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IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,837

BARRY KRISCHER, in his
official capacity as State Attorney
of the Fifteenth Judicial Circuit,

Appellant,

vs.

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

Appellees.

ON DISCRETIONARY REVIEW OF A JUDGMENT
OF THE FIFTEENTH JUDICIAL CIRCUIT, CERTIFIED
BY THE FOURTH DISTRICT COURT OF APPEAL
AS REQUIRING IMMEDIATE RESOLUTION

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

The record below will be cited as R-___. The transcript of the proceedings below will be cited as TR-___. Exhibits introduced into evidence at trial will be cited as Plaintiffs' Exhibit ___ or Defendant's Exhibit ___. The Appellees' Appendix, submitted with this Answer Brief, will be cited as App.-___.

The Amended Brief of "Appellant/Petitioner," served on March 18, 1997, will be cited as the "Initial Brief."

The Appellant, Barry Krischer, in his official capacity as the State Attorney of the 15th Judicial Circuit, will be referred to as "the State" unless the context calls for a more particularized reference.

STATEMENT OF THE CASE AND FACTS

In its Statement of Facts, the State omits many of the facts underlying Judge Davis's decision. Without restating the detailed factual findings in the trial court's Final Declaratory Judgment and Injunctive Decree' (the "Final Judgment"), this brief will provide additional facts and a rebuttal to the State's innuendoes.[2]

Charles E. Hall, 35, is[3] dying of AIDS.[4] Although he is suffering terribly,[5] he is committed to living his life to the fullest for as long as possible.[6] He is not suicidal [TR-122]. He is fully competent.[7]

Mr. Hall anticipates a point in the near future where he will be "totally bedridden and no longer capable of living life as a normal human being. Where my mind is going and there is no . . . hope for me to recover from it."[8]

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1 R-l 820-1844; Appendix to Brief of Appellant

2 Judge Davis observed the witnesses and "weighed and evaluated their credibility based on their demeanor, interest, and other factors in reaching its findings of fact." Final Judgment at 2. Judge Davis's factual findings are presumed to be correct. E.g., Herzog v. Herzog, 346 So. 2d 56, 57 (Fla. 1977), Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976). The State makes no suggestion that any fact in the Final Judgment lacks a substantial basis in the evidence. It is therefore objectionable that the Statement of Facts reargues factual premises that the State sought unsuccessfully to support by evidence and argument at trial, and that the trial court fully explored and rejected.

3 This brief is written in the present tense as to Mr. Hall because he was still alive at the moment the brief was signed.

4 TR-121-123, 423-424, 426.

5 TR-123-130, 408-424.

6 TR-122,432. No evidence was introduced that any of the patient-plaintiffs was suicidal in this case. Testimony about suicide as a "major public health problem" was therefore irrelevant [TR-644-656].

7 TR-206-212, 400-404, 430-432.

8 TR-132-133. See also TR-209, 335-336, 344-345, 427-429, 435-436.

Mr. Hall fears the day when his pain can be relieved only at the cost of his competence or consciousness.' In the State-approved version of death, Mr. Hall's health-care providers would render him unconscious and then fail to provide him with sustenance and rehydration.[10]

This manner of death, common throughout America today," is what the trial court was referring to in the Final Judgment, where it said:

> Physicians are permitted to assist their terminal patients by . . . prescribing medication to ease their starvation. Yet, medication to produce a quick death, free of pain and protracted agony, are prohibited. . . . It is clear that the State has little reason in forcing the prolongation of Mr. Hall's pain and suffering merely because he takes medication to shorten his death instead of taking medication to ease a longer dying period.

Final Judgment at 16. Mr. Hall does not want to be "like a zombie" in the last few days of his life [TR-13 1]. He has asked the appellee, Dr. Cecil McIver, M.D., to provide him with drugs and advice to enable him to terminate his suffering quickly.[12]

Dr. McIver, fearing prosecution under section 782.08 of the Florida Statutes and disciplinary action by the Florida Board of Medicine,[13] would not assist Mr. Hall in his death. However, they, joined by two other patients in circumstances similar to those of Mr. Hall, brought this action.

There is no basis for the Initial Brief to state that the trial court "did not discuss to what

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9 TR-13 1. See also R-2647-2650; 2740-2741, 2744.

10 TR-438-442, 472-473.

11. TR-438-442, 472-473, 482-483; R-1256-1257; Comnassion in Dying v. State of Washington, 79 F.3d 790, 823-824 (9th Cir. 1996) (en banc), *rehearing denied, 85* F.3d 1440, cert. *granted sub* nom Washington v. Glucksberg, 117 S.Ct. 37 (Oct. 1, 1996).

12 TR-126, 209, 398-399, 423-424, 427.

13 TR-432-434, 439, 463-464, 471.

extent additional or different pain relief was available, or could alleviate [Mr. Hall's] suffering." Initial Brief at 5, n.8. The trial court heard and rejected the State's efforts to suggest that Mr. Hall might be driven to "self-murder" by inadequate pain management. [14] The evidence demonstrated that Mr, Hall's pain management has been perfectly adequate[15] and that physical pain is not the issue.[16]

There is also no basis for the Initial Brief to question "whether Mr. Hall was willing to take whatever pain relief could effectively alleviate his suffering." Initial Brief at 5, n.8. The evidence showed that Mr. Hall takes pain relievers and other medicines as they are needed and will continue to do so[17] but would choose to seek a physician assisted death, should the law allow it, at the point when he otherwise believes that he will be forced to enter a morphine coma [TR-132-133]. Contrary to the Initial Brief, Mr. Hall did not "testif[y] that he would decline further pain medication at the point it would put him into a stuporous state."[18]

The trial court learned about the State-approved manner of death during testimony about the deaths of the other two patient-plaintiffs, C.B. ("Chuck") Castonguay and Robert G. Cron. They both died before this case was tried [R-705].

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[14] E.g., TR-179-182, 435.

[15] E.g., TR-133-134, 180, 435.

[16] TR-436-437. See also 479.

[17] TR-127-129, 408, 413-415, 435.

[18] This paraphrase of Mr. Hall's testimony appears in the Initial Brief at 5, n.8. There, the Initial Brief cites to a page that does not remotely support the paraphrase.

Mr. Castonguay's body was wracked by cancer." Convinced he was dying,[20] he declined to be subjected to the testing that would have determined whether his cancer originated in the throat or lungs, and he refused painful and invasive treatment.[21] It was perfectly obvious he was dying.[22]

Mr. Castonguay was not suicidal.[23] He did not want to die [TR-462]. Anticipating a protracted agony, he asked Dr. McIver to help him to hasten his own death by providing him with a prescription and counseling when he reached the end of the struggle.[24]

On May 5, 1996, while this litigation was pending, Mr. Castonguay asked Dr. McIver for advice on how to use his stockpiled painkillers to take his life [TR-469-470]. Dr. McIver counseled Mr. Castonguay to check into Hospice as an in-patient instead.[25] Had Dr. McIver been allowed to assist Mr. Castonguay in his death at the time of Mr. Castonguay's choosing, it is clear in retrospect that Mr. Castonguay would have died only a week sooner, at most, than he did in fact die.

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19 TR-466, 586-588, 1259-1261, 1286-1289.

20 TR-380, 586-587, 1261.

21 TR-197-198,466, 586-587, 1008, 1259-1261, 1286-1287.

22 TR-467, 1286-1289, 1295-1297. Even the State's expert oncologist, Dr. Howard R. Abel, whose clearly announced bias was to abhor physician-assisted suicide and encourage patients to avail themselves of all therapy [TR-100% 1022], testified that if he had been Mr. Castonguay's treating physician, he would not have been able to help Mr. Castonguay fend off his demise for very long [TR-1030].

23 TR-193,462.

24 TR-197-198, 386, 463-465, 577-579.

25 TR-469-470, 58 I-582,620.

At that point, given the terrible burden imposed on his disabled, nearly blind brother,[26] who cared for Mr. Castonguay in their Edgewater home [TR-378-3791, Mr. Castonguay — contrary to his preference to obtain his physician's assistance to die at home[27] — checked into his local Hospice to die as an in-patient.[28] While there, he had his brother smuggle to him a bottle of liquid morphine with which he could bring about his own death [TR-385-387].

On May 10, 1996, when Mr. Castonguay's brother brought him the morphine, Mr. Castonguay was unconscious.[29] His pain had reached the point where the Hospice staff could provide relief only by inducing a morphine coma [TR-472].

Of course, he could not orally ingest fluids.[30] In the meantime, as he had ordered,[31] the Hospice staff did not use artificial means — not even an intravenous infusion of fluids — to provide sustenance or rehydration [TR-472-473]. Predictably, he died within a few days — not solely of cancer, but also of an overdose of morphine coupled with a lack of fluids [TR-472-4731.

Mr. Cron, a retired accountant and businessman,[32] was dying of mesothelioma,[33] a cancer of the tissue that forms the pleural space surrounding the lungs [TR-477]. Mesothelioma is

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2b TR-383,468.

27 TR-383, 468-469, 620.

28 TR-384,468-469, 580.

29 TR-387,472.

30 TR-387,472.

31 Defendant's Exhibit 10. A copy of Mr. Castonguay's "Living Will," pursuant to which he authorized his non-hydration, is reproduced at App.- 1.

32 TR-140,353.

33 TR-143-144, 204, 355-356, 476, 528, 1265-1266.

always fatal.[34]

Mr. Cron was not suicidal.[35] He did not want to die.[36] He fought hard to live until the time came to die.[37]

Yet he wanted to say goodbye to his family while he was competent, and exit this world without exposing them to a period of his incompetence or unconsciousness.[38] He asked Dr. McIver to assist him in his death, when the time came,[39] and joined in this lawsuit to establish his right to obtain Dr. McIver's assistance.

By October 20, 1996, the 45th anniversary of his marriage to Vivienne Cron,[40] Mr. Cron's cancer had metastasised throughout his chest cavity and impeded the functioning of his heart [TR-6 14-6 173. Mr. Cron's wife, son, daughter and grandchildren gathered at the Cron home in Oldsmar[41] for the couple's last anniversary [TR-363-364].

Mrs. Cron testified at trial [TR-351-373] that Mr. Cron "battled" to live through the 45th wedding anniversary, but he knew he would not live to see his son's next birthday in November

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34 TR-357, 476, 477-478. The State's expert oncologist, Dr. Abel -whose bias, again, was to vigorously oppose physician-assisted death and support a heroic struggle against cancer — testified that he could not have helped Mr. Cron survive any longer than he did [TR-1041].

35 TR-146, 200-202, 355, 359.

36 TR-146,359.

37 TR-364,477-478.

38 TR-149-150, 153, 203, 358-359, 479.

39 TR-358, 476, 479, 537-538.

40 TR-141,363.

41 TR-139, 352.

[TR-364]. That night, he "blocked out" and "gave up."[42] At that time, if he could have, he would have asked Dr. McIver to help him bring about his own death [TR-374]. Instead, Mrs. Cron testified that Mr. Cron did not ask Dr. McIver to assist him in his death because he would not have asked Dr. McIver to risk prosecution [id.].

Because Mr. Cron was allergic to morphine, his pain previously had been managed with other drugs.[43] He wore a necklace warning doctors that he was allergic to morphine [TR-368]. On the evening of the wedding anniversary, however, the nurses began using morphine[44] to treat Mr. Cron's pain, and they rendered him unconscious.[45]

They began using morphine "at that stage of the game" because it "might be more effective," despite Mr. Cron's allergy to morphine [TR-367]. It no longer mattered whether Mr. Cron was allergic to morphine. His sedation would be terminal.[46]

Beginning that night, Mr. Cron, while incapable of ingesting fluids on his own,[47] was not rehydrated intravenously or by any other means.[48] His "body thrashed for three days"[49] while his

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42 TR-366. See also 374,

43 TR-143, 367-368,482.

44 TR-367-368,482.

45 TR-362, 368-370, 482-483.

46 TR-362,365-371.

47 TR-369-371.

48 TR-369-371, 482-483. The "Living Will," pursuant to which Mr. Cron authorized his lack of rehydration, is within Defendant's Exhibit 57 and is reproduced at App.-2.

49 Elsewhere, the testimony and literature about "terminal sedation" do not describe the patients' comatose bodies as thrashing. Mrs. Cron's testimony that her husband's "body thrashed for three days" can only lead one to wonder whether the thrashing was an allergic reaction to the morphine.

family tried without success to communicate with him, even just to obtain some sign of recognition [TR-369].

He died on October 23, 1996, not solely from mesothelioma, but also from dehydration after being placed in a morphine coma.[50] During the last three days, his widow estimated, he lost 20 pounds of retained water in his feet, legs, hands and face [TR-370-371]. His widow testified that he died a "very demeaning death" that was "very hard on his family [TR-371]," contrary to his wishes.[51]

Dr. McIver testified that he would have thought it medically appropriate and ethical to prescribe drugs and give instructions to assist Messrs. Castonguay and Cron[52] in their deaths, and that he believes it will be appropriate and ethical to so assist Mr. Hall in the foreseeable future.[53] Yet the Initial Brief states, "The trial court made no finding that Dr. McIver's professional judgment is in accordance with that of the profession. It is not." Initial Brief at 6 (emphasis in original). On the contrary, the trial court found:

> . . . the State's evidence proved only that the medical community is divided on the ethical propriety of physician assisted death. This Court finds that the State has little or no concern in enforcing its interests over those of Mr. Hall or the views of some doctors over the views of others.

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50 TR-370-371, 482-483.

51 TR-374. See also TR-479.

52 TR-44 1-442, 46 1-462, 465, 475-476, 617-6 18.

53 TR-447-450,623-630. Dr. McIver demonstrated that physician assistance in death is consistent with the Hippocratic oath (which, in fact, doctors do not take, e.g., TR-447, 639). By approving the "double effect," the AMA has abandoned the Hippocratic oath's prohibition against giving "any deadly drug" to a patient [TR-447-4531. The Hippocratic oath has been manipulated throughout the ages by those seeking to claim that is supports their moral or religious beliefs. See. e.g., Roe v. Wade, 410 U.S. 113, 130-132 (1973).

Final Judgment at 15. The evidence fully supports the trial court's factual finding.

At this time, the "profession" keeps its physician assisted deaths a secret because "assisting self-murder" is a crime.[54] One of the State's experts testified that perhaps a quarter of all AIDS patients in San Francisco die in physician-assisted suicides.[55] The evidence admitted in this case indicated that the Journal of the American Medical Association has reported that 12 percent of physicians in a Washington survey said they had been asked to assist in a suicide within the past year; 4 percent said they had been asked to perform euthanasia; and a quarter of the requests had been granted.[56]

Other than the criminal prohibition, there is no "standard."[57] In support of its statement that there is a "professional judgment" of the "profession," the State gives a list of record citations [Initial Brief at 6, n. 11]. At the cited pages, the State's experts stated their personal beliefs that

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54 See, e.g., R-2719-2720; App.-3-8; App.-9-13; Charles H. Baron, *et al.*, A **MODEL STATE ACT TO AUTHORIZE AND REGULATE PHYSICIAN-ASSISTED SUICIDE, 33 HARV. J. ON LEGIS.** 1, at 3 (1996), which was admitted into evidence as Plaintiffs Exhibit 5. Two of the nine authors of the Model State Act were physicians. See also Comnassion in Dying, 79 F.3d at 8 11.

55 R-2719-2720. At these pages, Dr. Byock testified to his knowledge, as an expert in the field, of the findings of a survey that had not yet been published, but which were published after the trial of this case. Lee R. Slome, *et al.*, **PHYSICIAN-ASSISTED SUICIDE AND PATIENTS WITH HUMAN IMMUNODEFICIENCY VIRUS DISEASE,** 336 N. **ENG.** J. **MED.** 417 (1997) (reproduced at App.-9- 13) (finding that more than half of San Francisco Bay area doctors who treat AIDS patients have granted a patient's request for physician-assisted suicide at least once).

56 See Plaintiffs Exhibit 11, admitted into evidence: Dr. Marcia Angell, M.D., **EUTHANASIA IN THE NETHERLANDS — GOOD NEWS OR BAD? 335 N. ENG. J. MED. 1676,** at 1677 (1996) (introduced into evidence as Plaintiffs Exhibit 11) (reproduced at App.- 14-17).

57 For instance, State's oncologist, Dr. Abel, testified that "a physician-assisted suicide is illegal in the State of Florida. And therefore contrary to medical practice, to statutory medical practice." TR-1012. **He** later condemned Dr. McIver on grounds that Dr. McIver made "an offer" to Mr. Cron "of the illegal procedure of assisted suicide." TR-1021. To Dr. Abel, the fact that physician assisted suicide is illegal is "more basic" than whether it is unethical [TR-1028].

physician assisted suicide is bad, and make their arguments against it. The views of the State's experts are entitled to no more legal significance than Dr. McIver's views,

Dr. McIver is joined in his views by psychiatrist Dr. Alfred Fireman, M.D., who assisted Dr. McIver in evaluating the mental competence of Messrs. Castonguay, Cron and Hall.[58] In fact, the evidence showed that many doctors believe they should be legally authorized to aid patients in dying under certain circumstances.[59]

The New England Journal of Medicine has published research reports showing that a majority of physicians polled in Michigan and Oregon support physician assisted death.[60] The president of the Palm Beach County Medical Society recently published a magazine column in which he concluded, "For those for whom there is no other solution, physician assisted suicide may remain the only humane option." TR-454. One of the State's experts, Dr. Ira Byock, M.D., the president-elect of the American Academy of Hospice and Palliative Care Medicine, a group composed exclusively of doctors, testified that some of the members of that organization support physician assisted death, as do some of the members of its Ethics Committee [R-2016-2017].

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[58] TR-213-2 16,347. The State's expert psychiatrist, Dr. Raymond M. Pomm, likewise did not hold an opinion that "physician-assisted suicide" is categorically unethical [TR-962-964]. Dr. Pomm testified that the profession of psychiatry takes no position on physician assisted death.

[59] TR-21%223,453.

[60] TR-454-456. In his testimony at those pages, Dr. McIver referred to Jerald J. Bachman, et *al.*, **ATTITUDES OF MICHIGAN PHYSICIANS AND THE PUBLIC TOWARD LEGALIZING PHYSICIAN-ASSISTED SUICIDE AND VOLUNTARY EUTHANASIA, 334 NEW ENG.** J. **MED.** 303 (1996) (finding that 56 percent of Michigan physicians favored legalization, while 37 percent favored a ban) (the abstract is reproduced at App.-18), and Melinda A. Lee, *et al.*, **LEGALIZING ASSISTED SUICIDE — VIEWS OF PHYSICIANS IN OREGON,** *334* **NEW ENG. J. MED.** 3 10 (1996) (finding that 60 percent of Oregon physicians thought physician-assisted suicide should be legal in some cases) (the abstract is reproduced at App.- 19).

The trial court admitted into evidence and heard testimony" on an eloquent argument by Dr. Marcia Angell, M.D., published in the New England Journal of Medicine in support of the legalization of physician assisted death; and a "Model State Act to Authorize and Regulate Physician-Assisted Suicide," co-authored by Drs. Lowell E. Schnipper, M.D., and Sidney H. Wanzer, M.D., published in the Harvard Journal of Legislation.[62]

While the American Medical Association formally opposes physician assistance in death, the evidence before the trial court showed that[63] (1) the AMA does not represent "the profession," or even a majority of doctors, and doctors are not required to be members of the AMA;[64] (2) it is more conservative than doctors as a whole, and historically opposes change, as in the legalization of abortion[65] and the right of patients to refuse or terminate life-sustaining devices; and, finally, (3) the AMA does not set a "standard" for the "profession."[66]

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[61] TR-219; App. 20-27 (admitted into evidence as Plaintiffs Exhibit 4) (Dr. Marcia Angell, M.D., **EDITORIAL, THE SUPREME COURT AND PHYSICIAN-ASSISTED SUICIDE-THE ULTIMATE RIGHT, 336 N. ENG. J. MED. 50 (1997)).**

[62] TR-2 15-2 16, 223-224, 337-343. See Baron, "A **MODEL STATE ACT,"** *supra* note 54.

[63] TR-216-218, 450-454, 638-639.

[64] E.g., TR-638-639, 964-965.

[65] The AMA took the position that abortion was unethical and violated the Hippocratic Oath, See Compassion in Dying, 79 F.3d at 829, Having historically found abortion to be medically unethical, in 1970 the AMA changed its position, finding abortion acceptable if performed "in accordance with good medical practice and under circumstances that do not violate the laws of the community in which [a physician] practices." Roe v. Wade, 410 U.S. 113, 144, n.39 (1973). The AMA thus gave the legislatures, via their criminal abortion statutes, the prerogative to decide when and whether abortion was acceptable as a matter of medical ethics.

[66] As for the Florida Medical Association, the only evidence in the record is that one corporate entity (the FMA) opposes "physician-assisted suicide and euthanasia." Predictably, the FMA's amicus brief does not reveal how, when, where and by whom the FMA's decision to oppose physician-assisted death was made, or any evidence of whether any number — a majority,

Next, the State states, "The Florida Board of Medicine has specifically rejected Dr. McIver's conclusion as to what is medically appropriate and ethical in this matter." Initial Brief at 6, n.11 (emphasis in original).[67] There is no record citation to this "fact" because it is not in the record.

After the Final Judgment was entered, this "fact" was manufactured by our opposing counsel. On February 8, 1997, Assistant Attorney General Allen R. Grossman, as General Counsel to the Board of Medicine, "begged" and "pressured" his client into taking a vote on "physician-assisted suicide."[68]

There was no disciplinary action pending before the Board of Medicine. No rulemaking proceeding had been commenced. There was no agenda item about physician-assisted suicide. No evidence was taken about any "standard" of the "profession."[69] Yet Mr. Grossman told the Board of Medicine that there was "no time to abdicate disciplinary authority" and "sticking one's head in the sand" would not "help anyone.""[70] If a "resolution," "statement," or other document

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a minority, any number at all — of physicians in Florida agree with the FMA's position, or even whether any number of its own limited membership agrees with its position.

[67] Elsewhere, the Initial Brief refers to "the action of the Board of Medicine as to physician-plaintiff [Dr.] McIver," without saying what "the action" was. Initial Brief at 25, n.27. At another point, the Initial Brief says "the medical profession ethically opposes . . . assisted suicide in this case." Initial Brief at 42 (emphasis in original). Thus, somehow, the unidentified "action" of the Board of Medicine "as to" Dr. McIver has evolved into the position of "the medical profession."

[68] App.-28-33.

[69] We confirmed what transpired at the Board of Medicine meeting by reviewing the records and listening to the audiotape recording.

[70] App.-28-33. The audiotape of the meeting confirms the accuracy of the newspaper reports.

was "enacted" or "passed" by the Board of Medicine at its February 8 meeting, it has not been provided to this Court or to Dr. McIver.[71]

The Initial Brief [at 8] says that the trial court "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." On the contrary, the trial court reached all of these "certain other issues" in ruling:

> g. The State introduced evidence to show its fear that permitting physician assisted death for a competent, terminally ill person, might lead down the "slippery slope" to physician assisted deaths in the cases of persons who are not terminally ill, or who are not competent, or who are secretly being coerced. Therefore, the State argues, it should be empowered to prohibit physician assistance in death under all circumstances.
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> h. This argument is unpersuasive. Section 782.08 is unconstitutional precisely because it is not narrowly tailored to address only the situations the State fears will take place. None of the State's interests is compelling in the case of Mr. Hall because the evidence proves that he is an adult who is mentally competent, terminally ill, acting under no undue influence, and who will not obtain his physician's assistance in his death until he is imminently dying. In rejecting the State's arguments, this Court is persuaded by the opinion of Justice Sundberg in Satz v. Perlmutter, 379 So. 2d [359], at 359 (Fla. 1980), that the courts must decide the constitutional rights of individuals on a case-by-case basis until the Legislature adopts a regulatory framework [note 6].
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> [note 6]. This Court is aware of the State's strong and particularly concerned opposition to suicide. Also, it is cognizant of the religious, moral, ethical, and legal grounds advanced as well as the fear that abuses may arise. These concerns, which are acknowledged as legitimate and of extreme importance

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[71] Originally, the members of the Board of Medicine were named as defendants in this case [R-l-l 3, 20-37, 41-73; Initial Brief at 2, n.2]. Mr. Grossman obtained an order transferring the venue of this case to Leon County as to them [R- 108- 111, 146- 15 1, 200-20 1, 490-491, 535-545, 552; App.-34-37; Initial Brief at 2, n.2]. In Leon County, they entered into a stipulation to resolve the case [App.-38-42], pursuant to which they cannot take disciplinary action against Dr. McIver for assisting in the death of Mr. Hall if it is done lawfully under a court order in this case [App.-38-48; Initial Brief at 2]. Thus, the Board of Medicine's only position "in this matter" has been to abandon any role.

> do not outweigh the [r]ight of [p]rivacy and [e]qual [p]rotection. The State, however, has the authority and responsibility to adopt regulations which safeguard against potential abuses. These safeguards are necessary, but should not unreasonably infringe upon the individual's rights of privacy and equal protection of the law. Regulation is a legislative, not a judicial function. With this understanding, the Court limits its ruling to the parties before it, leaving future plaintiffs to seek judicial review. Further, the Legislature is invited to prospectively enact laws balancing the individual's constitutional right to determine his or her course of medical treatment, including the option to hasten his or her death, against the State's interest in preserving life, preventing suicide, protecting innocent third parties, and maintaining the ethical integrity of the medical profession.

Final Judgment at 18-19. In sum, the trial court carefully considered the New York and Netherlands experience [Initial Brief at 9 and 10], and the other supposedly "factual" issues posed by the State [Initial Brief at 11-12], and rejected them.

The State implies that Dr. McIver's initial evaluation of Messrs. Castonguay, Cron and Hall was somehow inadequate. Initial Brief at 6. This contention was fully explored and rejected by the trial court.

The purpose of Dr. McIver's initial evaluation of these patients, in January 1996, was limited.[72] They had contacted Dr. McIver to ask for assistance in their deaths, not at that time, but when the time came.[73] Because he knew he would not provide them with assistance in their deaths until after months of litigation, if ever, he did not review their medical records or perform a complete physical examination during the initial evaluation.[74]

Complete medical records would be obtained during the upcoming months of litigation.[75]

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72 TR-397-398, 404, 461-462, 475, 623-627.

73 TR-398-399, 475, 551, 577-579.

74 TR-397-398, 539-541, 1282-1283.

75 TR-406-407, 531-533, 547, 627-628.

A physical examination would have been "absolutely irrelevant [TR-532]" for the purposes of the initial evaluation.[76] Mr. Hall's AIDS, for example, could not have been proven or disproven in that initial meeting by a physical examination, and neither could the cancers of Messrs. Castonguay and Cron.[77]

In January 1996 Dr. McIver conducted a sufficient investigation to enable him to proceed with the filing of the Complaint.[78] Even one of the State's own experts, Dr. Ira Byock, testified that the initial evaluations were adequate for their limited purpose [R-260826091. At that time, Dr. McIver fully intended to take whatever steps were necessary and appropriate, "in the fullness of time [TR-1278]," to confirm the diagnoses of the patients and resolve any and every doubt that they were terminally ill, mentally competent, and acting under no undue influence.[79] The trial court rightly rejected the State's pointless attempts to find a basis to attack Dr. McIver and his conduct.

The State refers to Mr. Hall's "history of depression," Initial Brief at 6, once again attempting to suggest a question about Mr. Hall's competence. The trial court heard all the evidence" on the so-called "history of depression," including Mr. Hall's testimony on this point [TR-129-1301, and rejected the State's suggestion that Mr. Hall was clinically depressed or that

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[76] TR-532-534, 542-550, 571, 577-579, 1276

[77] TR-532-533,547, 1259, 1274, 1289-1297.

[78] TR-595-597, 1279-1281.

[79] TR-406-407,480, 539-550, 597,628, 1276-1277, 1282-1283, 1302-1303. Judge Davis himself questioned Dr. McIver extensively on this issue, and on Dr. McIver's planned administration of the lethal drugs to Mr. Hall [TR-623-6341.

[80] TR-129-130, 180-185, 206-212, 324, 332-335, 411-413, 422-423, 593-594.

Drs. McIver and Fireman inadequately evaluated his condition.

The trial court's determination that Mr. Hall was competent is supported by more than ample evidence,*' In addition, the trial court itself was able to evaluate Mr. Hall's competence as he testified in court [TR-118-135]. The State availed itself of every prerogative to persuade the trial judge to doubt Mr. Hall's competence,[82] but the trial court affirmatively found that Mr. Hall "was mentally competent at the time of trial and at all relevant times prior to trial."

The State refers to Dr. Fireman's "initial one-hour evaluation" of the patient-plaintiffs in February 1996, trying to suggest here, as it did in the trial court, that one hour is not enough time for a psychiatrist to evaluate a person's competence. The trial court, however, has already rejected the State's contention that Dr. Fireman's evaluation of Mr. Hall was inadequate.[83]

The State asserts that Dr. Fireman's follow-up evaluation, in October 1996, consisted of

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[81] E.g., TR-206-212, 283-284, 293-297, 302-311, 400-404, 425-426, 430-432.

[82] The state's expert psychiatrist, Dr. Pomm, testified that a terminally ill person "absolutely" could be mentally competent while seeking to hasten his own death; in other words, seeking a physician-assisted suicide is not proof of mental illness [TR-967]. Dr. Byock testified to the same effect [R-27851. This is a particularly important fact, given that the State and so many amici assert that only the mentally ill would seek a "physician-assisted suicide."

[83] The State's psychiatrist, Dr. Pomm, attacked the adequacy of Dr. Fireman's evaluations, but Dr. Pomm was applying the evaluative tools (a "comprehensive neuropsychiatric evaluation") that are used to evaluate whether a professional, such as a doctor or lawyer, has fully recovered from drug addiction or psychosis sufficiently to practice his profession without endangering the public. E.g., TR-189-193, 969-970. Dr. Pomm testified that he thought this evaluative standard should be applied to anyone who seeks a physician-assisted death [TR-979-982]. Judge Davis evidently agreed with our argument that there is no basis in the law to apply these standards to determine if a person is competent to make a life-or-death medical decision. Dr. Fireman, who regularly provides evaluations of the competency of criminal defendants to stand trial [TR- 166], testified that Florida courts "accept" that "the one-hour consultation" is "adequate to the task" of such an evaluation [TR-167]. Dr, Fireman's evaluations in this case were far, far more extensive than a one-hour evaluation.

"a one hour . . . examination . . . without reviewing Mr. Hall's medical records." Initial Brief at 4, n.6. On the contrary, Dr. Fireman testified that his October 1996 follow-up investigation was based on a review of medical records and interviews with Mr. Hall, his wife, his home health aide, a Veterans Administration counselor and Mr. Hall's treating physician.[84]

The State implies that there is a question whether Dr. McIver is able to assist Mr. Hall in his death properly, See Initial Brief at 6-7. This non-issue arose on August 5, 1996, when the State took Dr. McIver's deposition.[85] At that time, because he knew it would be months, if ever, before he would actually assist a patient in his death, Dr. McIver had not made firm decisions about what drugs he would use or how they would be administered.[86]

He later made those decisions." In context, it was unremarkable that Dr. McIver's answers at trial were more detailed than his answers in the deposition five months earlier. Dr. McIver testified fully, sometimes under Judge Davis's own questioning, and Judge Davis was satisfied with his answers. Final Judgment at 7, ¶ 15. After all, one of the State's experts, Dr. Byock, testified [R-2 185-2 186] that "really any competent physician should be able to euthanize an individual a hundred percent of the time with really no failure. It's extremely easy to do."

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[84] TR-206-212, 324-326. The State also notes that the follow-up evaluation was undertaken "after expiration of the discovery deadline." Counsel had a disagreement about this issue. E.g., TR-171-177. We always said it would not make sense to appear at trial with weeks-old or months-old information about the health and competence of the subject patients, and we believed the State always knew that Drs. McIver and Fireman would bring up-to-the-minute testimony to the trial, and that this was consistent with the pretrial order.

[85] TR-552, 554-563, 607-614.

[86] TR-491-497, 552, 554-563.

[87] TR-606-614, 630-633.

SUMMARY OF THE ARGUMENT

(1) This Court has consistently held that the guarantee of liberty in article I, section 23 of the Florida Constitution (the "Privacy Amendment") protects an individual's autonomy to control his own body. Never is this right of self-sovereignty more important than when one must choose between sorrowful alternatives about how and when to die.

People often want their deaths to be the final expression of the values they held dear in life, particularly given that their deaths will be the last memory they leave their family. Some people, given a choice, would choose to take control of their deaths, and die at the time of their choosing, with the loved ones of their choosing, while they are still lucid.

The State, instead, forces them to submit to a doctor-induced morphine coma for several days, during which their respiration fails from the drugs or they die from dehydration. While most people may always choose this route, there is no justification for the State to force its citizens to die according to a State-approved script.

By prohibiting Mr. Hall from obtaining Dr. McIver's assistance in his death, the State has broken the promise of the Privacy Amendment that there is a realm of personal liberty that the government may not enter without a compelling justification. The trial court therefore correctly found that section 782.08 denies Mr. Hall his right of self-determination under the Privacy Amendment.

(2) Moreover, the State takes this action with no justification, given that the State approves of doctors assisting their patients to die by other means, none of which is safer, less subject to abuse, or otherwise superior to the assistance Dr, McIver is offering to Mr. Hall.

Because the State did not prove a rational basis to distinguish the State-approved modes of physician-assisted death from the mode Mr. Hall seeks from Dr. McIver, section 782.08 also denies Mr. Hall his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. THE PRIVACY AMENDMENT PROTECTS THE RIGHT OF MR. HALL TO SEEK HIS PHYSICIAN'S ASSISTANCE IN HIS DEATH UNDER THE FACTS OF THIS CASE.

Florida Statutes section 782.08, prohibiting "assisting another in the commission of self-murder," was enacted in 1868 as part of the wholesale enactment of a statutory criminal code.[88] There is no evidence of any legislative intent except to codify the common law. There is no evidence that the drafters of section 782.08 ever contemplated its application to a caring physician at a dying patient's bedside who might have hastened the patient's last breath.[89]

In the ensuing 129 years the art and science of medicine have advanced dramatically, extending life spans and sometimes causing death to be more protracted, lonely, painful and

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[88] See **DIGEST OF THE STATUTE LAW OF FLORIDA,** Ch. 18, § 9 (1872). By prohibiting assistance in "the commission of self-murder," section 782.08 reveals its antecedents from the era when suicide itself was the crime of "self-murder," and assisting in a suicide was considered an aiding and abetting crime. See Michigan v. Kevorkian, 447 Mich. 436, 508, 527 N.W.2d 714, 744 (1994) (Boyle, J., concurring in part and dissenting in part).

[89] The only references to this issue in the proceedings below were made in our opening statement, TR-55, when we challenged the State to prove that section 782.08 was interpreted in the 1800s to prohibit a doctor from hastening a patient's imminent death with his family's approval, and in closing, TR-1326-1327, when we pointed out that the State did not provide such proof. The fact is, there is no reported American case of a doctor ever being punished for helping a patient hasten his own death. Comnassion in Dying 79 F.3d at 8 11.

undignified than our forebears would have thought possible.[90] Our health-care institutions have taken few of the steps they could take to improve the quality of care of the dying." In reaction to these modern realities, people have struggled to restore to themselves and their families a measure of self-determination in their deaths. E.g., Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980). This Court has consistently supported them in that struggle, even before the passage of the Privacy Amendment. Id.

In this case, Dr. McIver is willing to provide Mr. Hall the means to exercise his own choice to die quickly and painlessly, while the State seeks to force Mr. Hall to die slowly in a coma. Although section 782.08 does not mention physician assistance in death for patients on their death beds, the State nonetheless now contends that a physician would be subject to a prison term if he responds to his competent, terminally ill patient's request for drugs that the patient can use to control the circumstances of his death.

This Court should not necessarily accept that the State of Florida's true interests are the ones being asserted by the State's lawyers in this case. After all, the lawyers who represent the State today are unaware of what position their counterparts took only two decades ago. They say, "Until the Comnassion in Dying and Quill[92] decisions, the difference between the withdrawal of life support to support a patient and physician assisted suicide was undisputed in

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[90] See, e.g., Comnassion in Dving at 8 12.

[91] Even the State's experts all agree with us on this point. TR- 115 1- 1155; 1177; 1216-1222; R-2654, 2658-2659, 2739; Exhibits 8 and 9 to transcript of trial deposition of Dr. Byock.

[92] Ouill v. Vacco, 80 F.3d 716 (2nd Cir. 1996), *cert. grunted,* 117 S.Ct. 36 (Oct. 1, 1996).

the law." Initial Brief at 34. On the contrary, 19 years ago the State of Florida took the position that the withdrawal of life support *was* murder or "assisted self-murder," prosecutable under section 782.04 or 782.08. See Satz v. Perlmutter, 362 So. 2d 160 (Fla. 4th DCA 1978), *affirmed,* 379 So. 2d at 395.

Since then, by enacting the Privacy Amendment, the people of this state chose to make their "right to be let alone and free from governmental intrusion" superior to any power of the legislature. They have that right. See Art. 1, § 1, Fla. Const.; Travlor v. State, 596 So. 2d 957, 96 1-963 (Fla. 1992). That being so, the people of Florida who enacted the Privacy Amendment in our generation certainly have more power than a 1 9th Century legislature, which, in the State's view, controls today's decision from beyond the grave.

Mr. Hall and Dr. McIver ask this Court to recognize that the State's interpretation of section 782.08, as applied in the facts of this case, violates the "fundamental principle of robust individualism that underlies our system of constitutional government in Florida." Traylor at 963 Two federal circuit courts have held that the very rights Mr. Hall and Dr. McIver assert in this case are protected by the Federal Constitution. See Comnassion in Dying, *supra* n. 11 (finding a substantive due process right); Quill, *supra* n.92 (rejecting the substantive due process right but finding an equal protection right). While neither of these decisions is binding on this Court, they provide thorough, eloquent analyses of the corresponding arguments.

I-A. THE RIGHT ASSERTED BY MR. HALL AND DR. McIVER IS PROTECTED BY THE PRIVACY AMENDMENT, THUS REQUIRING THE STATE TO PROVE A COMPELLING INTEREST IN APPLYING ITS INTERPRETATION OF SECTION 782.08.

For Mr. Hall, tortured by pain and destined soon to be deprived of all pleasure, a state-

enforced prohibition on hastening his death condemns him to a worse fate, that of slipping into a drug-induced stupor, never to return. "The individual's interest in making that vital decision is compelling indeed, for no decision is more painful, delicate, personal, important, or final than the decision how one's life will end." Compassion in Dying, 79 F.3d at 837,

If any interest is protected by the Privacy Amendment, Mr. Hall's must be. This Court has held:

> "Privacy" has been used interchangeably with the common understanding of the notion of "liberty," and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interest. . . . An integral component of self-determination is the right to make choices pertaining to one's health. . . . Recognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right includes all medical choices.

In re Guardianship of Browning, 568 So. 2d 4, 9-10 (Fla. 1990). See also Matter of Dubreuil, 629 So. 2d 819, 822 (Fla. 1993); In re T.W., 55 1 So. 2d 1186, 1191-92 (Fla. 1989).

This Court has decided "a number of cases dealing with personal decisionmaking." T. W. at 1192. There, the Court listed the cases decided through 1989 and noted that "no government intrusion in the personal decisionmaking cases cited above has survived." Id. In fact, no infringement of the right of personal decisionmaking in regard to one's own body has survived through today's date.

The self-sovereignty cases have involved, for example, the liberty to make free choices about whether to have an abortion, T.W. at 1191-92; whether one can direct the termination of life support through a surrogate, Browning at 12- 13; and whether one is entitled to refuse a medically necessary blood transfusion, Dubreuil at 822, Public Health Trust of Dade County v. Wons, 541 So. 2d 96, 101-102 (Fla. 1989) (Ehrlich, J., concurring).

In contrast to the personal decisionmaking cases, some Privacy Amendment claims raise a "threshold matter" of whether a claimant under the Privacy Amendment has a "legitimate expectation of privacy" in his or her privacy claim.[93] This Court has never once entertained the "threshold question" of a "legitimate expectation of privacy," however, in a case involving one's control over one's body. The words "legitimate expectation of privacy" do not appear in Dubreuil, Browning, Wons, or T.W. See Dubreuil at 822 ("The state has a duty to assure that a person's wishes regarding medical treatment are respected."); Browning at 10 ("we begin with the premise that everyone has a fundamental right to the sole control of his or her person"); Wons at 97 (same).

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of questions: first, whether, when and how one's body is to become the vehicle for another human being's creation; second, when and how — this time there is no question of "whether" — one's body is to terminate its organic life.

T.W. at *1192, quoting* L. Tribe, **AMERICAN CONSTITUTIONAL LAW** 1337-38 (2d ed. 1988).

Nonetheless, the State asks this Court to hold that Mr. Hall has no "legitimate expectation

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93. See Mozo v. State, 632 So. 2d 623, 633-34 (Fla. 4th DCA 1994), *affirmed on other grounds*, 655 So. 2d 1115 (Fla. 1995) (involving interception of communications made on cordless phones); Stall v. State, 570 So. 2d 257,259 (Fla, 1990) (whether the Privacy Amendment "was meant to protect those persons who deal commercially in obscenity"); Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989) (whether one has a right "to determine for themselves when, how and to what extent information about them is communicated to others"); Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985) (involving "one's interest in avoiding the public disclosure of personal matters"); State v. Conforti, 22 Fla. L. Weekly D144 (Fla. 4th DCA Jan. 8, 1997) (whether one had a "right to patronize a commercial establishment to buy a live, lewd performance"); Fosman v. State, 664 So. 2d 1163, 1166 (Fla. 4th DCA 1995) (whether on accused of rape. has a right to refuse to allow a determination of whether he is HIV positive); State v. Dean, 639 So. 2d 1009, 1011 (Fla. 4th DCA 1995) (whether the Privacy Amendment expanded the right to protection from search and seizure).

of privacy" in seeking Dr. McIver's assistance in his death. Initial Brief at 15, 16. In support of this novel theory, the State cites two cases, City of North Miami v. Kurtz, 653 So. 2d 1025 (1995), and Department of Community Affairs v. Moorman, 664 So. 2d 930 (Fla. 1 995).[94] Both of these cases are inapplicable.

In Kurtz, a would-be city employee challenged the city's right to ask her, on an employment application, whether she smoked. The Court could not perceive a "legitimate expectation of privacy" in whether one smokes. As Justice Overton wrote: "In today's society, smokers are constantly required to reveal whether they smoke." Kurtz at 1028. This disclosural privacy case does not support the State's argument.

Moorman involved a landowner who claimed the Privacy Amendment insulated him from having to comply with land-use regulations aimed at protecting the endangered Key Deer. Moorman at 933. The Court rejected Moorman's Privacy Amendment claim, finding it "self-evident" that the "decision to use land in a manner contrary to lawful public environmental policy is simply not a private act." Moorman at 933. Mr. Hall's case, in contrast, self-evidently involves a very private act.

An individual always has a "reasonable expectation of privacy" in his self-sovereignty. Accordingly, the appellees invoked their rights under the Privacy Amendment and the trial court

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[94] In the same context the State cites Resha v. Tucker, 670 So. 2d 56, 58 (Fla. 1996), for the proposition that the Privacy Amendment "applies only to governmental action." Initial Brief at 15. This case does not support the State's argument. The State stipulated before trial that the defendant, State Attorney Barry Krischer, would act "under color of state law" in prosecuting Dr. McIver for "assisting self-murder," R-701-707, ¶¶ III-2, III-3, and the trial court so ruled. Final Judgment at 8, ¶ 1. There is no question whether the threat of prosecution is a "governmental action," as would be any actual prosecution.

properly required the State to show a compelling interest in section 782.08, as applied to the facts of this case, and that the statute is "narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." Browning, 568 So. 2d at 14.

I-B. THE STATE FAILED TO PROVE A COMPELLING INTEREST IN APPLYING ITS INTERPRETATION OF SECTION 782.08 TO MR. HALL AND DR. McIVER.

There are four State interests that might be found compelling in defense of a State regulation of an individual's bodily integrity, including the (1) preservation of human life, (2) prevention of suicide, (3) protection of innocent third parties, and (4) maintenance of the ethical integrity of the medical profession. See. e.g., Satz, 362 So. 2d at 160; Browning, 568 So. 2d at 14. In this case, the trial court carefully weighed each of the State's asserted interests based on the evidence introduced at trial and properly concluded that they were "insufficient to overcome the privacy interests asserted by Mr. Hall in this case." Final Judgment at 17. The Final Judgment's conclusions on this point, while not repeated here in full, should be affirmed for the reasons set forth therein.

While the State's interest in the preservation of human life is often compelling, "'there is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether, but when, for how long and at what cost to the individual [his or her] life may be briefly extended'." Browning, 568 So. 2d at 14 (*quoting* Satz, 362 So. 2d at 162). See also In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. 2d DCA 1984) (state interest in preserving life must be balanced against rights of individual); Compassion in Dying, 79 F.3d at 820 ("When patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing

them to remain alive is clearly less compelling.").

> [W]hat interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes. . , . And what business is it of the state to require the continuation of agony when the result is imminent and inevitable? What concern prompts the state to interfere with a mentally competent patient's "right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life," Planned Parenthood v. Casey, [505 U.S. 833, 851] (1992), when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: "None."

Quill, SO F.3d at 729-30 (some citations omitted).

The State's interest in the prevention of suicide is similarly diminished in this case. This case is not about "the depressed 2 1 -year-old, the romantically devastated 28-year-old, the alcoholic 40-year-old," Comnassion in Dying at 821; it is about a person who is terminally ill and will soon be imminently dying. To people in Mr. Hall's circumstance, "preventing suicide simply means prolonging a dying patient's suffering, an aim in which the State can have no interest." Id, n.86, *quoting trial court decision*, Comnassion in Dying v. State of Washington, 850 F. Supp. 1454, 1464 (W.D. Wash. 1994).

The prohibition of physician-assisted suicide may even be counterproductive to the State's interest in preventing suicide. One doctor told a poignant story of how her father, a cancer patient, shot himself to death relatively early in his dying process because he was afraid of losing control once he subordinated himself to his doctors [App.-20-27]. His daughter thought he would have lived longer and tried treatment if he had been assured that he could control the determination of when he was ready to die. There is other anecdotal evidence to the same effect. Compassion in Dying, 79 F.3d at 824 n.98.

In this case, Mr. Hall proved that he is not suicidal and intends to take his life only when he is imminently dying, and Dr. McIver will not assist Mr. Hall to die until Mr. Hall's beliefs — that he is imminently dying and ready to die — are objectively reasonable. Given these facts, the trial court rightly found that the State's interests in the preservation of life and the prevention of suicide are not compelling in this case.

The State's interests fade and become minimal in this case precisely *because* this case involves only the terminally ill and imminently dying. Ignoring this reality, the State digresses into an argument that if there is a right to physician-assisted suicide every healthy Floridian should have the right to commit suicide at any time.[95] On the contrary, if a patient in another case proposes to die further in advance of his natural death, then at some point the State's interests in the preservation of life and the preservation of suicide would become compelling, as would its interests in the protection of third parties and the maintenance of the ethical integrity of the medical profession.

Thus, the State's argument that the right to physician-assisted suicide would be unlimited is spurious. It presupposes that this Court will forget its own analysis in this case and lose control of the law. The very definition of the right Mr. Hall and Dr. McIver assert demonstrates that it exists only when Mr. Hall is imminently dying.

The State's argument that Dr. McIver's "objective veto"[96] proves that Mr. Hall must not

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[95] The State wonders aloud, "if a person has a constitutional right to commit suicide, why has anyone the right to veto that decision on any basis?" Initial Brief at 32-33.

[96] Initial Brief at 18. There, the State asserts that imposing Dr. McIver's "objective veto" on Mr. Hall's "subjective determination" is "violative of the Privacy Provision and unworkable." This argument lacks merit. Of course Dr. McIver must determine, based on objective medical data, that Mr. Hall is "imminently dying," or else Dr. McIver would find it

really have such a right is again spurious. Given the limitation on the right, it was no error for the trial court to require that Dr. McIver establish that Mr. Hall believes he is imminently dying and is subjectively ready to die before Dr. McIver assist Mr. Hall in his death; and that Dr. McIver also conclude that Mr. Hall's conclusions are medically reasonable, based on his condition — in other words, he is in fact imminently dying.

Similarly, the trial court properly found that the protection of third parties is not an issue in this case. Mr. Hall's wife could not cause his life to be prolonged; nor does she benefit if the State makes him die its way instead of his way. She opposes physician-assisted suicide but has accepted her husband's decision. Her position only serves to further demonstrate the lack of undue influence being exercised in Mr. Hall's decision.

Finally, the maintenance of the ethical integrity of the medical profession is not a compelling State interest in the facts of this case for the factual reasons set forth at pages 8-13, above, See also Compassion in Dying at 828-30; Quill at 730-731. "[T]he medical profession's ethical integrity is more threatened by the current system of physician-assisted suicide, accompanied by nods and winks, than it would be by an open, honest and legal system."

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unethical to assist Mr. Hall in his death, and Mr. Hall's election to die would be vetoed by the State's compelling interest in the preservation of life and the prohibition of suicide. And of course Dr. McIver must determine that Mr. Hall is "subjectively" ready to die; that is only a requirement that Dr. McIver be assured that Mr. Hall has made the final decision. Given the truth about the trial court's decision, it is nothing more than an abusive misuse of the English language for the State to say that the trial court extended the right to physician-assisted suicide to persons who have "subjectively determined that their lives are no longer worth living," and whose treating physician "has objectively determined that their decisions to commit suicide are correct." Initial Brief at 18. See also Initial Brief at 32 (using same misleading terminology again).

[97] One of the amicus briefs makes an issue of whether health-care workers have a right to refuse to participate in "physician-assisted suicide" based on their personal convictions.

I-C. THE STATE FAILED TO PROVE THAT SECTION 782.08 IS NARROWLY TAILORED IN THE LEAST INTRUSIVE MANNER TO SAFEGUARD THE RIGHTS OF THE INDIVIDUAL.

Section 782.08 does not even attempt to be "narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." Browning, 568 So. 2d at 14. Section 782.08 absolutely forbids one type of physician assistance in death, even where, as here, the patient's voluntariness of choice, mental competence, and terminal condition are so clear as to withstand an aggressive challenge by the State.

The appellees in this case do not assert that the Privacy Amendment prohibits the State from regulating physician-assisted suicide to protect its legitimate interests. Any number of regulatory measures could be taken to ensure that the patient's choice is fully voluntary, that the patient is imminently dying, and that the patient is competent and is acting under no undue influence, including the influence of treatable depression. See, e.g., Lee v, State of Oregon, __ F.3d ___, 1997 WL 128500 (9th Cir. March 2 1, 1997) (describing and reprinting Oregon Death With Dignity Act, in which voters, by initiative, legalized physician-assisted suicide with many safeguards).

However, when section 782.08 is compared to the State's asserted interests, it becomes clear that there is little "fit" between the statute's terms and the asserted interests, and that the statute is therefore irrational or it serves some other, unstated, undefended purpose. The statute

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The citizens of this state have been dealing with that problem for years, e.g. Kenny v. Ambulatory Centre of Miami. Florida. Inc., 400 So. 2d 1262 (Fla. 3d DCA 198 1), and will continue to do so. The personal convictions of a health-care worker could never form the basis to deny a patient's constitutional right to privacy.

is grossly overinclusive in that it invades the privacy of the clearly competent and uncoerced, and it is equally underinclusive in that it does not prohibit the same decision -to hasten death with medical intervention — for those on life support or those who would submit to a morphine coma and starvation.

The evidence demonstrated that there are various gradations of physician involvement in causing patients' deaths. By seeing the whole spectrum, the trial court saw that the State does nothing to regulate a doctor's role in conduct that implicates the State's four interests as much as Dr. McIver's proposed form of physician-assisted death.

First, there is the use of painkillers with the "double effect" of relieving pain and hastening death. See. e.g., Compassion in Dving, 79 F.3d at 827-828. The AMA Code of Ethics says that "physicians have an obligation to relieve pain and suffering and to promote dignity and autonomy of dying patients in their care. This includes providing effective palliative treatment even though it may foreseeably hasten death." R-634.[98]

A doctor's over prescription of painkillers is thus approved by the State and the AMA not only if hastening death is an undesired, unforeseen side effect, but even if the doctor *knows* that the painkillers *will* hasten the patient's death, so long as the doctor's "intent" is to "relieve pain and suffering." A doctor need not even *try* to avoid hastening death.

The State argues that a doctor's "intent" can distinguish lawful conduct from physician-assisted suicide, but the State's view of "intent" is fundamentally contrary to American legal concepts. One acts with "intent" if "he believes that the consequences are substantially certain to

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[98] See AMA Council on Ethical and Judicial Affairs, CODE OF MEDICAL ETHICS: CURRENT OPINIONS § 2.20 (quoted also in Brief Amici Curiae of the FMA, AMA, et al., at 7).

result" from his conduct. **REST.** (2D) **OF TORTS** § 8A (1965). As Dr, McIver testified, "If I make a decision which has a predictable outcome, I'm responsible. If I have an action that has more than one, I'm responsible for all of them." TR-441. Dr. McIver's view is more in line with American law than the State's.

In the case of the "double effect," the law makes the doctor's conduct privileged, "not because the doctors sugarcoat the facts in order to permit society to say that they couldn't really know the consequences of their action, but because the act is medically and ethically appropriate even though the result — the patient's death — is both foreseeable and intended." Compassion in Dying at 823 n.95.

While the process of alleviating suffering to the point of death is underway, the patient often becomes unconscious, unable to eat or drink on his own. At that point, the physician fails to provide sustenance and rehydration. As far as Florida law is concerned, the patient authorized the pain relief medication, and the patient exercised his right to refuse artificial methods of providing sustenance and rehydration. See, e.g., § 765.303, Fla. Stat. (1995) (suggested form of living will). Again, the law, in any other setting, would hold a person responsible if he were to render another helpless and then allow the helpless person to die of starvation or a lack of fluids.[99]

At that stage, as the trial court found, physicians are "permitted to assist their terminal patients by . . . prescribing medication to ease their starvation," and medication is prescribed "to

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[99] See **REST.** (2D) **OF TORTS** § 284 (negligence includes a failure to act to protect another when one is under a duty to do so); § 3 14A (duty arises when one is in custody of another); § 321 (duty arises when one created danger); § 322 (duty to aid another harmed by actor's conduct); § 324 (duty arises when one takes charge of another who is helpless).

ease a longer dying period." When it comes to this legal form of active physician hastening of the deaths of the terminally ill, Florida law does not protect the poor, elderly, minorities or the disabled, or take steps to ensure that a decision is fully informed, voluntary, and reached under no undue influence, or that the patient is terminally ill and imminently dying.

Finally, Florida law allows a patient to prohibit resuscitation, rehydration and sustenance, and to refuse or terminate life-support devices. See, e.g., §§ 765.101, 765.102, 765.302, and 401.45, Fla. Stat. (1995); Final Judgment at 10-11, ¶ 5 and n.5. From cover to cover, the Initial Brief continually pretends as if this latter form physician involvement in death is the only issue in this case, ignoring what the trial court saw, an entire spectrum of physician conduct deemed to be ethically appropriate and legal.

For instance, in one typical reference, the State says: "It has been argued, and the trial court concluded, that there is no logical difference between the action of a physician in removing life-supporting equipment so a patient can die of natural causes and the action of a physician in providing the means to commit suicide through a lethal dose." Initial Brief at 28-29 (emphasis in original, footnote omitted). Note that the entire argument flowing from this quotation depends on the phrase, "*so that upatient can die of natural causes.*"

On the contrary, this case demonstrated that the State does not defend its interests in the preservation of human life, prevention of suicide, protection of third parties and maintenance of the ethical integrity of the medical profession across a whole spectrum of activities involved in a patient's death, some of which have nothing to do with "natural causes." Yet this State's trust and confidence in the goodwill and good judgment of doctors is reflected in the fact that an autopsy is not required when a doctor "attends" a death. See § 406.11, Fla. Stat. (1995).

Only 19 years ago hospitals feared criminal prosecution for "assisting self-murder" if they aided in the removal of a life-support device from a patient, and the State of Florida agreed that their fear was reasonable. See Satz 362 So. 2d at 162. The State's position at that time certainly proves that the removal of life-support devices implicates a State interest in the preservation of life and prevention of suicide. Yet the State, in this case, has produced no evidence that the patient's right to removed unwanted life-sustaining devices has been the subject of any significant amount of abuse since Satz.

The trial court properly found that section 782.08 is not narrowly tailored to address the State's interests or to protect the rights of Mr. Hall and others in his circumstance.

II. THE STATE FAILS IN EACH OF ITS EFFORTS TO SHOW AN ERROR TN THE TRIAL COURT'S ANALYSIS AND DECISION.

The State makes various arguments that fundamentally misconstrue the Final Judgment and applicable law for the following reasons.

II-A. THERE IS NO MERIT TO THE STATE'S ARGUMENT THAT THE PRIVACY INTEREST ASSERTED HERE IS AN INTEREST ONLY OF DR. McIVER'S.

The State argues that section 782.08 directs its threat of criminal prosecution only at Dr. McIver, not at Mr. Hall; and therefore "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." Initial Brief at 16; argument at section I-A, pages 14-17. There is no merit to this argument.

If the Privacy Amendment protects a person's "inherent right to make choices about

medical treatment," Browning at 10, it necessarily means that his privacy inheres in his consultations and interactions with his doctor. Otherwise, there would be no right to make choices about medical treatment.

The State's argument is inconsistent with this Court's holding and analysis in T.W. There, a statute prohibited a physician from performing an abortion on an unwed minor unless the minor presented written, informed consent of her parent or guardian or a court order authorizing the procedure. A physician who performed an abortion on an unmarried minor without such parental consent or court order was guilty of a third-degree felony. See 14A Fla. Stat. Ann. 300 (West 1993) (historical notes to § 390.001).

The statute in T.W. — like the one below — threatened criminal prosecution of the physician, not the patient. Just as section 782.08 "does not tell Mr. Hall he cannot commit suicide or even that he cannot request assistance," because section 782.08 "speaks only to Dr. McIver," Initial Brief at 16, so the statute in T.W. did not tell T.W. she could not induce her own abortion or even that she could not "request assistance," because the statute spoke "only to" her doctor. Just as section 782.08 "represents governmental action that intrudes only upon Dr. McIver's freedom to act," so the parental consent statute represented "governmental action that intruded only upon" T.W.'s doctor's "freedom to act."

The State cruelly tells Mr. Hall that he is free to point a gun to his temple, or to experiment, as he testified he is afraid to do [TR-130-13 1], with committing suicide by overdosing on his painkilling medications.[100] He does not want to run the risk inherent in an

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[100] In the Initial Brief at 26, the State says that suicide is not a crime in Florida. In the trial court, however, the State maintained that suicide itself is still a common-law crime in

amateur attempt to terminate his suffering, just as T.W. did not want to run the risk inherent in a self-induced abortion.

In each case, the statutory prohibition attaches criminal penalties to the only reasonable means available to the patient to exercise his or her medical choice. In this case, therefore, just as in T. W., the patient has standing to challenge the state's criminalization of his doctor's conduct. Moreover, the doctor, given his well-justified fear of prosecution, has standing to assert his own right not to be prosecuted for providing his patient with that which his patient is constitutionally entitled to receive."' See Quill at 722-723.

Moreover, the Florida Supreme Court's analysis under the Privacy Amendment runs parallel to the analysis applied by the Supreme Court of the United States in the abortion cases:

> In those cases, the Court initially determined whether a general liberty interest existed (an interest in having an abortion), not whether there was an interest in implementing that general liberty interest by a particular means. Specifically, in Roe v. Wade, [410 U.S. 113] (1973), the Court determined that women had a liberty interest in securing an abortion, not that women had a liberty interest in obtaining medical assistance for [the] purpose of an abortion The Court did so even though the Texas statute at issue did not prohibit a woman from inducing her own abortion; nor did it criminalize a woman's conduct in securing an abortion.

Florida. See R-59 ("It is axiomatic that if suicide is illegal, assisted suicide must also be illegal."), 195, 234, 603, 752; TR-75, 78, SO, 1441-1443.

[101] The State says that "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 to so rule." Initial Brief at 15. On the contrary, the trial court ruled: "In Count VI, Dr. McIver and Mr. Hall seek a declaratory judgment, and the Court does hereby grant them such relief and declares . . .that Dr. McIver is permitted to provide Mr. Hall with the assistance he requests." Final Judgment at 9, ¶ 2. It is implicit throughout the Final Judgment that the trial court held that Dr. McIver's rights were violated, and nowhere does the trial court say it "declined to so rule." If the trial court had not found Dr. McIver's rights violated, there would have been no purpose for the findings at page 1, ¶ 8, that the State Attorney had the authority to prosecute Dr. McIver and that Dr. McIver's fear of prosecution by the State Attorney was "quite reasonable, given the evidence."

> Rather, the Texas statute, like the Washington statute here [and like section 782.08], prohibited the rendering of assistance; specifically, the Texas statute prohibited only assisting a woman to secure an abortion. Roe, [410 U.S. at 151-52]. The Court first determined that a woman had a constitutional right to choose an abortion. Only after it did so, did it proceed to the second step: to determine whether the state's prohibition on assistance unconstitutionally restricted the exercise of that liberty interest.

Compassion in Dying, 79 F.3d at 801.

In this case, on the State's motion [R-41-73], the trial court denied third-party standing for Dr. McIver to assert the rights of Mr. Hall precisely because Mr. Hall was a'named party to this action and was asserting his own rights [R-140]. Now, the State says that neither does Mr. Hall have standing to assert his own rights. In sum, the State maintains that nobody on Earth has standing (or at least nobody in a Florida state court) to assert that a competent, terminally ill, imminently dying adult, acting under no undue influence, may obtain his physician's assistance in his death.

Just as it did in T.W., this Court should reject the State's effort to make it impossible for a patient to vindicate his right to privacy in a medical decision.

II-B. THERE IS NO MERIT TO THE STATE'S ARGUMENT THAT THE TRIAL COURT CONFUSED THE EQUAL PROTECTION CLAUSE WITH THE PRIVACY AMENDMENT.

The State maintains that the "circuit court determined that patient-plaintiff [Mr.] Hall had been denied his right to privacy under the Florida Constitution . . . based on an Equal Protection analysis"[102] and "erroneously equated the Florida Privacy Provision with the Equal Protection

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[102] Initial Brief at 15; argument at sections I-C and I-D, pages 17-22.

Clause." [103] Somehow, the reasoning goes, the trial court therefore incorrectly analyzed the rights of the plaintiffs under the Privacy Amendment. This argument ignores the contents of the Final Judgment and is without merit.

The State thinks the trial court applied an equal protection analysis because the Final Judgment discussed suicide and the withholding and withdrawal of life support measures in its Privacy Amendment analysis. However, in discussing those issues, the trial court was applying precisely the analysis established in T. W.[104]

In T.W., the State argued that it had a compelling interest in "the protection of the immature minor and preservation of the family unit." T.W. at 1194. This interest, the State asserted, was sufficiently compelling to support the State's prohibition against a physician performing an abortion on a minor without first obtaining written parental consent or a court order.

Looking beyond the State's assertion, this Court found that a Florida law, section 743.065, allowed "[a]n unwed pregnant mother" to give "valid and binding" consent to certain other medical procedures for herself or her child. Thus, Florida's own laws did not support the notion that "the protection of the immature minor and preservation of the family unit" required minors to be prohibited from obtaining medical services without parental consent. Indeed, in light of Barry, 445 So. 2d, a minor mother had a right to order the removal of life support from a

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[103] Initial Brief at 20 (this quote comes from the title to subsection I-D).

[104] The method of analysis also happens to be precisely that used in this brief at sections I-B and I-C, *supra*; and by the Ninth Circuit in Compassion in Dying, 79 F.3d at 816-833 to balance the interests of the State of Washington against the Fourteenth Amendment liberty interest asserted by the plaintiffs there.

brain-dead child (because the privacy right of mothers "overrides any interest of the state in prolonging their child's life," id. at 371). T.W. at 1195.

The Court noted that under section 743.065, "a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child — no matter how dire the possible consequences — except abortion," The Court went on to say:

> In light of this wide authority that the State grants an unwed mother to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. We fail to see the qualitative difference in terms of impact on the well-being of the minor between allowing the life of an existing child to come to an end and terminating a pregnancy, or between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to end one's pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest. Although the state does have an interest in protecting minors, "the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions."

T.W., 551 So. 2d 1195 (footnote and citation omitted). This Court also noted that Florida's adoption act did not require a minor to obtain parental consent to place her child up for adoption, which further underscored the State's selective application of its "compelling interest." Id.

Taking its cue from T.W., the trial court ascertained that Florida law did not truly reflect a "compelling interest" in the preservation of human life and the prevention of suicide when the individual is otherwise already on his death bed (or even when a person who is not dying refuses needed medical intervention). Final Judgment at 16. The Florida legislature itself, in our generation, has declared that "every competent adult has the fundamental right of self-determination regarding decisions pertaining to his own health, including the right to choose or refuse medical treatment," § 765.102, Fla. Stat. (1995), thus recognizing that the State's interest

in the preservation of human life sometimes gives way to the privacy rights of the individual. The same statement of legislative findings and intent adds: "The Legislature further finds that the artificial prolongation of'life for a person with a terminal condition may secure for him only a precarious and burdensome existence, while providing nothing medically necessary or beneficial to the patient,"

The trial court, following T.W. in its approach, properly found that the State's own laws proved that the State has a weak interest in prohibiting Mr, Hall from obtaining his physician's assistance in his death, given that the evidence proved that Mr. Hall will seek Dr. McIver's assistance in his death only at the end of his suffering, at the point in time when Florida law already grants him a right to shorten his natural life.

II-C. THERE IS NO MERIT TO THE STATE'S ARGUMENT THAT THE LACK OF A FEDERAL DUE PROCESS RIGHT EQUALS THE LACK OF A PRIVACY AMENDMENT RIGHT,

The State asserts: "That the circuit court found no liberty interest of patient-plaintiff [Mr.] Hall infringed by [section 782.081 should have instructed him that Mr. Hall's rights under the [p]rivacy [p]rovision likewise were not violated." The argument that the lack of a federal due process right equals the lack of a Privacy Amendment right is contrary to settled law:

> [T]he the states, not the federal government, are responsible for the protection of personal privacy. . . . This Court accepted that responsibility of protecting the privacy interests of Florida citizens when we stated that "the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution."
> . . .
>
> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution, This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally

> phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield, 477 So. 2d at 547-548 (citations omitted). This Court has added, "In other words, the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the [F]ederal Constitution." T.W., 551 So. 2d at 1192. See also. e.g., Kurtz, 653 So. 2d at 1026 ("Florida's privacy right provides greater protection than the [F]ederal [C]onstitution"); Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996) ("our constitutional privacy provision is a guarantee of greater protection than is afforded by the [F]ederal [C]onstitution"); Traylor v. State, 596 So. 2d at 962 ("State courts function daily as the prime arbiters of personal rights.").

The substantive due process rights under the Fourteenth Amendment only those "fundamental liberties so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed'." Quill, 80 F.3d at 723, *quoting* Palko v. Connecticut, 302 U.S. 319, 325-326 (1937). Such rights must be "deeply rooted in this [n]ation's history and tradition." Quill at 723, *quoting* Moore v. Citv of East Cleveland, 43 1 U.S. 494, 503 (1977). The privacy rights identified under federal law as "fundamental" to date are limited to marriage, procreation, family relationships, child rearing and education, and contraception and abortion. Id. at 724. The Supreme Court of the United States "has drawn a line . . . on the expansion of fundamental rights that are without support in the text of the Constitution." Id. That is because the Supreme Court of the United States "is most vulnerable and comes nearest to illegitimacy

when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Id., *quoting* Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

In stark contrast, however, this Court enforces the Florida Privacy Amendment vigorously, with full legitimacy, because (1) the right of privacy is explicit and clear in the Florida Constitution, and (2) it is there because the people of this state voted to put it there, and by a huge majority. This Court's jurisprudence merely reflects its affirmation that the people of Florida have more power than the legislature, See Art. 1, § 1, Fla. Const. Their power to impose a right of privacy superior to any legislative act must be at its zenith where, as here, the promise of the peoples' Privacy Amendment is weighed against an archaic statute, one that has been completely dormant for more than a century. These considerations are directly relevant to this Court's consideration of the state of the law in Florida. As then-Chief Justice Shaw once wrote:

> The state bills of rights . . . express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

Traylor, 596 So. 2d at 962 (Shaw, C.J., with the concurrence of every member of the Court on this issue). Considering all those factors, the "unique state experience" of Florida compels a conclusion that section 782.08 has no validity, in light of our Privacy Amendment, as applied to prohibit a competent, terminally ill, imminently dying adult from obtaining his willing physician's assistance in his death.

Finally, contrary to the Initial Brief, it is not true that the trial court "found no liberty interest" infringed by section 782.08. The trial court did find a liberty interest but concluded that the interest was not a "fundamental" one under the Federal Constitution, as that term is narrowly defined by the United States Supreme Court. The trial court ruled: "This Court, while convinced that competent, terminally ill, imminently dying patients have an interest in directing the course of their treatment, it does not find it clear that such an interest rises to the level of a fundamental right even though the court in Compassion in Dying made a strong equitable and historical analysis in favor of such a right." Final Judgment at 10, ¶ 4.

The Ninth Circuit found that a "balancing test is applicable" to determine whether the State of Washington's prohibition of physician-assisted suicide could overcome the "important liberty interest" of the terminally ill under the Fourteenth Amendment in their "right to die" Compassion in Dying at 804. "[O]ne point is absolutely clear: there can be no legitimate argument that rational basis review is applicable." Id.

Very much in disagreement, the Second Circuit panel found that the jurisprudence of the Supreme Court of the United States required, first, that the court determine if the "right to die" is a *fundamental right,* thus invoking strict scrutiny (compelling state interest, narrowly tailored statute); and if it were not a fundamental right, then there was no other test but the rational basis test to apply. Quill at 723-725. The Second Circuit did not recognize the existence of any intermediate "balancing test" to evaluate an "important liberty interest." Id.

In this split of opinions, Judge Davis sided with the Second Circuit's "all or nothing" view. It seems clear from the Final Judgment that, if Judge Davis had believed in the Ninth Circuit's intermediate "balancing test" approach, he would have found a significant liberty

interest and would have ruled that the State's interests, on balance, did not defeat the terminally ill person's liberty interest. Indeed, the Second Circuit's decision indicates that it probably would have reached the same conclusion if it had subscribed to the "balancing" approach of the Ninth Circuit. One can only wonder whether the Ninth Circuit would have reached the conclusion it did if it had believed, as the Second Circuit did, that no intermediate "balancing test" was available under the law.

The trial court concluded that only a "fundamental right" would be sufficient to invoke a heightened level of scrutiny as a matter of federal constitutional law. The trial court merely doubted whether the Supreme Court of the United States would find a new fundamental right. In no way did this decision of the trial court point toward a denial of relief under the Privacy Amendment.

III. THE TRIAL COURT PROPERLY FOUND THAT SECTION 782.08 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The State frames the equal protection issue by saying that 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." Initial Brief at 45. This characterization of the equal protection issue, which appears again and again in the Initial Brief, misstates the trial court's decision and disregards the record in this case. The evidence in this case showed that the two persons who were "similarly circumstanced" for purposes of an equal protection analysis, see Quill at 725, were:

1. A person such as Mr. Hall, who is terminally ill and will be "imminently" dying before he seeks to exercise his right to obtain his physician's assistance in his death, and

2. A person who dies in the State-approved manner that was forced upon Messrs. Castonguay and Cron, or a person who is on life support and therefore can instruct his physician to turn off the life support device.

Mr. Hall was forbidden from obtaining his physician's assistance in hastening his death, but those who die in the typical manner illustrated by the deaths of Messrs. Castonguay and Cron, or those whose lives are maintained by life-support devices, are not forbidden from obtaining their physicians' assistance in their deaths. For the reasons articulated in the Final Judgment and earlier in this brief, particularly at sections I-C and II-B, there is no rational basis for the state to treat these two categories of Florida citizens differently. See Quill.

The State is able to make its arguments against the equal protection claim only by reducing the issue to the dichotomy between physician assisted suicide and turning off life support "equipment so a patient can die of natural causes," Initial Brief at 28-29. This case is not simply about whether a physician may turn off a respirator and allow a patient to die of natural causes. Only in that scenario does the State's argument about the "action versus inaction" or "active-passive" distinction make some sense (although we do not concede that the argument has merit even in the "natural causes" scenario). This case is about a totally irrational statutory scheme in which one doctor may follow the State-approved script to cause his patient to die when the time comes, but only if he causes the death slowly; and another doctor is threatened with a prison term if he enables his patient to die quickly, by the volitional act of the patient himself.

Against the backdrop of modern laws governing patients' rights, section 782.08, as interpreted by the State in this case, is not supported by any rational basis. The trial court's

decision is well supported by its reference to the persuasive analysis and holding in Quill, 80 F.3d at 725-73 1. The trial court correctly found that section 782.08 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as applied to the facts of this case.

IV. THIS COURT SHOULD BE UNPERSUADED BY THE STATE'S EFFORTS TO RAISE SPECULATIVE AND IRRELEVANT ISSUES ABOUT WHAT MIGHT HAPPEN IN THE FUTURE.

Given that current quality of care for the dying is poor, at best, as the State's own experts proved, the State argues that this Court should deny relief to Mr. Hall because "acceptance of physician-assisted suicide will have an adverse effect on reforms." Initial Brief at 12, This argument really asks that Mr. Hall and others like him be forced to die in the State's manner so that the health-care field will continue to experience pressure to improve the quality of care for the dying. In other words, the State proposes that Mr. Hall be held hostage.

That argument presupposes that the caring and devoted professionals in the field of palliative care for the dying will quit in protest at the advent of legal physician-assisted death. On the contrary, one could just as well assume that professionals in the field of palliative care for the dying would redouble their efforts to improve the care of the dying. Given that these professionals — we are told — oppose physician-assisted suicide, they would work harder to minimize the number of people who choose to use it.

The State further says that the poor, elderly, minorities and the disabled will be "vulnerable to physician-assisted suicide in lieu of adequate medical treatment and palliative care." Initial Brief at 11. On the contrary, the less fortunate in our society might clamor for a right to physician-assisted suicide just as much as the rich, but the State would have them be

denied their right on grounds of paternalism. The denial of their right to physician assistance in their deaths would thus be the final indignity they suffer.

The State's position and those of the State's amici are undergirded by innumerable examples of these types of arguments based on speculation about hypotheticals drawn from the unknown future. Just as the foregoing two, each is easily converted into a hypothetical view in support of physician-assisted suicide. We make the foregoing two points only to illustrate why we have chosen to stick to the facts and the law in this case. This Court should not be persuaded by speculative and irrelevant suggestions about what might happen in the future.

Similarly, the Court should not look to "the Netherlands experience" for guidance. Initial Brief at 10. At the trial, one of the State's experts, **Dr.** Richard Fenigsen, testified based on "the Netherlands experience" that "euthanasia and physician-assisted suicide" are "a terrible and totally unnecessary act and mortal danger to our civilization." TR-827. In contrast, the New England Journal of Medicine, after evaluating the very same Netherlands government reports as Dr. Fenigsen, concluded: "As far as we can tell, Dutch physicians continue to practice physician-assisted dying only reluctantly and under compelling circumstances." App.-16.

We could spend many pages demonstrating, based on the record in this case, why the information on "the Netherlands experience" is not as the State suggests it is.[105] However, it will suffice to repeat the conclusion of the court in Comnassion in Dying:

> [T]he reports on relevant medical practices in the Netherlands are so mixed that it is difficult to draw any conclusions from them. See, e.g., Maurice A.M., de Wachter, **EUTHANASIA IN THE NETHERLANDS; DYING WELL?** A **COLLOQUY ON**

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[105] TR-12-16; 1161-1163; Plaintiffs' Exhibits 10, 11; Defendant's Exhibit 68 (see TR-1187):

> **EUTHANASIA AND ASSISTED SUICIDE,** The Hastings Center Report (1992) (describing sharply divergent appraisals of Dutch practices). . . . even if it were clear what lessons to draw from the Dutch experience, it would be far from clear how to apply those lessons to the United States. As two commentators have said: "One must be wary, however, of inferences drawn from the Netherlands and applied to the United States. Cultural, legal, psychological and other variables make generalizations problematic, even in the Netherlands itself." T. Howard Stone & William J. Winslade, **PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA IN THE UNITED STATES,** 16 J. Legal. Med. 48 1 (1995).

Compassion in Dying, 79 F.3d at 830 n. 114. See also Quill, 80 F.3d at 730-73 1 .[106]

The majority of the record in this case consists of the State attempting to liken the trial court to a legislative committee hearing. But Mr. Hall and Dr. McIver did not bring suit to establish the perfect law regulating physician-assisted suicide. They brought this action based on the facts prevailing as to them.

In the past, this Court has held that the

> preference for legislative treatment cannot shackle the courts when legally protected interests are at stake. As people seek to vindicate their constitutional rights, the courts have no alternative but to respond. Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.

Satz, 379 So. 2d at 360. Since the holding in Satz created a constitutional right for a terminal patient to reject life support, there have been no tragic consequences, despite dire warnings; just as the decision in Roe v. Wade did not lead, as predicted by opponents, to infanticide, the

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[106] The State also asks this Court to consider "the New York experience." Initial Brief at 9. The only "experience" to which this refers is that a task force recommended against any change in the law prohibiting physician-assisted suicide. This Court's constitutional jurisprudence is not dictated by the internal politics of another state's task forces. If it were, the Court might just as well be guided by a similar task force Michigan, where the Michigan Commission on Death and Dying's final report "recommended decriminalizing physician-assisted suicide under certain circumstances." See Compassion in Dying, 79 F.3d at 821 n.84.

deterioration of medical ethics, or abuse of abortion in discrimination against the poor, disabled and minority populations.

Finding a right to physician-assisted suicide for adults who are mentally competent, terminally ill, imminently dying, and acting under no undue influence would only serve to "breath the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government," State ex rel. Davis v. City of Stuart, 97 Fla. 69, 102-*03, 120 So. 335,347* (1929), *quoted* in Traylor, 596 So, 2d at 963. This Court is charged with enforcing those lofty principles now more than ever in light of the current electorate's decision to enact the Privacy Amendment.

CONCLUSION

Therefore, the Final Judgment should be affirmed.

Respectfully submitted,

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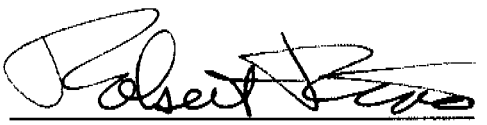
By: 

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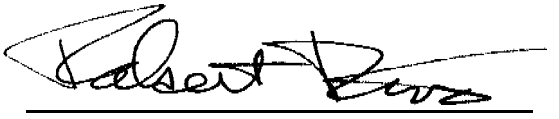
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Answer Brief was provided by Federal Express on March 3 1, 1997, to counsel for the appellant, including Michael A. Gross, Esq., Assistant Attorney General, Department of Legal Affairs, PL-01 The Capitol, Tallahassee, FL 32399; Charles H. Fahlbusch, Esq., Assistant Attorney General, 110 S.E. Sixth St., 10th Floor, Fort Lauderdale, FL 33301; and Parker D. Thomson, Esq., Thomson Muraro Razook & Hart, P.A., One S.E. 3d Ave., Suite 1700, Miami, FL 33131.



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