OA 5-8-97

FILED
SID J. WHITE
APR 22 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,837

BARRY KRISCHER,
in his official capacity as State Attorney of the 15th Judicial Circuit,

Petitioner,

vs.

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

Respondents.

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

REPLY BRIEF OF APPELLANT/PETITIONER

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL R. GROSS
Assistant Attorney General
Florida Bar No. 0199461
Office of the Attorney General
The Capitol, PL-01 110 Tower
Tallahassee, FL 32399-1050
(904) 488-8253/488-5899
Fax (904) 922-6674

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Office of the Attorney General
110 Southeast Sixth St., 10th Floor
Fort Lauderdale, FL 33301
(954) 712-4692
Fax (954) 712-4708

PARKER D. THOMSON (#081225)
CAROL A. LICKO (#435872)
Special Assistant Attorneys General
Thomson Muraro Razook & Hart, P.A.
One Southeast Third Avenue, Ste. 1700
Miami, Florida 33131
(305) 350-7200
Fax: (305) 374-1005

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE NOS.**

FLORIDA STATUTES

OTHER AUTHORITIES

IN _____

As we made clear in our Initial Brief, the State in no way contests or denigrates the tragic nature of Appellee Hall's condition. We reiterate that statement. But, respectfully, the State does not believe that to be the issue before this Court, The issue before this Court is whether -- granted Mr. Hall's suffering -- this Court is required to find a new constitutional imperative -- based on Florida's Privacy Provision -- in order to correct it, or whether this profound issue is one which in our system of government is committed to the legislative branch or to the people by initiative petition. If Florida's Privacy Provision does not require a new constitutional imperative, then this Court must find that the Legislature has spoken through its adoption of Section **782.08,** Florida Statutes (the "Statute").[1]

The State submits the very text of the Privacy Provision shows the only privacy thereby protected is that of Appellee Hall, not that of Appellee McIver, and that the Statute is directed solely at the conduct of Dr. McIver, not Mr. Hall, and that therefore the Privacy Provision does not trump the Statute. The State further submits that the issue of assisted suicide is quintessentially legislative, being one for consideration of the social desire "to respect patients' wishes, relieve suffering, and put an end to seemingly futile medical treatment" and the need "to maintain the salutary principle that the law protects all human life, no matter how poor its quality."[2] Kamisar, Yale, Against Assisted

---

'"Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter..."

[2]The United States Supreme Court in Cruzan v. Director, Missouri Dept. of Health, **497** U.S. **261, 110** S.Ct. **2841,** 111 L.Ed.2d **224 (1994)** ("Cruzan") explicitly left it to the states to make determinations without reference to the quality of life, and made clear that a state could decline to make such determinations ("a State may properly decline to *make* judgments about the 'quality' of life that a particular person may enjoy, and simply assert an unqualified interest in the preservation

Suicide --Even A Very Limited Form, 72 U. Detroit Mercy L. Rev. 735, 758 (1995). How these interests are to be balanced is not clear. As noted in our Initial Brief, the State of New York convened a special Task Force reflecting medical, social, and civil libertarian interests to consider, over a ten-year period, this and other profoundly difficult medical issues. In 1994, that Task Force concluded, stating its rationale in detail, that assisted suicide should continue to be forbidden by the State of New York. This is hardly the only possible solution. Appellees correctly observe that a Michigan commission reached a contrary conclusion "under certain circumstances." (Answer Brief at **47,** fn. **106).** But that proves the point; this issue is quintessentially for legislative consideration, with the result of that consideration in doubt.

I. Key Factual Assertions Made By Appellees Are In Error: Decedents Castonguay and Cron Died Naturally

In their factual statement, Appellees detail the deaths of C.B. (Chuck) Castonguay and Robert G. Cron, original plaintiffs below. Yet the trial court made no factual finding as to how these two original plaintiffs died when they did,[3] and in fact Appellees stipulated to the dismissal of both as

---

of human life..."). Appellees ignore both Cruzan (failing to cite it anywhere in their Answer Brief) and that proposition. But how do Appellees (or this Court, if it were to accept Appellees' argument) make decisions as to whose life lacks "quality?" For Appellees appear to be unwilling to argue that all individuals have an unlimited constitutional right both to commit suicide and to request the assistance of another in doing so. Rather, ultimately, they argue only for the right of certain terminally ill persons whose physicians objectively ratify that conclusion of the individual (without standards) to so request assistance, and the trial court so limited the purported privacy right. But this conclusion means that Florida may, as a constitutional imperative pronounced by this Court, make decisions that one life has more "quality" then another.

[3]The trial court noted only that Mr. Castonguay suffered from incurable cancer and died on May 12, 1996, and that Mr. Cron suffered from mesothelioma and died on October 23, 1996 (App. 3-4).

named parties at trial.[4] Appellees' factual statement appears to be offered as support for a later contention that persons who die after refusal or termination of life supports and under medical treatment do not die of "natural causes." (Answer Brief at 32). But the facts show that Mr. Castonguay and Mr. Cron did die naturally, and this Court has found that death after such refusal or termination of life supports and under medical treatment is, as a matter of law, death from "natural causes."[5]

Appellees have set out in the appendix to their Answer Brief the living wills of Mr Castonguay and Mr. Cron.[6] Both specify how they wished to die. They directed: (i) "that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying," (ii) "that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain," and (iii) "that food and water be withheld or withdrawn when the application of 'such procedures' would serve only to prolong death."' (emphasis added). Mr. Hall signed a similar living will on March 19, 1996, which is furnished as an appendix to this Reply Brief (Supp. App. 1).[8]

---

[4]As a result of the stipulated dismissal of Messrs. Castonguay and Cron, the trial court also dismissed all claims involving Dr. McIver as to either one of them. (App. at 12).

[5]Satz v. Perlmutter, 362 So.2d 160,162-163 (Fla. 3d DCA 1978), approved, 379 So.2d 359 (Fla. 1980) ("Perlmutter"); In re: Guardianship of Rrowning, 568 So.2d 4, 14 (Fla. 1990) ("Browning"); see Initial Brief at 27-28.

[6]Appendices 1 and 2.

'The formulation of this third requirement is slightly different in the two living wills, but the meaning is identical.

'Further, Appellee Hall, in his complaint, asserted that the decision he desired the freedom to make was "to terminate his own suffering before nature takes its full course." Third Amended

It is difficult to understand Appellees' factual characterizations of Mr. Castonguay's and Mr. Cron's deaths (Answer Brief at **3-8)** in light of the terms of these living wills. It would appear that the terms of these living wills were fully met. It is also difficult to understand how Appellees could characterize their deaths as coming from other than "natural causes", when the living wills characterize such death (including death after deprivation of food and water at the request of the individual) as "natural."[9]

Appellees also argue the State was incorrect in asserting that Dr. McIver's professional judgment was contrary to that of the medical profession, relying on the factual finding of the trial court that "...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...the views of some doctors over the views of others." (R. 1834, App. 15).[10] Appellees also try to argue that the Florida Board of Medicine did not take the action it did." Finally, Appellees argue that the medical profession's approval of the so-called "double effect" proves that "[t]he

---

Complaint at 14 (R. 721). The symbol "Supp. App." refers to the Supplemental Appendix to Appellant's Reply Brief.

[9] **A** diagnosis was never established for Mr. Castonguay (T. 1008). His treating physician, Bruce Crewe, M.D. indicated lung cancer **as** the cause of death and the probable manner of death as "natural" on his death certificate. The chest x-ray and CT scan showed a chest abnormality likely to **be** lung cancer (T. 1008-9). Dr. McIver's notes, based on a brief interview with no review of medical records, indicated that Mr. Castonguay suffered from esophageal cancer, although none of the tests supported this conclusion, and, contrary to these notes, the records reflect that no esophagoscopy was done (but, **as** noted, these medical records were not reviewed). (T. 1008, 1011, **586).**

[10] Answer Brief at 8; see, generally, Answer Brief at 9-11.

[11] Answer Brief **at** 12-13.

Hippocratic oath has been manipulated...."[12] These arguments are to no avail.

The State does not disagree that some physicians support the concept of physician assisted suicide in certain circumstances, but contends that the alleged "double effect" is fully in compliance with all relevant ethical considerations. The State notes:

- The Florida Legislature has defined what is "medical treatment." Florida's Medical Practice Act (Sections **458.301**-.349, Florida Statutes) makes clear that qualified physicians are authorized to treat intractable pain with a controlled substance if done "in accordance with that level of care, skill, and treatment recognized by a reasonably prudent physician under similar conditions and circumstances" (Section 458.326(1), (2), and (3)), but are not authorized to do so to accomplish assisted suicide (Section 458.326(4)). ***So*** using controlled substances to assist suicide is not "medical treatment."

- As the amicus brief of the Florida Medical Association and the American Medical Association (and others) (the "Medical Amicus Brief") shows (particularly at **29-30),** assisted suicide is the antithesis of "medical treatment" and violates the AMA Code of Medical Ethics.

- "Double effect" therapies (therapies using controlled substances which relieve pain, but which could, in sufficient doses, suppress breathing and cause death) have many analogues, such as "the provision of chemotherapy that is intended to heal but could have the unintended effect of hastening death." See Medical Amicus Brief at 29-30. Expert witnesses for the State gave their expert opinion that physician assisted suicide **is** not consistent with medical ethics. See Initial Brief at **5, 6,** n. 11. These witnesses were some of the leading experts in this country on this subject. See. e.g., Exhibits D-36, D-42(a), D-6(a), **D-48(a), and** D-49(a).[13]

---

[12]Answer Brief at 8, n. 53.

[13]Charles H. Baron, et al., have proposed A Model State Act to Authorize and Regulate Physician-Assisted Suicide, 33 Harv. J. On Legis. 1 **(1996).** (Supp. App. **2-7).** Interestingly, the standards proposed are more stringent than those required by the trial court, and Dr. McIver would not qualify as the "responsible physician" thereunder to assist a suicide, since that proposed Act would permit only the treating physician to fulfill that role. This information is offered only to show how difficult it is for the courts to act as "legislators" in this area.

The State also disagrees with Appellees' paraphrase of the testimony of Dr. Pomm and Dr. Abel **as** to their positions on **the** ethical implications of physician assisted suicide, See Answer Brief at 10, n. ***58*** and 9, n. **57.** Dr. Pomm testified he does not consider himself qualified to express **an**

Further, no matter what Appellees may argue, the Florida Board of Medicine convened on February 8, 1997, and by majority vote, concluded: (i) it is not appropriate for a physician to participate in physician assisted suicide; (ii) conviction under the Statute constitutes conviction of a crime related to the practice of medicine and a breach of the standard of care in the practice of medicine; and (iii) if Dr. McIver participates in physician assisted suicide, the Board reserves the right to prosecute him.[14]

II. Florida's Privacy Provision Does Not Create A Constitutional Right To Assisted Suicide

Florida's Privacy Provision states:

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

The key phrases for our purpose are "the right to be let alone" and "free from governmental intrusion." As the Initial Brief discussed at length, the person who asserts a "right to be let alone" is Appellee Hall. But the asserted "governmental intrusion" is the Statute which in no way is directed at Mr. Hall, only at Dr. McIver. And Dr. McIver has no privacy interest to be protected

---

opinion on the subject, and did not do so. (T. 963-65) Dr. Abel testified that physician assisted suicide is medically unethical at a higher level and illegal at its most basic level. (T. 1028).

[14]Rather than responding to Appellees' assertions about the role of participants, the State simply attaches in the Supplemental Appendix to this Reply Brief the transcript of the Board meeting. The State directs the Court's attention in particular to pages 39, 41-42, 44-45 of the transcript. (Supp. App. 8-53).

from this "governmental intrusion."[15] Therefore, by its terms, Florida's Privacy Provision cannot be used as a basis for invalidating the Statute.

III. Assuming That Florida's Privacy Provision Could Apply Despite The Fact That The Statute Is Directed At A Person Without Any Privacy Interest, The Privacy Provision Nevertheless Cannot Be Extended To Assisted Suicide

A. This Court's Decisions As To The Right To Refuse Or Terminate Life Support Do Not Apply To Assisted Suicide

Appellees argue that this Court's decisions regarding the right to refuse or terminate life supports apply to assisted suicide. This argument, as the Initial Brief makes clear, defies the language both of those cases and the applicable statutes, Thus, this Court in Perlmutter, 379 So.2d at 360, adopted the Fourth District's opinion which held (362 So.2d at 162-63) that refusal of treatment and allowing death to occur was not suicide, as opposed to causing an unnatural death by means of a death-producing agent. In Browning, this Court made clear, citing Perlmutter, that "suicide is not an issue when, as here, the discontinuation of life support in fact will merely result in [her] death, if at all, from natural causes." (at 14).[16] In Public Health Trust of Dade County v. Wons, 541 So.2d 96

---

[15]The State noted in its Initial Brief that although Dr. McIver's privacy rights under Florida's Privacy Provision were alleged in the complaint to have been violated, the trial court declined so to rule (Initial Brief at 14). The State further noted that Dr. McIver apparently was included (sub silentio) in the trial court's declarations of violation by the State of the Equal Protection Clause (Id.). Appellees, concerned about the first observation while ignoring the second, contend that "[i]t is implicit throughout the Final Judgment that the trial court held that Dr. McIver's rights were violated." (Answer Brief at 35, n. 101). Appellees miss the point. At least inferentially the trial court found that Dr. McIver's rights under the Equal Protection Clause were violated (a determination which the United States Supreme Court will shortly pass upon). It did not find that Dr. McIver's privacy rights under the Privacy Provision were violated, and no amount of smoke from Appellees can conceal that fact. In failing to so find, the trial court was correct, Dr. McIver had no privacy interest protected by the Privacy Provision to violate.

[16]Appellees' principal reliance appears to be on language taken out of context from Browning (Answer Brief at 22-25, 29, 34). This reliance is misplaced. First, Browning restricted itself, by its

(Fla. 1989), Justice Ehrlich, concurring and also citing Perlmutter, stated that refusal of treatment (there refusing a blood transfusion) does not implicate the State's interest in preventing suicide, because Mrs. Wons did not desire to die, and, should she die as the result of refusing a blood transfusion, her death would be from natural causes (at 100).[17] The United States Supreme Court in Cruzan, and all other state courts that have looked at this subject (see Initial Brief at 35), have made the same distinction. And the Florida Legislature has done likewise, for Section 765.309(2), Florida Statutes, provides that "[t]he withholding or withdrawal of life prolonging procedures from a patient in accordance with any provision of this chapter does not, for any purpose, constitute a suicide."

The foundation of the right to refuse or terminate treatment was the common law. Perlmutter, which predated the adoption of Florida's Privacy Provision, relied on common law principles making an undesired touching a battery. See Initial Brief, at 22-24; Cruzan, 497 U.S. at 269). The Privacy Provision encapsulated this portion of the common law in its "right to be left alone." No one has ever suggested that assisted suicide has a common law basis."

---

own terms, to a decision to forego the sustenance provided by a nasogastric feeding tube, "when the only alternative to a natural death is to artificially maintain a bare existence." Id. at 15 (emphasis added). This case involves an artificially induced death. Second, Browning specifically held, as quoted above, that suicide was not the issue there, Id. at 14. Third, Browning did not involve the Statute, but rather, in fact, cited the Statute with approval for the proposition that euthanasia continues to be a crime in this State, Id. at 13. Finally, Browning, say the Appellees (Answer Brief at 22), stands for the proposition that "one has the inherent right to make choices about medical treatment." Id. at 10. But, as discussed above, assisted suicide is not medical treatment.

[17]It is certainly ironic that Appellees charge the State with taking a different position in the right to refuse or terminate cases than it is taking here. (Answer Brief at 33). Counsel asserting the constitutional right to refuse or terminate life support treatment in those cases made the same differentiation as did this Court between such cases and assisted suicide.

[18]The right of a patient to accelerate death as such . . . depends on a broader conception of individual rights than any contained in common law principles." L. Tribe, American Constitutional

Appellees also argue that this Court's abortion decision, In re T.W., 561 So.2d 1186 (Fla. 1989) ("T.W.") supports the extension of the Privacy Provision to assisted suicide. First, they contend, contrary to the text of the trial court's Final Judgment and the argument of the Initial Brief (at 19-22), that the trial court did not equate the Privacy Provision with the Equal Protection Clause, but was only "applying precisely the analysis established in T.W." (Answer Brief at 37). Obviously the trial court did not think so, since it failed to cite T.W. in the entire 25 pages of the Final Judgment. Further, T.W. by its terms saw privacy as a liberty interest (and the trial court rejected the Ninth Circuit's formulation of assisted suicide in Compassion in Dying v. State of Washington, 79 F.3d 790 (9" Cir. 1996), cert. granted, Washington v. Glucksberg, 117 S.Ct. 37 (1996) as a liberty interest).

Next, although Appellees argue that T.W. stands for the proposition that the privacy right of the individual extends to the physician performing the abortion (Answer Brief at 34), T.W. nowhere discusses a physician, only the rights of the potential mother. Finally, T.W. is a defense of life, not death.'' Adopting the formulation of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) ("Roe v. Wade"), T.W. accepts that a fetus is not a person, so only the mother's liberty is at issue. T.W., at 1190. But once viability is reached, although the fetus is not a person, it has life and must be protected:

> Under Roe, the potentiality of life in the fetus becomes compelling at the point in time when the fetus becomes viable, which the Court defined as the time at which the fetus becomes capable of meaningful life outside the womb, albeit with artificial aid. Roe, 410

Law (2d Ed, 1988), Section 15-11 at 1370-71.

[19] In fact it is difficult to see how Florida's Privacy Provision, espousing the liberty interest in the "right to be left alone," can ever be other than an affirmation of life, not death.

> **U.S.** at 160, **163,** 93 S.Ct. at **730,** 731. Under our Florida Constitution, the state's interest becomes compelling upon viability, as defined below. Until this point, the fetus is a highly specialized set of cells that is entirely dependent upon the mother for sustenance. No other member of society can provide this nourishment, The mother and fetus are so inextricably intertwined that their interests can be said to coincide. Upon viability, however, society becomes capable of sustaining the fetus, and its interest in preserving its potential for life thus becomes compelling. (See Webster, 109 S.Ct. at 3075 (Blackmun, J., concurring/dissenting). Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. Under current standards, this point generally occurs upon completion of the second trimester. See id, at 3075 n. **9** (no medical evidence exists indicating that technological improvements will move viability forward beyond twenty-three to twenty-four weeks gestation within the foreseeable future due to the anatomic threshold of fetal development). Following viability, the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother's health is not jeopardized.

T.W., **551** So.2d at 1193-94 (footnote omitted).

B. Appellees' Asserted Privacy Interest Is Most Strange

Appellees call for this Court to endorse a most strange privacy interest. They suggest (at least at times) a privacy interest limited to just a few people and which the legislative arm of the government is permitted to regulate to avoid abuse, for they appear to concede that State action to avoid abuse and duress in the exercise of their purported privacy interest is necessary. It is hard to conceive of another purported privacy interest that is subject to such restrictions, or that any person whose privacy is reflected in those interests would accept. Can it be that such privacy interests as marriage, procreation, family relationships, and pre-viability abortions require that they be carefully regulated, so that the right will not be abused? To be sure, the decision in Roe v. Wade has been

attacked as foreclosing reasonable regulation, one individual (now Justice) commenting that the opinion "read[s] like a set of hospital rules and regulations." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L.Rev. 375, 381 (1985)(quoting Archibald **Cox,** The Role of The Supreme Court in American Government, 113 (1976)). Nevertheless, that attack merely confirms the fact that personal privacy interests have not been found to be consistent with governmental regulation. The effort to narrowly circumscribe those entitled to assert the privacy interest and to invite its regulation **is** itself a strong indication that no privacy interest is involved.

This whole approach of Appellees is contrary to this Court's interpretation of the Privacy Provision. It applies by its terms to "[e]very natural person." As such, it applies to minors as well as adults, incompetents as well as competents. (See Initial Brief at 23-24). But Appellees would suggest the privacy right they proffer is inapplicable to persons not in imminent danger of death?', persons under undue influence[21], persons unable to swallow medication, and incompetent persons. (Answer Brief at 13-14, 27). To make this approach work, say Appellees, somewhere, somehow, courts will in those instances find a compelling State interest to justify the State in denying these "natural persons" the putative right, although Appellees assert this Court has never found a

---

[20]As noted in the Initial Brief (at 5, n.9), there is no adequate definition of "terminally ill" (or imminent danger of death). This case proves this fact. In April 1996, Mr. Hall was alleged to be suffering from an "imminently terminal illness." (Motion for Expedited Special Hearing Time at 2, R. **74-77).** In June 1996, the second amended complaint also alleged Mr. Hall was "imminently dying." (R. 153-1**82).** Fortunately, Mr. Hall remains alive, What, then, is the suggested distinction for courts to make as between those who are "terminally ill" and those who are not?

"This, in itself, may be everybody. It has been observed that "[t]o make assisted suicide legal is to require each individual to justify (at least to herself) the decision to remain alive." Kreimer, Does Pro-choice Mean Pro-Kevorkian? An Essay on Roe, Casey and the Right to Die, **44** Am.U.L.Rev. 803, 8**16** (1995).

compelling state interest in denying a privacy right in personal decision-making, once determined to exist. (Answer Brief at 22).[22]

At least at some points in their Answer Brief, Appellees contend that everyone has a right to seek assistance in committing suicide, regardless of age, illness, or any other condition. See Appellees' Summary Of The Argument:

> 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.

(Answer Brief at 18). This *summary* of their argument covers all persons. See also, Answer Brief at **30,** which says that the Statute "invadesthe privacy of the clearly competent and uncoerced," (and, of course, Appellees argue that the privacy right necessarily implies the right to seek another's assistance in exercising it, contrary to the explicit words of the Privacy Provision),

Assumedly then, if one is both competent[23] and uncoerced, Appellees contend one may assert a constitutionally protected right to commit suicide and seek assistance (from a physician or anyone else) in doing so. If so, all the laws Florida has adopted to prevent people from committing suicide (see Initial Brief at 40, n. **45** for a partial list of these laws) are at least constitutionally suspect, if not

---

[22]This Court has certainly recognized and affirmed the limits of any constitutional right to privacy under the federal constitution, Laird v. State, **342** So.2d **962,963-65** (Fla. **1977)**("We reject the notion that smoking marijuana at home is the type of conduct protected by the [federal] constitutional right of privacy.")

[23]Of course, the constitutional right to refuse or terminate life support applies to incompetent, as well as competent, persons Browning, **568** So.2d at 11; John F. Kennedy Hospital v. Bludworth, 452 So.2d 921, 923 (Fla. 1984). Why then would a constitutional assisted suicide right not be similarly treated? **An** equal protection analysis would demand it.

unconstitutional on their face. **As** noted, Appellees would suggest that the limitation on this broad principle is that "at some point the State's interests in the presentation of life and the preservation (sic) 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." (See, Answer Brief at 27). Conveniently, Appellees make no effort whatsoever to advise the Court when they believe that "point" could occur. In fact, they, contradictorily, suggest that it could never occur:

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

(Answer Brief at 22).[24]

The Florida Legislature has to date said that society's interests in preserving life against assistance in suicides is always compelling; the Legislature has chosen not to make the decision that there is no point of time when life so loses its "quality" that society's interests in preserving that life give way. Appellees say that society's interests must give way in the instant case, but need not give way at some other utterly non-defined point. But their own analysis belies their suggestion. In fact, Appellees have proffered their most strange putative privacy right because they are well aware there can be no broad-scale right of this sort for "all natural persons." And since there is no such privacy right for "all natural persons," there can be none for Appellees.

---

[24]This is not quite true. In T.W., itself, this Court held that once viability occurs, the State has a compelling interest in protecting a potential for life.

IV. The Issues Raised By This Case Can Only Be Dealt With Legislatively

Appellees seem to agree that the appropriate forum for resolution of at least some of these issues is the legislative forum, although they would limit the Legislature to "regulation" of the constitutional imperative that they ask this Court to find (and without saying how a right "to be free from governmental intrusion" is subject to "governmental regulation"). Yet they seek to trivialize the current legislative enactment on the subject (Section **782.08,** Florida Statutes (the "Statute")) by saying it is a century old, adopted before that century's history of progress in medical science. In so doing, Appellees simply ignore the facts. The Legislature has twice recently effectively readopted the Statute, doing so in both **1984** and 1994.[25] So if age is a sin, the Legislature has obviated that particular sin.

Appellees do not dispute that there are alternatives to action by this Court, freezing into a constitutional imperative the extraordinarily difficult cultural, ethical, religious, and medical issues

---

[25]Chapter **84-58,** Laws of Florida, enacting legislation dealing with life support systems, specifically stated:

> Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act or commission to end life other than to permit the natural process of dying.

This initially was codified as Section 765.11(1) (referenced by this Court in Browning) and now is recodified as Section **765.309**(1). Similarly, Chapters **94-96,** Laws of Florida, enacting legislation dealing with the treatment of intractable pain, specifically stated:

> Nothing is this session shall be construed to condone, authorize, or approve mercy killing, or euthanasia, and no treatment authorized by this section may be used for such purpose.

This has been codified as Section **458.326(4).**

framed in this case. Nor can Appellees suggest that the Florida Legislature will refuse to act, if action is appropriate (although the Legislature's 1984 and 1994 ratifications of the Statute would not indicate any immediate desire to do so). All legislators face the possibility that they -- or their loved ones -- will one day suffer from terminal illness; they have no immunity. Nor does illness -- or terminal illness -- affect any discrete minority; it affects everyone, without discrimination on the basis of gender, race, religion, or degree of wealth. Further, Appellees cannot suggest that there is not still another alternative -- the people. For the people may speak through initiative petition. As this Court is well aware, they speak in this manner more and more often. Oregon adopted a limited permission for assisted suicide in this manner; California and Washington declined, but by rather narrow margins.

The issues posed in this case are peculiarly legislative. They are not for this Court to resolve unless Florida's Privacy Provision says it must.[26] Evaluation of the text of that Provision, evaluation of this Court's decisions construing that Provision, and evaluation of the facts of this case all lead to one conclusion -- this Court is not required constitutionally to give its blessing to assisted suicide.

CONCLUSION

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

---

[26] As the Initial Brief makes clear (at 13-14), the United States Supreme Court should shortly resolve whether there is a federal constitutional right to assisted suicide. The State relies on its Initial Brief (at 45-47) on this subject.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. **0191948**
Office of the Attorney General
110 Tower
110 Southeast Sixth St., 10th Floor
Fort Lauderdale, FL 33301
(954) 712-4692

MICHAEL A. GROSS
Assistant Attorney General
Florida Bar No. **019946**
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(904) 488-8253/488-5899
Fax: (904) 922-6674/488-6589

PARKER D. THOMSON (#08 1225)
CAROL A. LICKO (#435872)
Special Assistant Attorneys General
Thomson Muraro **Razook** & **Hart, P.A.**
One Southeast Third Avenue, Ste. 1700
Miami, Florida 33131
(305) 350-7200
Fax: (305) 374-1005

By: Carol A Licko

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true and correct copy **of** the foregoing **REPLY BRIEF OF APPELLANT was** furnished by mail to ROBERT **RIVAS,** ESQ., **RIVAS & RIVAS,** P.O. Box 2177, Boca Raton, FL 33427-2177, and to parties on the attached service list this 21st day of April, 1997.

Carol A Licko /

SERVICE LIST

Charles M. Fahlbusch
Assistant Attorney General
110 S.E. 6th St.
10th Floor
Ft. Lauderdale, FL 33301

Thomas A. Horkan, Jr.
Thomas J. Schulte
P.O. Box 1638
Tallahassee, FL 32302-1638

Paul X. McMenaman
P.O. Box 760
Steubonville. OH 431152

Marcia Beach
P.O. Box 14922
Tallahassee, FL 32317-4922

Barry A. Bostrom
James Bopp, Jr.
Bopp, Coleson & Bostrom
P.O. Box 8100
Terre Haute, IN 47808-8100

Dnniel Avila
Thomas J. Marzen
Jane E.T. Brockman
National Legal Center for the
Medically Dependent & Disabled
50 South Meridian
Suite 200
Indianapolis. IN 46204-3541

Wayne H. Basford
Resident Legal Services
Florida State Hospital
P.O. Box 1000
Chattahoochee, FL 32324-1000

Kenneth L. Connor
Connor & Associates
P.O. Box 11157
Tallahassee, FL 32302

Steven T. McFarland
Samuel B. Casey
Kimberlee Wood Colby
Edward J. Larson
Center for Law & Religious Freedom
4208 Evergreen Lane
suite 222
Annandale. VA 22003

Linda Miklowitz
P.O. Box 14922
Tallahassee, FL 32317-4922

Peter M. Leibold
Catholic Health Association
1875 Eye St., N.W.
Washington, D.C. 20006

Walter M. Weber
American Center for Law & Justice.
1000 Thomas Jefferson St.
Suite 304
Washington, D.C. 20007

Bruce D. Blehart
Kirk B. Johnson
Michael L. Ile
American Medical Association
515 North State St.
Chicago, IL 60610

Stephen F. Gold
Diane Coleman
125 South 9th St.
Suite 700
Philadelphia, PA 19107

Paul E. Kalb
Mark E. Haddad
Sidley & Austin
1722 Eye St., N.W.
Washington, D.C. 20006

Gary L. Printy
660 East Jefferson St.
Tallahassee, FL 32301

Edward Harris
Mudrick, Witt Professional Reporting
319 Clematis St.
5th Floor
West Palm Beach, Pl 33401

Nikolas T. Nikas
Clarke Forsythe
Americans United for Life
343 South Dearborn St.
Suite 1804
Chicago, IL 60604

Hon. Marilyn Beuttenmuller
Clerk
4th District Court of Appeal
1525 Palm Beach Lakes Blvd.
West Palm Beach, FL 33402

Casey J. Gluckman
Gluckman & Gluckman
541 Old Magnolia Rd.
Crawfordville, FL 32327

Jack, R. Bierig
Sidley & Austin
One First National Plaza
Chicago, IL 60603

David Allen Buck
Florida Silver-Haired Legislature
13129 Spring Hill Dr.
Spring Hill, FL 34609

Michael W. McConnell
202 Law Building
345 South University St.
Salt Lake City, UT 84112

Wesley J. Smith
International Anti-Euthanasia
Task Force
6062 Outlook Ave.
Oakland, CA 94605

Hon. S. Joseph Davis. Jr.
C/O Richard L. Oftedal. C.J
205 North Dixie Hwy.
West Palm Beach, FL 33401

John M. Knight
Florida Medical Association
123 South Adams St.
Tallahassee, FL 32301

Victoria H. Pflug
P.O. Box 1638
Tallahassee, FL 32302-1638

Morton J. Morris
Florida Osteopathic Medical Association
The Hull Building
2007 Apalachee Pkwy.
Tallahassee, FL 32301

Hon. Dorothy H. Wilken
Clerk
Circuit Court
301 N. Olive Ave.
P.O. Box 229
West Palm Beach, FL 33401

David J. Busch
3428 Robinhood Rd.
Tallahassee, FL 32312

Christopher L. Nuland
Florida Medical Association, Inc.
P.O. Box 2411
Jacksonville, FL 32204

Lynn G. Waxman, Y.A.
501 S. Flagler Dr.
Suite 505
West Palm Beach, FL 33401

Rosemarie Richard
Advocates for Disability Rights, Inc.
1591 S.W. Egret Way
Palm City, FL 34990

Andrew I. Batavia
Marina L. Fontani
Susan F. Dourmaux
McDermott, Will & Emery
201 S. Biscayne Blvd.
suite 2200
Miami, FL 33131

Tamar Feder
125 Broad St.
New York, NY 10004