IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,837

BARRY KRISCHER,
in his official capacity as State Attorney of the 1 5th Judicial Circuit,

Petitioner,

vs.

DR. CECIL McIVER, M.D.; C.B. ("CHUCK") CASTONGUAY;
ROBERT G. CRON; and CHARLES E. HALL,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
OF APPEAL CERTIFIED AS REQUIRING IMMEDIATE RESOLUTION

SECOND AMENDED BRIEF OF APPELLANT/PETITIONER

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PRELIMINARY STATEMENT

Appellant BARRY KRISCHER, in his official capacity as State Attorney of the 15th Judicial Circuit (the "State Attorney"), was the defendant in the trial court, and Appellees were the plaintiffs. The parties, in this brief, will be referred to as they stand before this Court or by name, as appropriate. The symbol "R" will be used in this brief to refer to the record on appeal, the symbol "T" will designate the transcript of circuit court proceedings, and the symbol "App.," will identify the Appendix to the Appellant's Amended Brief.

STATEMENT OF THE CASE AND FACTS

This case presents a challenge to the constitutionality of § 782.08, Fla. Stat. (1995) (the "Statute"), which prohibits assisted suicide.' The challenge was brought by individuals and their treating physician on behalf of persons who are adult, mentally competent, terminally ill, not subject to undue influence, and who wish to reserve the option to cause their deaths (that is, commit suicide) based on contingent circumstances (anticipated to occur in the future), by self-administering a lethal dose of drugs prescribed, and perhaps delivered, by a physician. (R., 708, 710, 720, 728-29). Three patient-plaintiffs originally joined in the action, but two died before its trial (presumably without deliberate assistance by the physician). (R., 3, 710, 729). The action as tried sought a declaration that the Statute violated Article I, Section 23 of the Florida Constitution ("Florida's Privacy Provision") and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; and an injunction against the State Attorney from prosecuting the physician for giving deliberate assistance to the commission of suicide.[2] (R., 708-09, 710-37).

After a six day bench trial, which concluded on January 13, 1997, the trial court entered a 25-

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'The Statute provides in relevant part that "[e]very person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter., . "

[2]Initially the action contemplated that an injunction would be required in the three circuits where the three patient-plaintiffs resided, so the State Attorney in each of those circuits was made a named defendant, and the Board of Medicine, the State agency charged with licensure and regulation of the practice of medicine (Chapter 458, Fla. Stat. (1995)), was made an additional defendant. Defendants contested venue, and the trial court agreed (on appeal, the District Court of Appeal, Fourth District affirmed without opinion). The plaintiffs then amended naming the State Attorney for the 15th Judicial Circuit as the sole defendant. The lawsuit against the Board of Medicine is pending in the circuit court in Leon County and the result therein will depend on the disposition by this Court of this appeal. (R., 1-2, 4, 20, 23, 41-55, 108-111, 146-51, 200-01, 153, 159, 167, 175).

page Final Declaratory Judgment and Injunctive Decree responding to the "...question of whether a competent adult, who is terminally ill, imminently dying, and acting under no undue influence, has a constitutional right to choose to hasten his own death by seeking and obtaining from his physician a fatal dose of prescription drugs and then subsequently administering such drugs to himself."[3] (App. 2). The trial court concluded that the Statute could not constitutionally be enforced against plaintiffs, and enjoined the State Attorney from enforcing it against physician-plaintiff Cecil B. McIver, M.D. ("Dr. McIver"), should he assist in the suicide of the sole surviving patient-plaintiff, Charles E. Hall ("Mr. Hall"). (App., 22-25). That Court based this conclusion on Florida's Privacy Provision and the federal Equal Protection Clause; he concluded there was no federal liberty interest in assisted suicide guaranteed by the federal Due Process Clause." (App., 9, 10-11, 23-24).

Defendant State Attorney appealed. (R., 1845-71). On February 6, 1997, the trial

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[3]The State disagrees that the issue can be so narrowly limited, as will be discussed below. As Justice Felix Frankfurter once said: "on the question you ask depends the answer you get. " See Friendly, Mr. Justice Frankfurter, in ***Benchmarks*** 3 18-9 (1967). The State believes that the court below reached the wrong answer in large part because it accepted the question as the plaintiffs proffered it.

[4]The trial court noted that the United States Court of Appeals, Ninth Circuit had found that Washington's statutory prohibition of assisted suicide violated the federal Due Process Clause and did not reach the issue of whether it also violated the Equal Protection Clause (see Compassion in Dying, et al. v. Washington, et al., 79 F.3d 790 (9th Cir. en banc, 1996), rev'g 49 F.3d 586 (9th Cir. 1996) ("Compassion in Dying")). The trial court further noted that the United States Court of Appeals, Second Circuit had found that New York's statutory prohibition on assisted suicide did not violate the federal Due Process Clause (rejecting the Ninth Circuit's conclusion to the contrary), but did violate the federal Equal Protection Clause, see Quill v. Vacco, 80 F. 3d 716 (2d Cir. 1996) ("Quill"), and that the United States Supreme Court was reviewing both these decisions, cert. granted, Washington v. Glucksberg, 117 S.Ct. 37 (1996); cert. granted, Vacco v. Quill, 117 S.Ct. 36 (1996). n effect, the trial court agreed with the Second Circuit's conclusion that the Due Process Clause was not violated by a statutory assisted suicide provision but that the Equal Protection Clause was, and formulated its evaluation of the claim under the Privacy Provision of the Florida Constitution in Equal Protection terms, as discussed below, (App., 19-22).

court set aside the automatic stay imposed by Rule 9.3 10(2), Florida Rules of Appellate Procedure.' This Court reinstated that stay and provided for expedited review.

STATEMENT OF FACTS

The trial court's Final Declaratory Judgment and Injunctive Decree contains findings of fact. Certain other facts are undisputed.

Specifically: patient-plaintiff Hall suffers from Acquired Immune Deficiency Syndrome (AIDS), which he contracted from a blood transfusion, (R., 719). He is 35 years old. (App., 4). He resides with his wife in Beverly Hills, Citrus County. (R., 3). Original patient-plaintiffs Robert G. Cron ((‘Mr. Cron"), a resident of Oldsmar, Pinellas County, died on October 23, 1996 at the age of 72 from mesothelioma, a cancer of the lining of the chest cavity, and Charles Castonguay ("Mr. Castonguay"), a resident of Edgewater, Volusia County, died on May 12, 1996 at the age of 65 from lung cancer. (R., 3, 710, 729; Death Certificate for Mr. Castonguay contained in Exh. D 10; T., 1008-11). The court below found that Mr. Hall:

(a) was "mentally competent at the time of trial and at all relevant times prior to trial"[6];

'Exhibit E to Appellant's Emergency Motion to Reinstate Stay, filed in this Court on February 7, 1997.

[6]The trial court "accepts Dr. Fireman [a psychiatrist]'s opinion of competency. " (App., 6). This opinion was based on an initial one-hour evaluation in February 1996 without review of medical records or the making of any tests, and a one hour follow-up evaluation of Mr. Cron and Mr. Hall in October 1996, also without reviewing Mr. Hall's medical records. (T., 941-43, 949-54, 1000). The follow-up evaluation was conducted after criticism by the State Attorney's experts aftial evaluations at denosition and in expert w vitness disclosu es. and after expiration of the discovery deadline. (T., 189, 193, 193-95, 200-03, 206-07, 24243: 253, 258-59, 261, 271, 276-77, 279-82, 286-87, 290-91, 296-97, 300, 302, 308-10, 313, 318, 320-21, 324; R., 250-52). The issue of competency at the time of suicide, if this shall occur, appears to have been left by the trial court to patient-plaintiff Hall and physician-plaintiff McIver on whatever basis he or they may elect. (App., 22).

(b) is in "obviously deteriorating health"[7];

(c) is "clearly suffering"[8];

(d) is "terminally ill"[9]; and

(e) "fully understands his tragic predicament.""

(App., 4). Mr. Hall "wishes to live, but has decided to" commit suicide [denominated by the court below as "end his suffering"] "at the point where he will no longer feel the comfort and assurance of knowing that his agony will be followed by a period of acceptably renewed health." (App. 4).

The trial court said there was no testimony from a family member. (App., 6). However, Mr. Hall's wife is opposed to assisted suicide, but endorsed his decision to elect it. (T., 134,327).

It was Dr. McIver's "professional judgment" that it is "medically appropriate and ethical to

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[7]The trial court found that Mr. Hall "at times, has sores over his entire body, red blotches, sores in and about his mouth, fine hairs on his tongue and sides of his mouth, no feeling in his bladder, stomach pains, and is legally blind. " (App., 5).

*The trial court noted that Mr. Hall is "on morphine. " The court did not discuss to what extent additional or different pain relief was available or could alleviate his suffering, or whether Mr. Hall was willing to take whatever pain relief could effectively alleviate his suffering. (App . , 5). Mr. Hall testified that he would decline further pain medication at the point it would put him into a stuporous state. (T., 13 1).

[9]The trial court did not define the term "terminal illness." This is a term used in several Florida appellate decisions, but these decisions also do not define the term. The trial court deferred to Dr. McIver on this issue, saying that his "testimony as to Hall's terminal illness is credible and accepted by this Court." (App., 6). The initial projection of original patient-plaintiff Cron's time to live was nine months, but he survived two years and one month, almost three times as long, and spent his last conscious day visiting with his family. (T., 356-57, 363-64, 476). Mr. Hall was diagnosed as "'terminally ill" in 1993 and 1994. (T., 122-23, 129-30, 423-24, 569-70). "Terminal illness" is not a factually precise term. (R., 2034-37, 2084-85, 2087, 2100; T., 145, 827-30, 836-39), and Florida's legislative attempts to define it have been less than adequate. (See, for example, §765.101(15), Fla. Stat. (1995).

[10]Presumably this is an additional factual finding that plaintiff-patient Hall was competent. The State did not contest below, nor does it contest now, the tragic nature of Mr. Hall's present condition,

provide Mr. Hall with the assistance he requests at some time in the future," (App., 7). The trial court made no finding that Dr. McIver's professional judgment is in accordance with that of the profession. It is not.[11]

"Dr. McIver testified that the methods he proposes [to assist Mr. Hall's prospective suicide] in Mr. Hall's case would be effective, and the Court accepts his testimony." (App., 8). The trial court noted that Mr. Hall's primary treating physician did not testify. (App., 6). The evidence was that Dr. McIver initially examined Mr. Hall (and the other original plaintiff-patients) for one hour each, reviewing no medical records and performing no physical examinations. (T., 405-07, 461, 475, 480, 482, 487, 512, 527, 531-36, 570-71, 1008-9, 1011, 1017-19, 1021). Dr. McIver was unaware of Mr. Hall's history of depression. (T., 572, 577, 586, 588, 590, 595, 726-27, 917-18, 949-54, 1000). After being criticized by the State's experts during deposition and in expert witness disclosures for having not performed physical examinations, Dr. McIver did do so.[12] (T., 5 12-13, 601-02, 10 19). In August 1996, Dr. McIver testified that he intended to effectuate assisted suicide by means of oral medication, but admitted he had no expertise in that area and could not guarantee the results. (T., 487, 491-97, 520-23, 554-57, 559-60, 612; R., 2127). After the State's experts in deposition and in expert witness disclosures pointed out the high failure rate of oral medication as

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[11] See discussion below at 34-35, 41; see also amicus brief of American Medical Association and Florida Medical Association ("FM,"), at 6-7, 21, 28-29. The national and state Medical Associations' amicus brief sets forth the professional judgment of that body which is that assisted suicide is neither medically appropriate nor ethical. Several expert witnesses so testified at trial. (T,, 819, 840-41, 827, 896, 1028, 1051, 1077, 1085-86, 1092, 1096, 1101, 1104-07; R. 2118-20, 2169, 2201, 2206-07, 2626-27, 2634-35, 2716, 2727, 2732). The Florida Board of Medicine has specifically rejected Dr. McIver's conclusion as to what is medically appropriate and ethical in this matter.

[12] The follow-up examination was conducted after the expiration of the discovery deadline. (T., 431, 513, 599-600; R. 250-52).

a means of implementing assisted suicide, Dr. McIver testified at trial that his new plan for assistance in Mr. Hall's prospective suicide is by intravenous means--that is, by giving Mr. Hall a combination of Ativan and morphine to mix and self-administer through a port already connected to a vein in Mr. Hall's chest. Dr. McIver now can guarantee the result. (T., 419-20, 560, 606-08). This, too, is a new procedure for Dr. McIver. (T., 494; 554-55).

The trial court further found that Dr, McIver had a legitimate fear of prosecution and applauded his seeking a judicial declaration and injunction rather than acting as did Dr. Jack Kevorkian in Michigan.[13] (App., 7, 9). The court then adopted the following procedure by which Mr. Hall and Dr. McIver must accomplish Mr. Hall's suicide:

(a) the "lethal medication must be self-administered only after consultation and determination by both physician and patient that Mr. Hall is (1) competent, (2) imminently dying, and (3) prepared to die;

(b) Mr. Hall must state that he subjectively believes that his time to die has come because he has no hope of further life of satisfactory quality and would die soon in any event;" and

(c) Dr. McIver must conclude that Mr. Hall's belief--and his chosen option [of suicide]--is objectivelv reasonable at the time. (App., 22) (emphasis added).

This procedure would presumably apply to any other patient who subjectively reaches a similar conclusion, and to any other licensed physician who objectively (in her or his own mind) concurs.

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[13] As the result of Dr. Kevorkian's actions (which included assisting in the suicide of both terminally ill and non-terminally ill patients), the Michigan Supreme Court held that the United States Constitution does not prohibit the state from imposing criminal penalties on one who assists another in committing suicide, and upheld the Michigan assisted suicide statute against constitutional attack. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).

The court below made no findings as to certain other issues posed by the State. These issues relate to the ability of the judiciary to confine the result the trial court reached to the facts of this specific case. (T., 875-76, 884-85, 1069-72, 1075-77, 1088-89, 1092). While the State is well aware of the desire of this Court to deal with these matters case-by-case, the history of adjudication by this Court and the lower appellate courts shows a steady progression of the expansion of rights of "personhood," evolving from one case involving a right to refuse life supporting devices to the next. The State believes these additional uncontested facts are relevant to informed disposition of this appeal:

1. What hannens if nlaintiff-patient Mr. Hall should not be able to self-administer the lethals e .

The Ninth Circuit in Comnassion In Dying could find no logical difference between self-administration of the physician-provided lethal dose ("assisted suicide") and physician administration of the lethal dose ("euthanasia") provided the patient had expressed his desire to die (that is, under the test of the court below, that Mr. Hall had subjectively determined it is time to die and Dr. McIver obiectivelv agreed).[14] See also, (T,, 329-31, 864, 866, 875, 884-85, 1050, 1069; R.,

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[14]The Ninth Circuit stated:

> disagree that it may be difficult to make a ' ' ion between physician-assisted suicide and the provision to terminally ill patients of life-end& medical assistance. such matron of drugs by a physician. We recognize that in some instances, the patient may be unable to self-administer the drugs and that administration by the physician, or a person acting under his direction or control, may be the only way the patient may be able to receive them. The question whether that type of physician conduct may be constitutionally prohibited must be answered directly in future cases, and not in this one. We would be less than candid, however, iif fwe did not acknowledge that for present purposes we view the critical line in

2 127-34).

2. The New York experience.

New York State created a task force to consider assisted suicide and euthanasia in 1985. Appointed by the Governor, it consisted of eight medical doctors (two of whom were deans of medical schools), two bioethicists who were not medical doctors, four lawyers, six clergymen (one of whom was also a law professor), the state commissioner of health, the state commissioner on the quality of care for persons with mental disabilities, and a member of the New York Civil Liberties Union). In addition, three medical doctors and a nurse served as consultants. This Task Force published several reports, the one relevant to the issues here just three years ago. The New York State Task Force on Life and the Law, When Death is Sought; Assisted Suicide and Euthanasia in the Medical Context at ii-iii (1994) ("New York State Task Force Report"). While having different views on the ethics of these issues, the members unanimously agreed not to recommend any changes in New York's law barring both assisted suicide and euthanasia because the "potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved." (New York State Task Force Report at 120).

> right-to-die cases as the one between the voluntary and involuntary termination of an individual's life. In the first case - volitional death - the physician is aiding or assisting a patient who wishes to exercise a liberty interest, and in the other - involuntary death - another person acting on his own behalf, or, in some instances society's, is determining that an individual's life should no longer continue. We consider it less important who administers the medication than who determines whether the terminally 111 person's life shall end.

79 F.3d at 831-832 (emphasis added).

3. The Netherlands experience.

Although the Ninth Circuit in Compassion in Dying indicated that doctor-administration of a lethal dose was not conceptually different than self-administration (and, as demonstrated below, others would concur), such doctor-administration is euthanasia. And one form of euthanasia has led elsewhere to other forms. In the Netherlands, where euthanasia has been openly practiced for 24 years, large scale abuses prevail. (T., 840, 850, 857-61, 867, 872-73, 1042, 1051, 1071-76, 1084-85). The Report of the Dutch Governmental Committee on Euthanasia (the "Remmelink Report"), based on a nation-wide survey of the practice ordered by the Dutch government, shows that in 1990 there were 11,800 sick persons whose lives were actively and intentionally terminated. (T., 861). Doctors in Holland actively terminated the lives of 1,000 patients without their request, contrary to established guidelines. (T., 860-62, 867). Moreover, 4,491 persons died because doctors, without the patients' consent and with the intention to cause death, administered lethal doses of morphine. (T., 860-62, 864). This is the case in a society with gratuitous social services and national health care. (T., 868-69, 1042, 1078-79). The Florida Legislature has found that there is inadequate and inequitable access to health care in Florida, and the health care system is in dire need of reform. See the "Health Care Reform Act of 1992." §§408.0015-408.604, Fla. Stat. (1995); see also "The Florida Health Access Corporation Act." §408.0014, Fla. Stat. (1995). The testimony below shows that if physician assisted suicide is accepted as a right in our society, where social services are limited and medical care is a privilege, substantial abuses will prevail. (T., 827, 1042, 1051-52, 1054-56, 1058-59, 1069, 1071-72, 1078-80, 1084-85, 1093-94).

4. What is the impact of the response of the trial court to its posed auestion as to other persons who (together with the licensed physician) meet that subiective/obiective standard?

In our society, 34 to 44 million people are uninsured or underinsured for health care. (T., 1055-56, 1058-59). Three-quarters of the people in our society will die in old age of multiple illnesses, impoverished, in health care institutions rather than at home, with limited family support, and isolated, (R., 2065, 2070-73). Good palliative care is not available to the majority of people. (R., 2030, 2043; T., 1054-56, 1059, 1061-66). There is neither adequate training (in medical school curricula or elsewhere), for good palliative care, nor for pain management. (R., 203 1,2039,2043-44, 2055; T., 1107-08). Pain can be adequately controlled in nearly all cases, but adequate pain management is simply not available to many patients. (R., 2027-30, 2032, 2034; T., 1061-66). Moreover, the trend in health care in our society is toward managed care, where the health care provider is paid the same no matter what service is provided, so the incentives move toward reducing services and treatment. (R., 2074-2083; T., 1022-23, 1025). The incentives inherent in managed care create a risk to dying patients that adequate medical treatment will not be available. (R., 2080-82; T., 1022-23, 1025). If physician-assisted suicide becomes legal as a medical option in this environment and era of cost control, physician assisted suicide could well be encouraged as the preferred option. (R., 2080-83, 2141-42; T., 1055-56). Dying patients, including the poor, elderly, minorities, and the disabled, as a result of the undue influence of social indifference and economic coercion, could well become a new vulnerable class of people, vulnerable to physician assisted suicide in lieu of adequate medical treatment and palliative care.[15] (R., 2021-23, 2033-34, 2058-59,

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"Approximately 50% of Medicare costs are expended during the last six months of the affected persons' lives. (T., 1023, 1056). Assisted suicide applied to this group could result in a spectacular economic bonus at a disastrous human cost. (T., 1023, 1056).

2053-55; T., 1051-52, 1054-56, 1058-60, 1071-72, 1079-80, 1084-85, 1096). Reforms in health care are being made at the national and state levels, but acceptance of physician assisted suicide will have an adverse effect on reforms. (R., 2046-5 1).

The determination of competency for the patient-plaintiffs was to be made when they elected suicide at an unspecified future date. (T., 741). This kind of evaluation is difficult, perhaps impossible, to conduct when the subject is in a distressed, suicidal crisis. (T., 741-42). By the time patients are sick enough to be deemed terminally ill, they may well not be competent to decide the issue of assisted suicide, but who is to tell and how? (R., 2122-23). Currently, .2% to .5% of dying patients persist in thinking of suicide as a viable option. (R., 2067). Most patients experiment with the thought, and then find life precious and cling to life to the end. (R., 2029-2030, 2109). At least 95% of persons who die by suicide evidence symptoms of major psychiatric illness in the weeks before death, usually depressive illness or alcoholism. (T., 676, 684-85, 709). Depressive illness is a temporary and treatable condition that frequently goes unrecognized, untreated, or inadequately treated, (T., 686, 698, 704, 706-07). Proponents of so-called rational suicide often assume physical illness and associated restrictions are the primary basis for rational suicide. (T., 675-77, 683). On the contrary, very few suicides suffer from terminal illness. (T., 676-78). There is a serious question regarding the medical profession's ability to distinguish between people who make a rational decision to terminate their lives and those who are in need of psychiatric care.[16] (T., 694-96, 716-19).

[16]These are some of, but certainly not all the issues a legislature must consider in responding to calls for approval of assisted suicide. See, generally, New York State Task Force Report.

SUMMARY OF THE ARGUMENT

(1) The trial court erred in holding that the Florida Privacy. Provision, which mandates that persons have the right to be free from government intrusion into their private lives, requires that physicians be permitted to intrude into the private lives of others by assisting in their suicide, if requested to so do, The trial court determined that the cases concerning the right to refuse medical treatment should be extended to protect physicians from prosecution for assisting in suicide by assuming that the refusing or withdrawal of medical treatment and the commission of suicide are legally equivalent acts. This determination was erroneous where the acts concerned have traditionally been distinguished on rational, legal, intentional, ethical, moral and religious grounds and such where reasoning converts the shield against government intrusion into a sword with which to end one's life.

Even were that not the case, however, compelling State interests in preservation of life, prevention of suicide and in medical ethics should lead to upholding the statute which makes assisting in suicide a crime.

(2) Violation of the Equal Protection Clause of the United States Constitution was not properly found in this case where persons who assist others to commit suicide and those who, at the request of the patient, withdraw life support are not similarly situated within the meaning of the Clause. The distinction drawn by the trial court, between terminally ill patients on life support and terminally ill persons wishing to commit suicide, is inapplicable where neither are subjects of the statute being attacked and where there are numerous historical and other differences between these situations which have been recognized by the courts, at any rate.

ARGUMENT

I.

THE CIRCUIT COURT ERRED IN RULING THAT THE RIGHT OF PRIVACY GUARANTEED BY THE FLORIDA CONSTITUTION IS VIOLATED BY THE FLORIDA STATUTE WHICH MAKES ASSISTANCE IN SELF-MURDER HOMICIDE, AS APPLIED TO PHYSICIANS WHO DELIBERATELY ASSIST PERSONS WHO ARE TERMINALLY ILL TO DIE.

A. Introduction: The Statute Is Constitutional Under The Florida Privacy Provision Because It Does Not Implicate The Right Guaranteed By That Provision -- The Right To Be Let Alone And Free From Governmental Intrusion Into One's Private Life

Since Comnassion in Dving and Quill are currently pending before the United States Supreme Court, having been argued in January 1997, and since that Court's decision can be expected to resolve the Fourteenth Amendment federal constitutional claims, this brief almost exclusively is directed to the decision below with respect to the Florida Constitution. The trial court's decision as to the Equal Protection Claim is dealt with briefly thereafter.

The circuit court erred in holding that the Privacy Provision of the Florida Constitution requires, as a mandate of the Florida Constitution, that a physician be permitted to assist a terminally ill person to commit suicide. The circuit court struggled with this most difficult issue and its 25 page opinion reflects careful thought. Nevertheless, that court reached the wrong result, and the principal reason that it did so was because it failed to carefully consider the text of Florida's Privacy Provision and determine just whose privacy was being protected, and from what governmental intrusion

The Third Amended Complaint made an as applied challenge to § 782.08, Fla. Stat. (1995) prohibiting assisting in a suicide based the Privacy Provision (Article I, Section 23) of the Florida

Constitution and the Due Process and Equal Protection Clauses of the United States Constitution. The circuit court determined that patient-plaintiff Hall had been denied his right to privacy under the Florida Constitution, by virtue of the Statute based on an Equal Protection analysis. (App., 12-15, 17-18). However, despite the assertion in the Third Amended Complaint that physician-plaintiff McIver's privacy rights under Florida's Privacy Provision were also violated, the circuit court declined so to rule. The court then ruled on the two Fourteenth Amendment claims, rejecting the reasoning of the Ninth Circuit in Compassion in Dying that plaintiffs (presumably both patient-plaintiff Hall and physician plaintiff McIver) had been denied substantive due process, but accepting the reasoning of Quill that plaintiffs (again presumably both the patient and the doctor) had been denied equal protection because they were denied a right granted to those similarly situated. (App . , 19-22).

Article I, § 23 of the Florida Constitution provides:

> **SECTION 23. Right of privacy.--Every** natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This constitutional provision extends to "[e]very natural person," but, as this Court has explicitly confirmed, it protects natural persons only against governmental intrusion into one's private life:

> The language of this constitutional provision clearly provides that it applies only to government action.

Resha v. Tucker, 670 So.2d 56, 58 (Fla. 1996), citing City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995). Further, in analyzing the Privacy Provision, this Court first determines whether a governmental entity is intruding into an aspect of one's life in which that person has a

"legitimate expectation of privacy." City of North Miami v. Kurtz, 653 So.2d at 1028; see also Dewartment of Communitv Affairs v. Moorman, 664 So.2d 930, 933 (Fla. 1995) (holding in relevant part that the right of privacy did not apply to one's decision to use his own land in a manner contrary to lawful public environmental policy).

The asserted "governmental intrusion" here is the Statute. The Statute does not prohibit suicide -- or "self-murder" in the words of the Statute. If it did, it would be "governmental intrusion" as to Mr. Hall. But that is not toward whom the Statute is directed. Rather the Statute impacts on "[e]very person assisting another" in the commission of suicide. Its impact -- a prohibition -- is solely on Dr. McIver. It does not forbid Mr. Hall from anything at all.[17] The Statute does not tell Mr. Hall he cannot commit suicide or even that he cannot request assistance. The Statute speaks only to Dr. McIver. Mr. Hall's "legitimate expectation of privacy" simply does not extend to protecting from prosecution third parties who assist in his suicide-- Mr. Hall's "autonomy" (and any expectation of privacy associated with it) terminates by definition with third party assistance.

The Statute represents governmental action that intrudes only upon Dr. McIver ' s freedom to act. Dr. McIver is a "natural person" who has the rights afforded him under the Privacy Provision. But the trial court declined to find his rights thereunder violated. This is probably because any "expectation of privacy" that Dr. McIver may have does not extend to giving him the right to kill another human being. Precluding Dr. McIver from participating in the homicide of another human could not possibly be considered interference with his private life. Thus, while

[17]Mr. Hall is not, as he testified, considering assisting anyone else to commit suicide. (R. 708-737; T., 118-35).

there is no question that the Privacy Provision. ". . .protects the decision-making or autonomy zone of privacy interests of the individual,. , " Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 546 (Fla. 1985), the amendment cannot possibly protect any "right" of Dr. McIver to assist in Mr. Hall's suicide.

B. The Order and the Burden:

The circuit court's order introduces its findings by noting:

> The case poses the question of whether a competent adult, who is terminally ill, imminently dying, and acting under no undue influence, has a constitutional right to choose to hasten his own death by seeking and obtaining from his physician a fatal dose of prescription drugs and then subsequently administering such drugs to himself. With respect to the precise facts of this case, the Court answers the question in the affirmative.

(App., 2). The court then concludes by setting out the procedure to be utilized before the patient is supplied with lethal drugs so as to answer the question in the affirmative:

> In considering the injunctive relief sought by the plaintiffs, the Court notes that its declaratory judgment encompasses the right of Mr. Hall to hasten his death and the right of Dr. McIver to prescribe the lethal drugs for Mr. Hall to take. This lethal medication must be self-administered only after consultation and determination by both physician and patient that Mr. Hall is (1) competent, (2) imminently dying, and (3) prepared to die. In other words, Mr. Hall must state that he subjectively believes that his time to die has come because he has no hope of further life of satisfactory quality, and would die soon in any event. At that time Dr. McIver must conclude that Mr. Hall's belief--and his chosen option--is objectively reasonable at the time.

(App., 22). The court then enjoined the State Attorney from prosecuting Dr. McIver for assisting Mr. Hall in terminating his life. (App ., 23-26) .

Although the trial court attempted to limit its holding to the situation in this case, it is

unsuccessful. Indeed, on the second page of its decision, the court makes it clear that the decision applies to any "... competent adult, who is terminally ill, imminently dying, and acting under no undue influence . . . . " (App., 2). It sets out a condition (imposing an "objective" veto on a "subjective" determination) which is itself violative of the Privacy Provision and unworkable, but which, if the decision is upheld, is destined to be applied to numerous cases throughout the State.

C. Application of the Doctrine of Primacy Requires First Consideration Of The Statute Under The Florida Privacy Provision

This Court applies the doctrine of primacy, See Traylor v. State, 596 So.2d 957,962 (Fla. 1992) ("When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution.. . ") Therefore, this Court must first determine whether the trial court correctly concluded that the Statute violates Florida's Privacy Provision as to a person by prohibiting a treating physician from assisting in the suicide of that person, who is himself within that class of persons: (a) who are terminally ill; (b) who have subjectively determined their respective lives are no longer worth living, and who are competent to make that determination; and (c) whose treating physician has objectively determined that their decisions to commit suicide are correct.

The trial court, in evaluating plaintiff-patient Hall's assertion that the Statute violated his rights under Florida's Privacy Provision, considered the two federal circuit court decisions presently before the United States Supreme Court. The court below concluded the Ninth Circuit was wrong in finding a liberty interest protected by the Due Process Clause had been violated by Washington's analogue to the Statute. The court, however, adopted the reasoning of the Second

Circuit in finding an Equal Protection violation. Therefore, while the United States Supreme Court will decide the correctness of the Ninth and Second Circuit's decisions, a brief summary of these two decisions may be useful to this Court as well.

The Ninth Circuit's Compassion in Dying, invalidating Washington's prohibition of assisted suicide as applied to terminally ill patients and their physicians on Due Process grounds, did not reach the Equal Protection Clause. That court, following reasoning similar to Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973),[18] concluded that a person has a liberty interest in suicide which increases from youth and health to terminal illness and which is to be balanced against the state's interest in preventing suicide, which decreases as age increases and health declines, being minimal in terminal illness cases. See Compassion in Dying, 79 F.3d at 836-37. It opined that regulation would be permissible, but left such matters to the legislature or appropriate administrative agency. Id. at 833, 837. That court strongly indicated that, although the issue of direct administration of the death-producing agent was not before it, who delivered the drugs was of no constitutional significance. Id. at 831-32. The majority in Compassion in Dying believed that a substantive due process right protected the decision of the individual electing suicide, making irrelevant whose hand implemented the decision. Id. at 839.

Quill, in contrast, the Second Circuit case, concluded that the Due Process Clause did not invalidate New York's prohibition of assisted suicide as applied to terminally ill patients and their physicians, concluding that there is no fundamental right to assisted suicide. However, reaching the equal protection claim, that court concluded that the New York analogue to the Statute violated

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[18]The principal dissent contends, based on Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), that the abortion right created ~~in Roe v. Wade~~ is sui generis, Beezer, J. dissenting, 79 F. 3d at 848-49.

the Equal Protection Clause as to these patients because it did not treat similarly circumstanced persons alike, finding that persons who were being kept alive by life support systems were permitted to hasten their deaths by directing that these systems be removed, while persons similarly situated except not attached to life support could not hasten their deaths by self-administering prescribed drugs. Quill, 80 F.3d at 729. Judge Calabresi, concurring, concluded that the statute should be held unconstitutional on the basis of the current legislative record, but took no position on whether such prohibitions, or other more finely drawn ones, might be valid under both the Equal Protection and the Due Process Clauses. Id. at 73 1-743.

D. The Trial Court Erroneously Equated The Florida Privacy Provision With The Equal Protection Clause Of The Federal Fourteenth Amendment

The trial court decided that the Florida Privacy Provision was violated by the Statute, but paradoxically concluded there is no liberty interest (within the scope of the Due Process Clause) which is violated. This Court has analogized the protection of the Florida Privacy Provision to a liberty interest under the Due Process Clause.[19] The United States Supreme Court agrees. Thus,

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[19] See Rasmussen v. South Florida Blood Service. Inc., 500 So.2d 533, 536 (Fla. 1987):

> In approving the [Florida Privacy] amendment, Florida became the fourth state to adopt a strong, freestanding right of privacy as a separate section of its state constitution, thus providing an explicit textual foundation for those privacy interests inherent in the concept of liberty . . .

(emphasis added). See also, In re Guardianship of Browning, 568 So.2d 4, 9 (Fla. 1990):

> 'Privacy' has been used interchangeably with the common understanding of the notion of 'liberty', and both imply a fundamental right of self-determination. ..

See also, B.B. v. State, 659 So.2d 256,259 (Fla. 1995), quoting In re T.W. , 551 So.2d 1186 (Fla.

in Cruzan v. Director. Missouri Dept. of Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1994) ("Cruzan"), the Supreme Court noted the parallel between state privacy and federal liberty interests:

> Although many state courts have held that a right to refuse treatment is-encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.

497 U.S. at 279, n.7.

The trial court did not accept this analysis, concluding there was no liberty interest to be violated, but instead decided the Statute violated the Equal Protection Clause. Further, it appears to have interpreted the Florida Privacy Provision in an Equal Protection sense:

> Suicide may be defined as the premature ending of one's life, therefore, in the strictest sense, disconnection from life support or withholding of food and water are all forms of suicide. . .Physicians are permitted to assist their terminal patients by disconnecting life support or by prescribing medication to ease their starvation. Yet, medication to produce a quick death, free of pain and protracted agony, are prohibited. This is a difference without distinction. In those cases where a competent, terminal patient chooses to hasten his death the State has little interest in preventing this type of suicide. [20]

1989), quoting Rasmussen.

[20]Compare the trial court's quote from Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996) which held New York's analogue to the Statute violated the federal Equal Protection Clause, which quote was the circuit court's basis for its similar conclusion as to the Statute:

> The State, in the present case, argued that there is a difference between withholding or withdrawing treatment and actions which hasten death. This Court finds that the main purpose of both courses of medical intervention are to cause the patient's death, the only difference being the time it takes for the patient to expire. A most persuasive argument is found in Quill and is adopted by this Court:

That the circuit court found no liberty interest of patient-plaintiff Hall infringed by the Statute should have instructed him that Mr. Hall's rights under the Privacy Provision likewise were not violated.[21] Had the trial court seen that the Statute — the "governmental intrusion" here--was directed not at Mr. Hall but at Dr. McIver, it would have reached a result opposite to the one it did reach.

> Indeed, there is nothing "natural" about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure. By ordering the discontinuance of these artificial life-sustaining processes or refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or condition from which the patient suffers.
>
> Moreover, the writing of a prescription to hasten death, after consultation with a patient, involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration. Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death. The ending of life by these means is nothing more nor less than assisted suicide. It simply cannot be said that those mentally competent, terminally ill persons who seek to hasten death but whose treatment does not include life support are treated equally.

(App. 21, quoting Quill, 80 F.3d at 729).

[21]The trial court's lengthy Quill quote, contending that death from removal of a life support system is not death from natural causes, is directly contrary to several decisions of this Court. See discussion below, at pgs. 22ff.

E. The Trial Court Erroneously Extended A Person's Right to Refuse Medical Treatment, As Established By This Court And Subordinate Appellate Courts Under The Florida Privacy Provision, To A Physician's Right To Avoid Criminal Prosecution For Assisting Suicide

(1) This Court's Decisions Acknowledging A Right To Refuse Medical Treatment Only Protect The Person From The State Requiring That Person To Remain Alive

This Court, affirming the Fourth District, decided, prior to adoption of the Florida Privacy Provision, that there was both a common law and constitutional privacy right to removal of life support systems. Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980), affirming Satz v. Perlmutter, 362 So.2d 160 (Fla. 4th DCA 1978) ("Perlmutter").[22] This Court has read the Privacy Provision, added to the Florida Constitution in 1980, as ratifying Perlmutter. In re Guardianshin of Browning, 568 So.2d 4 (Fla. 1990) ("Browning"). The multitude of decisions by this Court rendered in this field since Perlmutter evidence a strong conclusion that the Privacy Provision bars external medical intervention of virtually any sort into one's personhood. It is now crystal clear

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[22]This Court did not state in Satz the basis of its decision. Then Chief Justice Ehrlich, concurring specially in Public Health Trust of Dade County v. Wons, 541 So.2d 96, 101 (Fla. 1989) said:

> Perlmutter was a case grounded primarily in the rights of privacy and self-determination derived from the federal constitution and the common laws." He relied for this conclusion on the Perlmutter decision of the Fourth District, referencing 362 So.2d at 164, which states:
>
> > Such a course of conduct invades the patient's constitutional right of privacy, removes his freedom of choice and invades his right of self-determination.

that the Provision applies to every natural person, competent or incompetent, and it guarantees every natural person "the right to be let alone and free from governmental intrusion into his private life." See Browning; supra; John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So.2d 921 (Fla. 1984); Matter of, 629 So.2d 819 (Fla. 1993).

In Perlmutter, this Court authorized the removal of an artificial life-supporting device at the behest of an adult competent person. This "right" was then extended to incompetent persons, whether the incompetency is by reason of age[23] or physical condition.[24] The "right" now applies to a refusal to accept intrusion in the first place[25] and, as well, to a demand for removal of intrusive devices .[26]

Furthermore, the case-by-case adjudication has removed the courts from the ultimate life-and-death decision-making, and has deferred such decisions to the medical profession and the family, all the time declaring that the "ethical integrity of the medical profession [is] the least significant state interest. " See Browning, 568 So.2d at 14; Singletary v. Costello, 665 So.2d 1099

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[23]See In re T.W., 551 So.2d 1186 (Fla. 1990); B.B. v. Florida, 659 So.2d 256 (Fla. 1995).

[24]John F. Kennedy Memorial Hospital, Inc. v. Bludworth, supra, (comatose patient); Browning 568 So.2d at 13 (patient who was "not totally comatose");. see also In re Guardianship of Barry, 445 So.2d 365 (Fla. 2d DCA 1984). This Court in Browning concluded that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health," seeing "no reason to qualify that right on the basis of the denomination of a medical procedure as major or minor, ordinary or extraordinary . . . or otherwise," then extended the same right to incompetent persons (through surrogate decision). 568 So.2d at 11.

[25]Several of these cases involve the refusal to accept a blood transfusion by reason of religious convictions, thus implicating Article I, Section 3 of the Florida Constitution as well as Florida's Privacy Provision. Public Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989); St. Mary's Hospital v. Ramsey, 465 So. 2d 666 (Fla. 4th DCA 1985).

[26]See Perlmutter, 362 So.2d at 161; Browning, 568 So.2d at 8, 11-12.

(Fla. 4th DCA 1996).[27]

The trial court erroneously -- applying Equal Protection logic to the Privacy Provision -- seeks to transform these decisions from a shield against unwanted bodily interference into a sword with which to end one's life. No longer is the issue one of protection of personhood against intrusion by doctors and hospitals acting as agents of the State to preserve life when the person no longer wants (or never wanted) that intrusion. Instead, the trial court would negate the Statute, which directs a physician not to assist a suicide, and would require the State to permit that physician to aid the suicide. And, at the same time, the circuit court, apparently not trusting patient-plaintiff Hall's subjective decision as to the "need" for suicide as an exercise of his "privacy right, " required an "objective" rein on that decision by physician-plaintiff McIver.

(2) This Court's Decisions Acknowledging A Right To Refuse Medical Treatment Are No Precedent For Assisted Suicide

In attempting to determine the appropriate course of a case-by-case adjudication from the right to refuse life-supporting devices to assisted suicide (and why the trial court committed error in making this leap of Equal Protection logic), it is imperative to understand the course of adjudication to date. This Court's position as to patient refusal to accept life-supporting devices

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[27]Although the Fourth District in Singletary v. Costello seemed to believe this Court has made the universal holding that the "integrity of the medical profession" is always the least significant state interest, this is not a fair reading of Browning. When this Court in Browning held that "maintenance of ethical integrity of the medical profession" was the "least significant of the aforementioned state interests," it did so because in the instance of right-to-refuse life-support services, this Court's directives and those of the medical profession are consonant. See Browning, 568 So.2d at 14. In the case of assisted suicide, the medical profession (as discussed below at 34-35. 41, in the amicus brief filed by the Medical Associations and in the action of the Board of Medicine as to physician-plaintiff McIver) rejects medical assistance in suicide as contrary to the integrity of the profession.

is based on a clear understanding that Florida's Privacy Provision guarantees each individual the "right to be let alone and free from governmental intrusion into his private life" (emphasis added). As we have observed, the governmental intrusion here involved--the Statute--is not directed at Mr. Hall. But even if it were to be so directed, an extension of the right to refuse life-supporting devices to assisted suicide would be clearly improper. The basic predicate of the Privacy Provision (and this Court's decisions thereunder) is that government may not intrude into one's personhood -- it is not a right of the individual to determine when and how she or he may die (nor is it a right of a physician to assist a person in committing suicide without risk of prosecution). As the New York State Task Force concluded as to the course of this adjudication in other states:

> The imposition of life-sustaining medical treatment against a patient's will requires a direct invasion of bodily integrity and, in some cases, the use of physical restraints, both of which are flatly inconsistent with society's basic conception of personal dignity.. .It is this right against intrusion -- not a general right to control the timing and the manner of death -- that forms the basis of the constitutional right to refuse life-sustaining treatment.[28]

The Statute does not bar Mr. Hall from committing suicide. Florida -- like most states -- has no statute law barring suicide, although at common law penalties could be imposed for committing suicide:

> At common law in England, a suicide -- defined as one who 'deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death, ' 4 W. Blackstone, Commentaries *189 -- was criminally liable. Ibid.

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[28]New York State Task Force at 7; Accord, Yale Kamisar, Against Assisted Suicide -- Even A Very Limited Form, U. Detroit Mercy L. Rev. 735, 757 (1995). This Court's recent decision, Beagle v. Beagle, 678 So.2d 1271 (1996), holding a statute providing grandparental visitation rights in an intact family to be unconstitutional under the Privacy Provision absent a threat of harm to the child of the family, confirms that the Privacy Provision is directed at freeing individuals from governmental intrusion into their private lives.

> Although the States abolished the penalties imposed by the common law (i.e., forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. Case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense.

Cruzan, Justice Scalia concurring, 497 U.S. at 294. Accord, Yale Kamisar, Are Laws Against Assisted Suicide Unconstitutional? 23 Hastings Center Report 32 (May 1993):

> [T]he decriminalization of both suicide and attempted suicide did not come about because suicide was deemed a "human right" or even because it was no longer considered reprehensible. These changes occurred, rather, because punishment was seen as unfair to innocent relatives of the suicide and because those who committed or attempted to commit the act were thought to be prompted by mental illness.

But while following, on a case-by-case decisional basis, the expansion of this right-to-refuse-intrusion even to the point where a healthy individual was last year accorded by the Fourth District Court of Appeal a "constitutional right" to starve himself to death[29], this Court and the

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[29]Singletary v. Costello, supra, involved the right of a prison inmate, convicted of first degree murder, to starve himself to death "to object to and protest the actions of the Department of Corrections," and to enjoin the prison system from "providing any medical treatment, assistance, testing or procedure of any form or kind." The proposed "medical assistance" was forced feeding through a nasogastric tube (Id. at 1101). The 4th District held that the State had no right to prevent even a prison inmate from committing suicide:

> Turning to the instant case, quite obviously, the state interest in the preservation of life, the most significant interest, is implicated...Costello's condition was curable rather than a terminal affliction. However, although the state interest in the preservation of life is powerful, in and of itself, it will not foreclose a competent person from declining life-sustaining medical treatment...This is because the life that the state is seeking to protect is the life of the same person who has competently decided to forego the medical intervention...the state's interest in the preservation of life, in and of itself, cannot overcome Costello's fundamental right to forego life-sustaining medical intervention.

United States Supreme Court have been most careful to distinguish the right to cause one's own death (through substituted judgment if incompetent) from the right to reach outside oneself and ask another to assist the suicide. Thus, this Court said in Browning (quoting the District Court of Appeal at 543 So.2d at 269):

> The Ethics and Advocacy Task Force, as amicus curiae, raises a very legitimate concern that the "right to die" could become a license to kill.

Browning, 568 So.2d at 13. The United States Supreme Court has been even more explicit:

> As a general matter, the States -- indeed, all civilized nations -- demonstrate their commitment to life by treating homicide as a serious crime. Moreover. the maiority of States in this country have laws imposing criminal penalties on one who assists another commit suicide.

Cruzan, 497 U.S. at 280 (emphasis added).

(3) Whatever The Logic Of The Equal Protection Based Extension of Removal Of Life-Supporting Devices to Assisted Suicide, That Extension Is Contrary to Legislative Choice, Medical Ethics, Modern Studies, And Ethical, Moral, And Religious Values

It has been argued, and the trial court concluded, that there is no logical difference between

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Id. at 1109. Ironically, the court concluded that since the prisoner was engaged in a protest, "the state interest in the prevention of suicide is truly not implicated in the instant case." Id. Although the court attempted to limit its holding to the specific facts of that case (id. at 11 10), surely the holding will be argued as applicable to many other conditions and facts, The Singletary v. Costello decision appears to adopt Justice Brennan's position in dissent in Cruzan, at least as Justice Scalia saw it:

> It seems to me, in other words, that Justice Brennan's position ultimately rests upon the proposition that it is none of the State's business if a person wants to commit suicide.

Justice Scalia, concurring, 497 U.S. at 299-300. This Court has repeatedly stated that this is not Florida's position. See Browning;, 568 So.2d 4 at 14.

the action of a physician in removing life-supporting equipment so a patient can die of natural causes[30] and the action of a physician in providing the means to commit suicide through a lethal dose. But, even were that true (the State submits it is not true) there is more to law -- and constitutions -- than simple logic. The Ninth Circuit in its Compassion in Dying decision may well have been correct in saying there is no logical difference between self-administration of a lethal dose ("assisted suicide") and physical administration of a lethal dose ("euthanasia"); certainly the distinction is not a "bright-line."[31] Nevertheless, laws and constitutions reflect deep social, ethical, and moral values which must be considered -- and we suggest govern -- abstract logic. Whatever the logic of the circuit court's equation of a physician removing life-supporting equipment and a physician tendering a lethal dose, this Court, the United States Supreme Court, and all state courts to date involving the issue, have been able to perceive both the distinction and the underlying difference.

(4) The Abortion Rights Decisions Are Not Precedent For An Extension Of The Right To Refuse Life Supporting Devices To Assisted Suicide

It has also been argued that physician participation in a penumbra of constitutional "privacy" has been sanctioned by Roe v. Wade, supra, incorporated intact into Florida's Privacy

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[30]It has been argued that when life-supporting devices are removed by a physician or other attending person, death occurs not from the underlying disease but from starvation or dehydration. (See. e.g., the trial court's quote from Quill at pg. 21-22, n.20 (App. 21). While this may at times be true, death from starvation or dehydration is a natural process. This Court has explicitly held that death occurring subsequent to removal of life-supporting devices is death from "natural causes." Satz, 362 So.2d at 162; Browning, 568 So.2d at 14.

[31]The Ninth Circuit's full statement on this subject is set out at pg. 8-9, n. 14.

Provision as the rule of Roe v. Wade stood in 1980.[32] But certainly the federal abortion decisions are sui generis as is made clear by the oft-quoted plurality opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("Casey") w Roe v. Wade itself converted a "liberty" interest into a "privacy" interest. s most careful not to couch the abortion right in "fundamental right" terms, and the same is true for Cruzan, as to the right to refuse treatment.[33] This is not to suggest that the Florida abortion

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[32] By 1980, abortion rights were well established under the federal Constitution, and I believe the privacy amendment had the practical effect of guaranteeing these same rights under the Florida Constitution. If the United States Supreme Court were to subsequently recede from Roe v. Wade, this would not diminish the abortion rights now provided by the privacy amendment of the Florida Constitution.

In re T.W., Grimes, J., concurring in part and dissenting in part, 551 So.2d at 1202.

[33] The Casey plurality states repeatedly that it is the combined force of stare decisis and liberty that protects a woman's right to abortion. Casey, 505 U.S. at 845, 853, 112 S.Ct. at 2804, 2808. This implies that liberty alone would be insufficient to support a fundamental right to abortion.

> The plurality never characterizes the abortion right as fundamental. This omission is significant, given the plurality's broad characterization of the liberty interests, as well as its use of the undue burden test in lieu of the strict scrutiny ordinarily applied to fundamental rights. The four-Justice dissent goes farther, stating that it would hold the abortion right to be nonfundamental...Central to the dissent's reason for wanting to call the abortion right nonfundamental is the fact that it involves the purposeful termination of human life. Abortion is sui generis, and the courts are on notice that these four Justices will not find fundamental any other asserted right that involves the purposeful termination of human life.
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> The other main end-of-life case, Cruzan, presumes a nonfundamental liberty interest in refusing unwanted medical treatment. This interest was subjected to ordinary balancing against the state interests, rather than strict scrutiny. Cruzan, 497 U.S. 261, 110 S.Ct. 2841.

decisions are sui generis.[34] They are not.[35] But it is to suggest that there is no discussion of physician involvement in Florida's single abortion decision (In re T. W., relating to parental consent) and little to none in the federal ones.

(5) The Trial Court's Standard For Exercise Of The Purported Constitutional Right Proves Its Non-Existence

The circuit court, first misconstruing that the Statute was "governmental intrusion" into Mr. Hall's personal decisional autonomy, rather than into Dr. McIver's freedom to practice medicine on a patient so as to facilitate his suicide, and then seeking to extend this Court's right to refuse intrusive medical intervention to assisted suicide, states that patient-plaintiff Hall is free

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> These cases, combined with the Supreme Court's disinclination to find new fundamental rights, compel the conclusion that a liberty interest in physician-assisted suicide, if one exists, is nonfundamental.

Compassion in Dying, Beezer, J., dissenting, 79 F.3d. at 849. The Quill court, of course, as the trial court here, concluded that there was no "liberty" right to physician-assisted suicide, fundamental or non-fundamental.

[34]The State recognizes that, in light of this Court's decision as to parental involvement in abortion decision-making, In re T. W., supra, "we conclude that Florida's clear constitutional mandate in favor of privacy is implicated in B.B., a sixteen-year-old, engaging in carnal intercourse." B.B. v. State, 659 So.2d at 259. This Court has thus followed In re T.W. in an area different from "abortion rights."

[35]

> Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment.
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> ...
>
> We expressly decide this case on state law grounds and cite federal precedent only to the extent that it illuminates Florida law.

In re T.W., 551 So.2d at 1192, 1196,

to commit suicide when, competent, he subjectively determines that his life is no longer worth living, But, the court continues, Mr. Hall is entitled to the assistance of physician-plaintiff Dr. McIver only if McIver determines, based on an unstated standard, that Mr. Hall's death decision is objectively reasonable. In constructing this standard, the trial court tried to steer around the land mines implicit in his overall determination that the Privacy Provision, as applied to Mr. Hall (contrary to the terms of the Statute, which do not apply to Mr. Hall), trumps the Statute:

> Let us examine the standard:
>
> > Plaintiff-patient Mr. Hall must be competent at time of reaching his decision to commit suicide, Why is that? This Court has determined in the right-to-refuse-treatment realm that the same rules apply to incompetents as competents, and Mr. Hall has a wife and a doctor to cast his proxy vote.
> >
> > - Although the trial court determined Mr. Hall to be competent through his testimony at trial, that court further required that his competency must be redetermined at the time of his decision to die, and the issue of competency must be made by Mr. Hall as well as Dr. McIver. On what basis?
> >
> > Once Mr. Hall makes a subjective decision that life is no longer worth living, an outsider has a right to veto that decision if the outsider does not objectively believe the subjective decision was reasonable.[36] But if a person has a constitutional right

[36] Dr. McIver is protected from prosecution if he follows the procedure set out in the order, but that procedure does not even meet the minimal requirements for informed consent. A patient must be informed of potential risks, possible results and alternative methods of treatment to meet the minimal procedural requirements of the Fifth and Fourteenth Amendments. See Cruzan, 497 U.S. 261 at 269; $766.103, Fla. Stat. (1995); Parikh v. Cunningham, 493 So.2d 999, 1001 (Fla. 1986); In re Cincinnati Radiation Litigation; 874 F.Supp. 796, 814 (S.D. Ohio 1995). Here, Dr. McIver is protected from prosecution even though the specific treatment involved has not been

> to commit suicide, why has anyone the right to veto that decision on any basis? This Court has indicated that a surrogate decision for an incompetent can be the family and the patient's physician. But Mr. Hall's wife is not part of the surrogate team. And, since Mr. Hall must be competent before he commits suicide, why is there a surrogate of any sort?
>
> Although the issues involved in removal (or non-attachment) of life-supporting devices would truly seem to be medical (possibility of regaining health, seriousness of pain, possibility of relieving pain, etc.), why is the decision that a patient's subjective determination that his or her life is no longer worth living a medical one, and on what basis does the medical reviewer make his or her objective ratification of the subjective determination?

The State submits that these questions are impossible to answer, and show how astray the trial court--with all good intentions--went from the standards of this Court created for removal of life-supporting equipment in his effort to skirt the land mines of applying these standards to the new world of assisted suicide.[37]

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specified nor did the court below require that the potential risks the treatment may pose if an initial attempt is unsuccessful in terminating Mr. Hall's life be explained.

[37]For example, the trial court required that the lethal medication be self-administered. (App. 22), which creates an obvious substantial problem:

> If the claim that one has, or ought to have, a right to control the time and manner of one's death is well founded--if one who is terminally ill has, or ought to have, the right to make the choice whether or not to go on living until death comes naturally--how can this right be denied to someone simply because she cannot swallow the barbiturates that will bring about death?

(6) The Distinction Between Refusing Treatment and Physician-Assisted Suicide:

Until the Compassion in Dying and Quill decisions, the difference between the withdrawal of life support to a patient and physician assisted suicide was undisputed in the law. If these decisions are reversed by the. United States Supreme Court, the difference will again be undisputed (except for the circuit court's decision here). At least forty-four states which recognized the right to refuse treatment or unwanted life support have expressly disapproved of assisted suicide.[38]

Kamisar, Against Assisted Suicide, 72 U. Detroit Mercy L. Rev. at 747. It is difficult to discern the basis upon which persons who may swallow are granted a right denied to persons who cannot. If extended to intravenous medication systems, the same problem exists since people who could press the plunger on a hypodermic needle would be granted a right that those who could not would be denied. Self-administration would appear to create indefensible discrimination. Indeed, as quoted above, the majority in Compassion in Dying is not concerned with who administers the lethal dose, concentrating, instead, on the significance of the decision to commit suicide, See pg. 8, n.14.

[38]Ala. Code § 22-8a-10 (1990); Alaska Stat. § 18.12080(f) (1994); Ariz. Rev. Stat. Ann. § 36-3210 (1995 Supp.); Ark. Code Ann, § 20-17-210(g) (1991); Cal Health & Safety Code § 7191.5(g) (West Supp. 1996); Colo. Rev. Stat. § 15-18-112(1) (1987); Act of July 12, 1982, 93 Del. Laws 821 (1981); Fla. Stat. Ann. § 765.309(1) (West 1996 Supp.); Ga. Code Ann. § 31-32-1 l(b) (1994); Haw. Rev. Stat. § 327D-13 (1992 Supp.); Idaho Code § 39-152 (Supp. 1996); Ill. Comp. Stat. Ann. Ch. 755, §§ 35/9(f), 40/50 (Smith-Hurd 1992); Ind. Code Ann. §§ 16-36-4-19, 16-36-1-12(c), 16-36-1-13, 30-5-5-17(b) (Burns 1993 & Supp. 1996); Iowa Code Ann. §§ 144A.11.6, 144B.12.2 (West 1989 & Supp. 1996); Kan. Stat. Ann, § 65-28.109 (1992); Ky. Rev. Stat. Ann. § 3 11.639 (Michie/Bobbs-Merrill 1995); La. Rev. Stat. Ann. Tit. 50 § 1299.58.10(A) (West 1992); Mass. Gen. Laws Ann. Ch. 201D, § 12 (West 1996 Supp.); Me. Rev. Stat. Ann. Tit. 18-!, § 5-8130 (1995 Supp.); Md. Health-Gen. Code Ann. § 5-611© (1994); Mich. Comp. Laws Ann. § 700.496(20) (West 1995); Minn. Stat. Ann, § 145B.14 (West 1996 Supp.); Miss. Code Ann. § 41-41-117(2) (1993); Mo. Ann, Stat. § 459.055(5) (Vernon 1992); Mont. Code Ann. § 50-9-205(7) (1995); Neb. Rev. Stat. § 20-412(7) (1995); Nev, Rev, Stat. Ann, § 449.670(2) (Michie 1991); N.H. Rev. Stat. Ann. § 137-H:13 (1995 Supp.); N.Y. Pub, Health Law § 2989(3) (McKinney 1993); N.C. Gen. Stat. § 90-320(b) (1993); N.D. Cent. Code §§ 23-06.4-01, 23-06.5-01 (1991); Ohio Rev. Code Ann. § 2133.12(d) (Anderson 1994); Okla. Stat. Ann. Tit. 63, § 3101.12(g) (West 1996 Supp); Pa. Cons. Stat. Ann. Tit. 20, § 5402(b) (Purdon 1996 Supp.); R.I. Gen. Laws §§ 23-4.10-9(f), 23-4.11-10(f) (1995 Supp.); S.C. Code Ann. § 44-77-130 (Law. Co-op 1993 Supp.); S.D. Codified Laws Ann. § 34-12(D)-20 (1994); Tex. Health & Safety Code Ann. § 672.020 (Vernon 1992); Utah Code Ann. § 75-2-1118 (1993); Va. Code Ann. § 54.1-2990 (1994); Wash. Rev. Code Ann. § 70.122.100 (1996

Thirty-six states impose criminal sanctions on such assistance. See Compassion in Dying, Beezer, J. dissenting, 79 F.3d at 847. Three of this Court's cases draw the explicit distinction between withdrawal of life support and assisted suicide. See, Browning, 568 So. 2d at 14; Public Health Trust of Dade County v. Wons, 541 So. 2d 96, 100 (Fla. 1989); Perlmutter, approving, 362 So. 2d 160, 162-63 (Fla. 3d DCA 1978). Numerous other state courts likewise recognize this difference. See, Thor v. Superior Court, 855 P.2d 375, 385 (Cal. 1993); Fosmire v. Nicoleau, 551 N.E. 2d 77, 82 (N.Y. 1990); McKay v.Bergstedt, 801 P.2d 617, 627 (Nev. 1990); In re Kevorkian 534 A.2d 947, 955 (Me. 1987).; People v. , supra. Unwanted medical treatment or life support could well be considered, either under the common law or Florida statute, an offensive or unwanted touching or a battery, See, Black's Law Dictionary, 1195 (6th ed. 1990); $784.03, Fla. Stat. (1995); see also this Court's decision in Perlmutter and Cruzan, 497 U.S. at 269. But being shielded from battery is hardly the same as having a right to assistance in self-destruction.

(a) The Medical View;

The medical profession clearly distinguishes a right to refuse medical intervention from a right to assisted suicide. Thus, the Hippocratic Oath, one of the mainstays of medical ethics, requires that a physician "give no deadly drug to any, though it may be asked of [them], nor will [they] counsel such." The American Medical Association Council on Ethical and Judicial Affairs has taken the position that assisting suicide is inconsistent with the physician's role as healer. American Medical Association, Council on Ethics and Judicial Affairs, Physician Assisted Suicide

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Supp.); W.Va. Code § 16-3-10 (1995); Wis. Stat. Ann. § 154.1 1(6) (West 1989); Wyo. Stat. §§ 3-5-211, 35-22-109 (1994 & Supp. 1996).

in Code of Medical Ethics Reports, Report 59 (Vol. V, No. 2, July 1994). The Council notes that:

> [T]here is a fundamental difference between refusing life sustaining treatment and demanding life ending treatment , . . The right to refuse life sustaining treatment does not automatically entail a right to insist that others take action to bring on death . . . Patients do not have a 'right' to insist on treatments that are inconsistent with sound medical practices. The physician's role is to affirm life, not to hasten its demise,

The State refers this Court to the amicus curiae brief of the American Medical Association and the Florida Medical Association, which discusses the medical profession's position in greater depth.

(b) Intent:

A further significant difference between the right to refuse treatment and assisted suicide is the intent of the parties involved. A physician who assists in a suicide must patently have the primary intent that "the patient be made dead," L. Kass, Ethical Issues in Assisted Suicide, Testimony Before Oversight Hearing on Assisted Suicide of House Committee on Judiciary, Subcommittee On the Constitution (April 29, 1996), at 16. The intent involved in the withdrawal of treatment which the patient finds offensive, even if the effect of the withdrawal will be that the patient will expire of natural causes, is patently different. But, a patient who requests assistance in suicide is not asking for relief of pain or suffering, which can usually be accomplished short of death (R., 2025-27,2156-58)[39], but rather is asking to die. See, discussion of intent in

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[39]Assisted suicide is distinguishable from treatment to relieve pain and suffering which may result in the death of the patient because the latter is administered solely to relieve the pain and suffering, but with the patient's knowledge and acceptance of the risk of death. See Council on Ethical and Judicial Affairs, American Medical Association, *Physician Assisted Suicide* (Report 8), App. C at 2 (Dec. 1993). Medically, the acceptance of palliative treatment that may result in death is no different from the knowing acceptance of the risk of death that accompanies many medical treatments. *News from the Circuit Courts: How Not to Think About Physician Assisted Suicide, 2* BioLaw S: 171, S: 181 (July-Aug. 1996).

Comnassion in Dving, Kleinfeld, dissenting, 79 F.3d at 858-859.

(c) Causation:

The clearest difference between terminating life support and assisting suicide is the causation of death. A person who requires termination of medical treatment or life support dies of natural causes. "In letting die, the cause of death is seen as the underlying disease process or trauma. In assisted suicide/euthanasia, the cause of death is seen as the inherently lethal action itself. " People v. Kevorkian, 527 N. W. at 728 (quoting the Guidelines for State Court Decision-Making In Life-Sustaining Medical Treatment, National Center for State Courts (2d ed.), pp. 143-145 (1992)). Dying of a self(or physician)-administered lethal dose is certainly qualitatively different causation from dying from a natural cause.

(d) Action and Inaction:

The difference can also be expressed as that between action and inaction. This distinction has long been recognized by the law of negligence, differentiating "misfeasance" and "nonfeasance" (active misconduct versus passive inaction). The duty to do no wrong is a legal obligation, while the duty to protect against wrong is, for the most part, a moral obligation. Prosser & Keeton, Torts (5th ed.) § 56, pp. 373-374. The distinction lies in the fact that, by "misfeasance, " the defendant has created a new risk of harm to the plaintiff, while by "nonfeasance" he has at least made the plaintiff's situation no worse. Id. Although one could assert that disconnecting life support or treatment is "active," that assertion would be wrong--it is simply disconnecting that which the patient now finds offensive. No new risk of harm is created; the patient simply becomes more susceptible, at his own request, to a risk which pre-existed the request. Thus, ending a life contemplated by physician-assisted suicide is truly

an active one.

(e) The Extension Of The Privacy Right To Third Parties Who Are The Subject Of The "Governmental Intrusion"

Physician-assisted suicide patently requires the active participation of third parties, physicians. The trial court's order protects the physician third party so acting. But the phrase "private assisted suicide" is an oxymoron, extending, as it does, the privacy right--which protects the autonomy of its subject--to the physician, whose body is not that of the person whose right of privacy is being invoked (the patient).

F. If In Fact There Is A Privacy Right To Assisted Suicide, Then The Statute May Constitutionally Operate Only If The State Has A Compelling Interest

"Cases decided by this Court have identified state interests in the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession, and have balanced them against an individual's right to refuse medical treatment." Browning, 568 So.2d at 14.[40] Assuming (I) that Mr. Hall had a privacy right

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[40]The concept that privacy is a "fundamental right" and, that, being such, it may be regulated only by reason of a compelling state interest was first articulated in a case of disclosural privacy, rather than the autonomy privacy asserted in the right-to-refuse-treatment cases, the abortion cases, and assisted suicide claims. Winfreld v. Division of Pari-Mutual Wagering, 477 So.2d 1186 (Fla. 1985). The application of this concept of fundamental rights is somewhat anomalous since the concept is based on United States Supreme Court decisions, but, as discussed above, the United States Supreme Court has been unwilling to apply "fundamental right" status to the analogous liberty interests in the right-to-reject-treatment and abortion federal cases. Further, the Winfreld court, having raised the compelling state interest formula, then proceeded to find it met: in the field of disclosural privacy, a compelling state interest has often been found. But in autonomous privacy cases, it has rarely been found:

> When this [compelling interest] standard was applied in disclosural cases, government intrusion generally was upheld as sufficiently compelling to overcome the individual's right of privacy. We reaffirm, however, that this is a highly stringent standard, emphasized

protecting him from "governmental intrusion" not directed at him (but rather directed at Dr. McIver), and (ii) the same four state interests as this Court has considered in right-to-refuse cases, apply to assisted suicide, then each of these interests must be evaluated. The State submits that if it is required to show a compelling interest, collectively their evaluation simply of those four interests shows the overall State interest to be compelling.

(1) Preservation of life.

In the cases involving refusal of life-supporting devices, this Court has termed this the most significant of the factors. The "preservation of life" factor in those cases was the interest of the state in denying an individual the ability to permit himself/herself to die of natural causes by rejecting the intrusion of the life-supporting devices into his/her personhood against his/her wishes. Here the "preservation of life" factor is the interest of the state in denying an individual the right to cause his/her death by the ingestion of lethal drugs and the further right to call on a third party professional to prescribe and make available those drugs to the individual -- for the moment at least--to self-administer. If the constitutional principal involved in the privacy right-to-refuse cases is -- as both the language of the Privacy Provision and this Court's decisions say -- the right to prevent intrusion of an outsider's intervention into one's personhood, then the "preservation of life" interest here is very different from the "preservation of life" interest in those cases.[41] And, if so -- as this Court's decisions say -- the State's "preservation of life" interest here

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> by the fact that no government intrusion in the personal decision making cases cited above has survived.

In re T.W., 551 So.2d at 1192,

[41] As then-Chief Justice Ehrlich said, concurring specially, in Public Health Trust of Dade County v. Wons, 541 So.2d 96, 100 (Fla. 1989):

should be deemed compelling .[42]

(2) Protection of innocent third parties.

The only third party here involved is Mr. Hall's wife, who supports his right to decide, but personally rejects the concept of assisted suicide. Despite this Court's requirement that the family participate in the decision to refuse life-supporting devices,[43] the trial court did not include Mrs. Hall in the ultimate "subjective" decision that life is no longer worth living nor the "objective" review of that decision.[44]

(3) Prevention of suicide.

It may well be that this factor is merely the obverse of the state's interest in the "preservation of life. " While this State does not make suicide a statutory crime, it has placed on

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> Mrs. Wons does not desire to die, Rather, she has chosen not to live, if to do so would require that she receive blood. Should she die because no blood transfusion is administered, her death would be of natural causes, not suicide.

These words show the contradiction here, for although Mr. Hall does not presently "desire to die," the decision below applies only when, and if, he does "desire to die."

[42]As this Court has held, "we believe that society has an interest in the preservation of the life of the individual for his own sake." State v. Eitel, 227 So.2d at 489, 491 (Fla. 1969) (holding motorcycle helmet laws to be constitutional).

[43]See John F. Kennedy Hosp. v. Bludworth, 452 So.2d 921,923 (Fla. 1984), which adopted the principle from In re Covler, 99 Wash.2d 114, 660 P.2d 738 (1983) that "as a general practice these decisions are to be controlled by the patient-doctor-family relationship..and where physicians and family agree, court intervention would be little more than a formality." Bludworth involved an incompetent.

[44]As this Court has noted (citing J. Mill, On Liberty (Bobbs-Merill ed. 1956) that, "no person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them." State v. Eitel, 227 So. 2d at 491 (in which the court upheld the motorcycle helmet law against a challenge based on the "right to be let alone.").

the books a host of laws reflecting its interest in preventing suicide."[45] These collectively reflect the State's compelling interest in not having Floridians kill themselves, and certainly in preventing others from positively assisting them because they "objectively" conclude that the individual is "correct" in his/her subjective decision that life is no longer worth living.[46]

(4) Maintenance of the ethical integrity of the medical profession.

This factor was labeled in In re T. W. the least important factor, but there it was so labeled because this Court believed that medical ethics were consistent with the autonomous right to reject the intrusion of life-supporting devices. This Court's belief has been corroborated by the

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[45]Fla. Stat. § 765.309(1) states that nothing in that chapter "shall be construed to condone, authorize, or approve mercy killing or euthanasia." See also e.g., Fla. Stat. § 440.09(3) (denying workers' compensation coverage where the injury is primarily attributable to a willful intent to commit suicide); Fla. Stat. § 365.171(4)(b) (including suicide prevention in the state's emergency "911" telephone number); Fla. Stat. § 401 .015 (including suicide prevention agencies in the state-wide emergency medical telecommunications system); Fla, Stat. § 212.08(7)(o)(2b)(III) (extending state sales tax exemption to charitable institutions seeking to prevent suicide); Fla. Stat. § 934.15(1) (authorizing law enforcement to cut, reroute, or divert telephone lines when a person is armed and threatening suicide; Fla. Stat. § 394.463 (placing the threat of serious bodily harm to oneself among the criteria for an involuntary psychiatric examination); Fla. Stat. § 944.35(1)(f)(2) (authorizing application of physical force against a prison inmate when treatment is offered in satisfaction of a duty to protect the inmate against self-inflicted injury); and Fla. Stat. § 23 1.117(2)(a)(4) (requiring competence in the techniques of suicide prevention as a condition of teacher certification).

[46]Suicide is the eighth leading cause of death in the United States. New York State Task Force, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context 9 (May 1994). Studies indicate that ninety-five percent of successful suicides have a diagnosable mental disorder at the time of death. Id. at 11, Experts treating suicidal patients who are terminally ill commonly find all the elements of irrational suicidal ideation, despite a general perception that suicide among the gravely or terminally ill is a rational choice, David J. Mayo, Contemporary Philosophical Literature on Suicide: A Review in Suicide and Ethics 340 (David Mayo ed., 1983). Terminally ill patients who wish to commit suicide, like other suicidal persons, are usually suffering from a treatable mental illness, most commonly depression. New York State Task Force, supra, at 13.

New York State Task Force Report at 49-40, 146-48. But here the medical profession ethically opposes assisted suicide in the generic sense, and assisted suicide in this case, and expresses its great concern over the impact on itself -- at this time -- of any such concept. Surely the State has a compelling interest in supporting and protecting that interest.

G. Complex Political Problems Are Matters For The Legislature:

Creating a constitutional right to physician assisted suicide, which is what the trial court has done (App.,), sinks the moral, ethical, legal and medical values involved in the present case into cement, creating a situation in which, even if the court's present assessment of those values is correct, any future change in either knowledge or attitudes will be met with constitutional inflexibility. Whatever this Court's power to act here, this is a political policy area more appropriately left to the legislature. Physician assisted suicide is clearly an evolving concept, is in a state of substantial flux, and is an issue as to which large numbers of persons and organizations hold strongly held opinions. Empirical data is only now being collected. Biomedical ethical issues have only recently been brought to the fore.

Indeed, New York, which commissioned the extensive investigation of the issue resulting in the New York State Task Force report issued just three years ago, unanimously reached the same conclusion as to assisted suicide as that of Florida's Legislature.[47] Whether or not the decision of the New York State Task Force was "correct", it is clear that, after extensive collection and examination of evidence and opinions, reasonable persons with diverse professional

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[47]The Florida legislature has responded on the issue before this Court, and that response, to date, has been to make physician-assisted suicide a crime. § 782.08, Fla. Stat. (1995); see also § 458.326(4) and § 769.309, Fla. Stat. (1995) (mercy killing and euthanasia not authorized, nor any deliberate act to end life other than to permit the natural process of dying).

qualifications differ with the opinion of the trial court as to any necessity that physician assisted suicide be considered a fundamental individual right, even in a philosophical sense. This Court had the following to say in **Perlmutter**, even before adoption of Florida's Privacy Provision, as to the right to refuse medical intervention:

> Because the issue with all its ramifications is fraught with complexity and encompasses the interest of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type of issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all institutions and individuals properly accommodated.

Perlmutter, 379 So. 2d at 360.

Judge Kleinfeld, dissenting in **Compassion in Dying** forcefully echoed these concerns:

> That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all the great questions would be decided by the judiciary. . . . That an issue is important does not mean that the people, through their democratically elected representatives, do not have the power to decide it. One might suppose that the general rule in a democratic republic would be the opposite, with a few exceptions.
>
> . . .
>
> People of varying views, including people with terrible illnesses and their relatives, physicians, and clergymen, through democratic institutions, obtain enlightened compromises of the complex and conflicting considerations. They can do so at least as well as we judges can, and nothing in the Constitution prevents them from making the law.

Compassion in Dying, Kleinfeld, J., dissenting, 79 F.3d at 858, 859.

Should the legislature wish to change its present position and attempt to legalize and regulate the practice of assisted suicide, it may do so. Indeed, the legislature abrogated the common law crime of being a principal to suicide by enacting the Statute, § 782.08, Fla. Stat. (1995). State v. Adams, 21 Fla. L. Weekly D1522, D1524 (Fla. 2d DCA June 28, 1996). A public referendum can be held on the issue (as was done in Washington and Oregon--with opposite results) and the legislature take guidance from the wishes of the electorate. If physician assisted suicide were decriminalized by the legislature and severe abuses resulted, a criminal statute could be passed, once again. However, if this Court finds the Statute--directed at Dr. McIver--is governmental intrusion on Mr. Hall's autonomy right to privacy under the Florida Constitution and thereby finds the Statute unconstitutional, the flexibility, sensitivity and fact-finding expertise inherent in the legislative process become largely irrelevant, because the critical decision on the issue will already have been judicially made in a manner that constrains all future action. For these very reasons the Supreme Court of Michigan, in deciding this same issue, stated:

> . . . while the complexity of the matter does not permit us to avoid the critical constitutional questions, neither does it, under the guise of constitutional interpretation, permit us to expand the judicial powers of this Court, especially where the question clearly is a policy one that is appropriately left to the citizenry for resolution, either through its elected representatives or through ballot initiative . . .

People v. Kevorkian, supra. Respectfully submitted that, as a matter of law and policy, the legislative process is better equipped to deal with the issue of physician assisted suicide than are the courts.

Experience in the Netherlands would appear to indicate that the legalization of physician-

assisted suicide will lead to abuses which could threaten innocent people, and the ethical integrity of health care professionals. It certainly appears that such a practice has had an adverse effect on medical ethics in the Netherlands where, in 1990, there were 1,000 cases of involuntary euthanasia and 4,491 cases of excessive doses of morphine with the intent to terminate life, without the consent of the patient. Richard Fenigson, The Report of the Dutch Governmental Committee on Euthanasia, 7 Issues in Law and Medicine 339, 340 (1991) (T., 860-62, 864-867); yet Browning made very clear that this Court does not endorse euthanasia as a product of the Privacy Provision.

II.

THE CIRCUIT COURT ERRED IN RULING THAT THE EQUAL PROTECTION CLAUSE OF THE; UNITED STATES CONSTITUTION IS VIOLATED BY THE FLORIDA STATUTE WHICH MAKES ASSISTANCE IN SELF-MURDER HOMICIDE, AS APPLIED TO PHYSICIANS WHO DELIBERATELY ASSIST PERSONS WHO ARE TERMINALLY ILL TO DIE.

The trial court erred in ruling that terminally ill patients who wish to commit suicide are situated similarly to terminally ill patients who wish for treatment to be terminated or life support withdrawn, leading to its conclusion that refusal to permit physician assisted suicide is a violation of the Equal Protection Clause, (See, App., 20-21). This error has necessarily been examined at length above, since the trial court's determination as to Florida's Privacy Provision was made on Equal Protection grounds.

The Equal Protection Clause is, of course, essentially a direction that similarly situated persons should be treated alike. ClelCenter. Cleburne Living , 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Here, there is not the slightest indication that any

suspect classification is involved, so the general rule is applicable "that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. " Id. at 440. The Statute simply makes it a crime to deliberately assist another person in self-murder. The only classification in that Statute is between people who help others commit suicide and people who don't. The State's interests, previously discussed, in the preservation of life and in preventing suicide would appear to be more than sufficient to support such a classification,

The trial court adopted the analysis in Quill for its analysis that requesting the withdrawal of life support is equivalent to committing suicide. (App., 20-22).

> . . . it seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directed the removal of such systems; but those who are similarly situated except for the previous attachment of life-sustaining equipment are not allowed to hasten death by self-administering prescribed drugs.

Id. at 729.

However, requesting a doctor to disconnect life support and committing suicide, as previously explained, are simply not equivalent acts. They differ in the intent of both the patient and the doctor, they differ in the time required for death and its certainty and in a number of other ways as previously set forth in this brief, Focusing on the fact that they both "hasten death" (or probably do, since removing a patient from life support does not make death a certainty) is changing the tangential to the essential.

Further, as previously explained, the right to commit suicide is not the right being protected by the right-to-refuse-life-support cases. The right protected, rather, is "the right of

every individual to the possession and control of his own person, free from all restraint or interference of others . . . . " Cruzan, 497 U.S. at 269. We submitted that the right to live free of restraint cannot be equated with a right to chose the time of death, even if the practical effect of exercising either such right would be to hasten death. The "similar situation" appears not to bear up under analysis.

The United States Supreme Court will be deciding in the extremely near future whether the trial court was correct or not, which will effectively moot any possible decision by this Court on the issue. But the analysis herein of the Equal Protection methodology under which the court below evaluated Florida's Privacy Provision makes clear that this Court has uniformly and repeatedly determined that requiring the withdrawal of life support is not equivalent to committing suicide.

CONCLUSION

Based on the foregoing analysis and authorities, it is respectfully submitted that this Court should reverse the decision of the circuit court and hold that the Statute which criminalizes assisting self-murder is constitutional.

Respectfully submitted,

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