IN THE SUPREME COURT OF THE STATE OF FLORIDA

Barry Krischer, in his official capacity as State
Attorney of the 15th Judicial Circuit.

Appellant, **Case No. 89,837**

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CLERK, SUPREME COURT
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v.

Charles Hall and Cecil B. McIver, M.D.

Appellees.

**APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT OF PALM BEACH COUNTY**

**BRIEF OF AMICUS CURIA, FLOFUDA CATHOLIC CONFERENCE
IN SUPPORT OF APPELLANT**

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INTEREST OF THE AMICUS

The Florida Catholic Conference, a Florida corporation not for profit, is comprised of all the active Roman Catholic Bishops in the State of Florida, including the Archbishop and Auxiliary Bishop of Miami, and the Bishops of St. Augustine, St. Petersburg, Orlando, Pensacola-Tallahassee, Palm Beach and Venice, The conference is the vehicle through which the Bishops speak, cooperatively and collegially in the field of public affairs. It advocates and promotes the pastoral teaching of the Roman Catholic Church on many diverse issues including the sanctity and dignity of human life, Roman Catholicism is one of the largest religious denominations in the State of Florida. Its members, numbering over 2 million in the State of Florida, share a faith that has long recognized the sanctity and dignity of each and every human life.

When permitted by court rules and practice, the Conference files briefs as amicus curiae in litigation of import to the Catholic Church and its people in the State of Florida. Of the values that the Conference seeks to promote through its participation in litigation, respect for human life is of the highest importance.

The Catholic Church's opposition to euthanasia and assisted suicide is well known, and is as old as Christianity itself. Moral teaching against assisting a suicide is actually older than Christianity, for it is found in Jewish tradition and in the Hippocratic Oath which laid the groundwork for modern medicine as a healing profession.

Through their counsel, the parties **have consented** to the filing of this brief by this amicus **curia.**

STATEMENT OF THE CASE AND FACTS

This case is an appeal from a Final Declaratory Judgment and Injunctive Decree entered by the Circuit Court of Palm Beach County, Florida on January 31, 1997. The plaintiffs below included three terminally ill adult patients, Charles E. Hall, C.B. "Chuck" Castonguay and Robert *G.* Cron, as well as a licensed Florida physician, Cecil B. McIver, M.D. Mr. Cron and Mr. Castonguay died prior to trial in this cause and were dismissed upon stipulation of counsel prior to entry of Final Judgment, Charles E. Hall and Dr, Cecil McIver, the Appellees herein, requested a declaration from the trial court that § 782.08 of the Florida Statutes, which makes a it a crime to assist in self-murder, was unconstitutional as applied to prevent Dr. McIver from prescribing a lethal dose of drugs to be self-administered by Mr. Hall in the event Mr. Hall determines that he no longer wishes to live. Injunctive relief was also sought against the Defendant below and Appellant herein, Barry Krischer, who, as the State Attorney for the Fifteenth Circuit of Palm Beach County, would have the discretion to prosecute Dr. McIver pursuant to § 782.08 Fla. Stat. (1995) in the event he complied with Mr. Hall's request for a physician's assistance in self-murder. The trial judge below phrased the question presented as follows: "Whether a competent adult, who is terminally ill, imminently dying, and acting under no undue influence, has a constitutional right to choose to hasten his own death by seeking and obtaining from his physician a fatal dose of prescription drugs and then subsequently administering such drugs to himself"

The court answered the question in the affirmative. It construed existing Florida case law dealing with the withholding and withdrawal of medical treatment to create a "right to control the time and manner of [one's] own death" (Judgment, p. 14) that was protected by Article I, § 23 of the Florida Constitution. It the found that "in the strictest sense, disconnection from life support

or withholding of food and water are all forms of suicide" (Judgment, p.16). The court thus held that Mr. Hall had a constitutional right under the Privacy Amendment of the Florida Constitution, Article I, § 23, to decide to terminate his suffering and determine the time and manner of his death, with the assistance of his physician, Dr. Cecil McIver, M.D. Under the circumstances of the case, § 782.08 Fla. Stat. (1995) denied Charles E. Hall the equal protection of the law as provided under the Fourteenth Amendment of the United States Constitution insofar as it denies Mr. Hall the right to choose to hasten his impending death with the assistance of his physician, while other terminally ill persons whose treatment includes life support or life-sustaining treatment are able to exercise this choice. (Judgment p. 24) The court permanently enjoined the State Attorney from filing an information, seeking an indictment or prosecuting Dr. McIver for assisting in the suicide of Mr. Hall.

The State of Florida appealed. The District Court of Appeal, Fourth District, certified, pursuant to Article V, § 3(b)(5) of the Constitution of Florida that the case presented a question of great public importance requiring immediate resolution by this Court. This Court accepted jurisdiction. A stay of the judgment below was entered pending the disposition of this appeal.

References herein to the Appellant, Barry Krischer, the State Attorney for the Fifteenth Judicial Circuit shall be by name or title or in the form of "Appellant", or the "State of Florida". Likewise references to the Appellees herein, Charles E. Hall and Cecil B. McIver, M.D. shall be by reference to "Appellees" or by name. References to the Final Declaratory Judgment and Injunctive Decree entered by the Fifteenth Judicial Circuit Court in and for Palm Beach County will be in the form of "Judgment, p. ___".

"Suicide" and "self-murder" shall be used interchangeably; and "Assisted suicide" and "assisted self-murder" shall be used interchangeably, except where referring to specific statutory language.

SUMMARY OF ARGUMENT

This is a momentous case of first impression, whose impact extends to "all natural persons." The court ruled that the State of Florida cannot constitutionally prohibit all persons from assisting in the self-murder of another, but must recognize an exception as to a physician who seeks to prescribe a lethal dose of drugs to enable a consenting, competent, terminally ill adult to take his own life. By excluding certain persons from the protection of the homicide laws based on the condition of their health, the court's holding contravenes the very principle of equal protection of the law upon which it purports to be grounded. The Privacy Amendment of the Florida Constitution does not even support, let alone compel such a conclusion. If allowed to stand, it would require that such an "exception" be recognized for *"every natural person."*

Further, the decision below is based on a number of erroneous assertions which compromised the application of the law in this case. First, the court erred in failing to recognize any rational legal distinction between declining medical treatment, thereby allowing natural death, and intervening in the natural course for the purpose of causing death. The court thus rejected the express provision of Section 765.309(2) and cast aside a distinction that has achieved nearly universal recognition in the common law, statutory law, medical profession, and countless court decisions.

Secondly, in broadly mischaracterizing existing jurisprudence regarding the withholding/withdrawal of medical treatment to recognize a "right to control the time and manner of ...death" the court invoked the protection of the privacy amendment, thereby circumventing the threshold analysis required under Article I, § 23. This threshold inquiry requires a finding that Appellees had a legitimate expectation of privacy in suicide and physician assistance in suicide. An examination of the common law, statutory law, and jurisprudence

reveals that the concept of suicide, physician assisted suicide, mercy killing and euthanasia have been consistently rejected such that there exists no legitimate expectation of privacy in these acts. However, assuming some privacy interest was implicated, the State demonstrated compelling governmental interests in maintaining its prohibition on assistance in death under all circumstances.

Finally, the court erred by subjecting to equal protection scrutiny a Florida law that creates no classification whatsoever. By misstating the right in issue, the court was able to substitute its judgment for that of the Florida Legislature. In the last analysis, the ruling below manufactures a "right" that would radically alter society. There is no right for one person, intending the death of another, to furnish the other with the means to take his or her life. The decision below should be reversed.

ARGUMENT

I. WITHHOLDING OR WITHDRAWAL OF LIFE-PROLONGING MEDICAL TREATMENT IS DISTINCT FROM SUICIDE.

The court below found that "in the strictest sense, disconnection from life support or withholding of food and water are all forms of suicide." (Judgment, p. 16). It was upon this basis that the trial judge concluded that the state's prohibition of assistance in suicide, codified in § 782.08 of the Florida Statutes, violated both the privacy amendment of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This finding ignores existing statutory provisions, case law, and longstanding legal, moral and medical principles. It is in direct conflict with § 765.309(2) dealing with health care advance directives, which states:

> The withholding or withdrawal of life-pro-longing procedures from a patient in accordance with any provision of this chapter does not, for any purpose, constitute a suicide.

To conclude that in recognizing an individual's right to withhold or withdraw life-prolonging medical treatment our legislature and judiciary have already sanctioned suicide is plain error.

Our system of laws is based upon the concept that human life is itself a good to be preserved and protected against the oppressive powers of government or third parties[1] as well as one's own folly. The law has held constant this ethic in favor of life, even denying to those who lose the will to live any sanction of, let alone "right" to self-destruction. Both natural and civil law have for centuries recognized a vital distinction between letting nature take its course and intervening in that course - in this case by administering a lethal agent - to intentionally cause the death of

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[1]The right to life is a matter of nature, not of the will. All the rights of man presuppose our self-interested attachment to our own lives. John Locke, *Second Treatise of Civil Government*. All natural rights are derived from this primary right to life.

another person. Indeed, the trial judge below in finding that there is no constitutionally permissible distinction between refusing medical treatment and deliberate killing ignores the very distinction upon which the right to refuse medical treatment was grounded in the first place.[2]

Two primary differences between declining affirmative treatment to extend life and insisting upon affirmative treatment to intentionally curtail life were overlooked by the court below. First, the basis for the constitutional right to refuse medical treatment is a liberty interest in being free from unwanted bodily invasion, a right which is not implicated in Mr. Hall's request for a particular type of life ending treatment. Secondly, in the withholding/withdrawal of medical treatment the intent is that a natural death be permitted whereas in assisted suicide, the unambiguous intent is to cause death through the administration of a death producing agent.

A) THE RIGHT TO BE FREE FROM UNWANTED BODILY INVASION IS LEGALLY DISTINCT FROM ASSISTED SUICIDE, A POSITIVE DEMAND FOR A PARTICULAR FORM OF LIFE-ENDING TREATMENT.

The interest of a competent adult in being free of bodily invasion at the hands of another has been a mainstay of English and American law for centuries. The law protects this interest by imposing a duty upon everyone to refrain even from touching another, absent his or her consent. Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3d DCA 1957). The fact that one may forego

[2] Matter of Quinlan, 355 A. 2d 647, 665 (N.J. 1976) (" We would see ...a real distinction between the self-infliction of deadly harm and a self-determination against artificial life support...in the face of irreversible, painful and certain imminent death") cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1979); Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417, 426 n. 11(Mass. 1977) (distinguishing a "competent, rational decision to refuse treatment when death is inevitable" from an action of intentional self-destruction); Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. 4th DCA 1978) (distinguishing removal of a respirator which would result in death from natural causes from administration of a death producing agent that causes unnatural death.")

medical treatment "even if" treatment might have prolonged life suggests how misleading it is to speak of a "right to die" a "right to hasten death" or a "right to determine the time and manner of one's death". Patients have a right to refuse treatment *despite* the fact that treatment might have extended their lives, not because the refusal will shorten their lives. "Both as a matter of law and as a matter of medical ethics, the right to refuse unwanted medical intervention is properly seen not as part of a right to become dead but rather of a right protecting how we choose to live, even while we are dying." Leon Kass, *Dehumanization Triumphant*, 65 First Things 16 (August/September 1996). This distinction was one of the many reasons for the 25 member Governor's Task Force of New York retaining that state's statutory ban on assisted suicide:

> As....courts have recognized, the fact that the refusal of treatment and suicide may both lead to death does not mean that they implicate identical constitutional concerns. The imposition of life-sustaining medical treatment against a patient's will requires a direct invasion of bodily integrity and, in some cases, the use of physical restraints, both of which are flatly inconsistent with society's basic conception of personal dignity. It is this right against intrusion - not a general right to control the timing and manner of death - that forms the basis of the constitutional right to refuse life-sustaining treatment. Restrictions on suicides, by contrast, entail no such intrusions, but simply prevent individuals from intervening in the natural process of dying.
>
> New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 71 (1994).

All of the health care decisions premised upon Florida's right to privacy involve the right to be free from bodily invasion - a feeding tube, blood transfusion, respirator, etc. There is no protected constitutional interest in receiving a particular "medical" treatment. One has no constitutional right to insist upon an organ or bone marrow transplant, dialysis or a particular life-prolonging surgery. This case is not about respecting a person's desire to be free of an unwanted or burdensome medical treatment. It is about providing to one who appears to be terminally ill a death producing agent for the express purpose of causing his death. As assisted

self-murder does not implicate Mr. Hall's interest in being free from unwanted bodily intrusion, the central interest in refusal of medical treatment, it is legally distinct. It is only by misidentifying the "right" in issue as the "right to control the time and manner of . . . death" (Judgment, p. 14), rather than the right to forego a bodily intrusion, that the trial court was able to equate a decision to forego medical treatment with suicide.

B) THE INTENT IN FOREGOING LIFE-PROLONGING MEDICAL TREATMENT IS TO ALLOW A NATURAL DEATH AS THE RESULT OF AN UNDERLYING DISEASE, WHEREAS THE INTENT IN ASSISTED SUICIDE IS TO CAUSE DEATH BY AN INTERVENING ACT.

In rejecting the State's argument that there is a difference between withholding/withdrawing treatment and "actions which hasten death", the trial court found that the "main purpose of both courses of medical intervention is to cause the patient's death, the only difference being the time it takes for the patient to expire." (Judgment, p. 21). However, this conclusion ignores a vital legal distinction between intentional and foreseeable acts. The difference between intention and foreseeability is central to our civil and criminal law:

> The distinction between what is intended and what is not intended but brought about as a side-effect is at the basis of the vast modern law of tortious liability in negligence; it is the focus, too of the criminal law's long accepted distinction between murder and manslaughter...it is not the esoteric preserve of some sectarian moral teaching, but a morally significant distinction which is intrinsic to practical reasonableness.[3]

Clearly, in the physician's removal of a respirator or feeding tube, there is no deadly intention. When for example, a patient unexpectedly survives following withdrawal of life-sustaining treatment, families and courts do not then seek a way of ensuring the patient's death, for that was

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[3]John Finnis, *Intention and Side Effects*, in R. G. Frey and Christopher Morris, eds., Liability and Responsibility: Essays in Law and Morals 32 (Cambridge University Press 1991).

not the intention.[4] Even those cases in which the patient may be exposed to the risk of earlier death from respiratory depression as a result of pain medication are distinguishable from assisted suicide because the intent in administering these drugs is not to cause death, but to relieve pain. In the very unlikely event that death may occur, it is an *unintended* consequence, not the intended result. It is the underlying pathology that prevails - the inability to breathe or eat or swallow. Assisted suicide and euthanasia, on the other hand, while perhaps motivated by an intent to relieve pain, require an intention to cause death; the administration of a lethal agent that deliberately disrupts the natural course. The trial court's decision is based on the radical notion that the intended/unintended distinction is not a meaningful one, a notion that this Court should soundly reject.

C) THE DIFFERENCES BETWEEN DECLINING MEDICAL TREATMENT AND ASSISTED SUICIDE HAVE CONSISTENTLY AND UNIFORMLY BEEN RECOGNIZED BY THE COURTS, LEGISLATURES, LEGAL AND MEDICAL ORGANIZATIONS, WITH THE EXCEPTION OF TWO CASES CURRENTLY UNDER CONSIDERATION BY THE UNITED STATES SUPREME COURT.

While the trial judge in this case found no meaningful distinction between withholding/withdrawal of medical treatment and physician assisted suicide, there is consistent authority to the contrary. When the courts began to extend the right to forego medical treatment to incompetent and comatose patients, they did so precisely *because* it was different from

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[4]By contrast, the intent to ensure death is absolutely clear in assisted suicide. Some proponents, conceding that attempts to commit suicide by orally ingesting drugs may sometimes fail to achieve that result, have declared that the law should also authorize lethal injections so that a physician can always be standing by "to administer the *coup de grace* if necessary." D. Humphry, *Oregon's assisted Suicide Law Gives No Sure Comfort to Dying*, N.Y. Times, Dec. 3, 1994, at 22 (letter to the editor). The Ninth Circuit accommodated this concern by refusing to find any "principled distinction" between assisted suicide and active euthanasia. *Compassion in Dying v. State of Washington*, 79 F.3d 790, 831 (9th Cir. 1996).

committing suicide. The right to forego life-prolonging medical treatment did not involve self-infliction of deadly harm, an action of intentional self-destruction, or introduction of a death producing agent.[5] The courts cautioned explicitly that their decisions were not to be taken as blurring or violating the identified distinction.[6]

Likewise, our elected representatives have recognized a distinction between allowing death and causing the death. The "majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990). In recent years, that number has in fact increased. In 1996, Iowa and Rhode Island joined the ranks of states with specific statutes against assisting a suicide. Since 1994, at least seventeen states have considered and rejected proposals to legalize assisted suicide.[7] The right to decline medical treatment, by contrast, has a long history in the common law and is recognized in every state. The legislatures of 45 states

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[5]See footnote 2.

[6]Id.

[7]Alaska, HB 371 (died in House State Affairs Committee, 1996); Arizona, S.B. 1007 (negative vote in Senate Health Committee, Jan. 1996); California, A. 1080 (withdrawn by sponsor in 1995) and A. 1310 (died without a hearing, Jan. 1996); Colorado, H.B. 1308 (tabled by House Committee on Health Environment, Welfare and Institutions, Feb. 1995) and H.B. 1185 (defeated 7-4 in the same committee, Feb. 1994); Connecticut, S.B. 361 (died in committee, April 1995); Maine, L.D. 748 (rejected by House Judiciary Committee 10-3 and by full House 105 to 35, June 1996); Maryland, H.B. 933 (rejected by House Environmental Affairs Committee 15-4 in 1995) and H.B. 474 (rejected by same committee 16-5 in 1996); Massachusetts, H.B. 3173 (died in House Judiciary Committee, May 1995); Michigan, H.B. 4134 (died in committee, 1995); Mississippi, H.B. 1023 (died in House Judiciary Committee, 1996); Nebraska, L.B. 1259 (died in Judiciary Committee, 1996); New Hampshire, H.B. 339 (rejected by House of Representatives 256-90, Jan 1996); New Mexico, S.B. 446 (tabled 6-to-1 by Senate Judiciary Committee, Feb. 1995; New York, S. 1683, S. 5024-A, A. 6333 (died without a hearing in 1995): Vermont, H.B. 335 (died in House Committee on Health and Welfare, 1995); Washington, S.B. 5596 (died in committee, March 1995); Wisconsin, S.B. 90 and A.B. 174 (died in committee).

have sought to prohibit intentional acts to cause the death of another, regardless of the medical condition or consent of the victim, while at the same time recognizing an individual's right to forego medical treatment.[8]

The American Medical Association ("AMA") also recognizes a "fundamental difference between refusing life-sustaining treatment and demanding a life-ending treatment." AMA Council on Ethical and Judicial Affairs, Report I-93-8, at 2.[9] So do other medical organizations.[10] To state the AMA position:

> When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease. The illness is simply allowed to take its natural course. With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent. Although a physician cannot force a patient to accept a treatment against the patient's will, even if the treatment is life-sustaining, it does not follow that a physician ought to provide a lethal agent to the patient. The inability of physicians to prevent death does not imply that physicians are free to help cause death.

The American Bar Association's Commission on Legal Problems of the Elderly also noted that decisions to refuse treatment are "legally and ethically distinct" from decisions to provide "a lethal agent with the intentional purpose of terminating life." American Bar Association ("ABA"), Commission on Legal Problems of the Elderly, Memorandum of Jan. 17, 1992, reprinted in 8 Issues in Law & Med. 117, 118 (Summer, 1992). As one legal commentator

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[8]Edward R. Grant & Paul Benjamin Linton, *Relief or Reproach? Euthanasia Rights in the Wake of Measure 16*, 74 Oregon L. Rev. at 462-3 (listing statutes.)

[9]This position was reaffirmed by the AMA as recently as June of 1996. American Medical Association, Press Release, "AMA Soundly Reaffirms Policy Opposing Physician-Assisted Suicide." (June 24, 1996)

[10]The World Medical Association, American Nurses Association, National Hospice Organization, American Geriatrics Society, Canadian Medical Association, and British Medical Association oppose physician-assisted suicide. Edward R. Grant & Paul Benjamin Linton, *Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16*, 74 Oregon Law Rev. at 469 n. 70. Leah L. Curtin, *Nurses Take a Stand on Assisted Suicide*, 26 Nursing Management 71 (May 1995); Bill Wallace, *The Right to Die Rightly*, 3 Hospice 10-11 28 (Summer 1992).

observed, assisted suicide "involves not letting the patient die, but making the patient die...." Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 236 (1993). To suggest that this is "a difference without distinction" is error. (Judgment, p. 16).

II. ARTICLE I, § 23 OF THE FLORIDA CONSTITUTION DOES NOT EXTEND A CONSTITUTIONAL RIGHT TO SUICIDE OR PHYSICIAN ASSISTANCE IN SUICIDE TO MR. HALL, A TERMINALLY ILL, COMPETENT ADULT BECAUSE APPELLEES HAVE NO LEGITIMATE EXPECTATION OF PRIVACY IN THESE ACTS AND THERE EXIST COMPELLING GOVERNMENTAL INTERESTS IN PROHIBITING PHYSICIAN ASSISTED SUICIDE UNDER ALL CIRCUMSTANCES.

The Florida Constitution was amended in 1980 by referendum of the voters to include an explicit right of privacy. Codified in Article I, § 23, it provides in part that "Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein." The Florida Supreme Court, in the seminal decision of Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985), identified the standard for review under the state's constitutional right to privacy:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

However, in order to invoke the test, the Court concluded that it was first incumbent upon the Plaintiff to identify governmental intrusion into an aspect of his or her life in which he/she has a legitimate expectation of privacy. Winfield, 477 So. 2d at 544, 548; City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995); Stall v. State, 570 So. 2d 257, 260 (Fla. 1990); Pottinger v. City of Miami, 810 F. Supp. 1551, 1574 (S.D. Fla. 1992). Determining "whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation". Stall v. State, 570 So. 2d 257, 260. There is little discussion in the case law of the criteria for making this initial showing. Those cases concluding that the plaintiff lacked a legitimate expectation of privacy appear for the most part to have examined the individual's subjective expectation in light of

societal expectations as to what is reasonable.[11] It is only if a legitimate expectation of privacy is identified that a balancing of the governmental interests is required and an assessment of whether these interests has been promoted through the least intrusive means.

If there was any consideration by the trial court as to whether Appellees in the case below met this threshold, there was no discussion from which its reasoning might be gleaned. It can only be surmised that by construing the jurisprudence upholding a patient's right to forego or terminate life-sustaining medical treatment to recognize the "right to control the time and manner of...death" no threshold inquiry was necessary. If the health care decisions stood for the proposition that patients had the right to control the time and manner of their deaths, certainly physician assisted suicide would be a health care decision to which the privacy amendment would extend. Therefore, the burden of proof shifted immediately to the state to demonstrate a compelling governmental interest in prohibiting this conduct. The trial judge erred in his interpretation of the existing case law as creating a "right to determine the time and manner of one's death" - a right to suicide, and in the application of the law in this case.

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[11] See e.g., City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995), no legitimate expectation of privacy in disclosure of information as to smoking history on a job application as restaurants, motels, rental car agencies, employers, and others frequently request this information; Pottinger v. City of Miami, 810 F. Supp. 1551, 1575 (S.D. Fla. 1992) - no legitimate expectation of privacy in sleeping and eating in public; Stall v. State, 570 So. 2d 257, 260 (Fla. 1990), while legitimate expectation of privacy in possessing obscene materials in home, no legitimate expectation of privacy in purchasing obscene materials at retail establishments; Department of Community Affairs v. Moorman, 664 So. 2d 930, 933 (Fla. 1995), right of privacy does not apply to a decision to use land in a manner contrary to lawful public environmental policy because not a private act.

A. APPELLEES HAVE NO LEGITIMATE EXPECTATION OF PRIVACY IN THE ACT OF SUICIDE OR ASSISTANCE IN SUICIDE AS: 1) THE COMMON LAW, 2) LEGISLATION, 3) THE JURISPRUDENCE OF THE STATE HAVE ALL CONSISTENTLY AFFIRMED THE PUBLIC POLICY AGAINST SUICIDE, AND 4) THE 1980 PRIVACY AMENDMENT CANNOT REASONABLY BE CONSTRUED TO CREATE A RIGHT TO SUICIDE OR PHYSICIAN ASSISTED SUICIDE IN CONTRAVENTION OF THE EXISTING PUBLIC POLICY OF THE STATE.

The threshold question, not addressed by the trial court below, was whether Mr. Hall had a legitimate expectation of privacy in a future decision to commit suicide, and if so, whether it includes a right to be successful - to the assistance of third parties, particularly Dr. McIver. An attempt to find a privacy interest in assisted suicide independent of such an interest in suicide itself cannot succeed. If Article I, § 23 does not encompass a fundamental right to end one's life - to determine the time and manner of one's death - it cannot encompass a right to assistance in ending one's life. Consequently, a finding of a right to suicide or that Mr. Hall has a legitimate expectation of privacy in committing suicide - is a prerequisite to any finding of state assistance in the implementation of the right. An examination of the common law, Florida Statutes, the jurisprudence of the State, the societal treatment of suicide and the intent of the citizens of this state in adopting Article I, § 23, all indicate that any expectation as to a constitutional right to suicide or assistance in suicide is wholly unfounded and there was no evidence presented to suggest a basis for such an expectation.

1) The Common Law

At common law, self- murder and assisted self-murder were felonies. 30 Fla. Jur. Suicide § 2.; 13 ALR 1259, "*Guilt of One Aiding or Abetting Suicide*". The act of self-murder carried severe penalties, including forfeiture of one's estate and ignomious burial. 4 Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769) pp. 189, 190. The State

of Florida adopted the common law of England to the extent it is not inconsistent with the Constitution and laws of the United States and the acts of the Florida Legislature. § 2.01 and § 775.01 Fla. Stat. (1995). Clearly then, both self-murder and assisted self-murder remain crimes under the common law as adopted by the State of Florida.

2) The Legislation

Florida's statutory scheme has reinforced the state interest in preventing suicide and preserving the lives of those who seek to harm or kill themselves. While self-murder is not specifically criminalized by statute[12], the state's unqualified interest in preventing suicide is evident throughout the Florida Statutes.[13] No exceptions are identified based on the citizen's

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[12] While suicide is no longer explicitly criminalized by statute in any state, this is not indicative of societal approval or acceptance of suicide or a "right to suicide" but more likely due to the fact that such statutes could not meet the requirements for rationality, there being no state interest furthered by punishment of the family. See, "Communitarianism and Assisted Suicide", Notre Dame Journal of Law, Ethics & Public Policy, Vol. 9, (1995); Criminal Liability for Assisting Suicide (1986) 86 Colum. L.Rev. 348. As the California appellate court observed in Donaldson v. Van De Kamp, 4 Cal. Rptr. 2d 59, 64 (Cal. App. 2 Dist. 1992). "The absence of a criminal penalty for these acts is explained by the prevailing thought that...suicide or attempted suicide is an expression of mental illness that punishment cannot remedy." Also, as it was assumed the one who committed suicide was suffering from a mental frailty, he or she would lack the mens rea to commit a crime. People v. Kevorkian, 527 N.W. 2d 714 (Mich. 1994) citing Marzen, O'Dowd, Crone & Balch, *Suicide, A Constitutional right?*, 24 Duquesne L.R.. 1, 63, 69, 35-876, 88-89 (1985) As Justice Scalia observed in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990), this change in the law resulted from a desire "to spare the innocent family and not to legitimatize the act." Cruzan at 294.

[13] See, e.g. § 212.08(7)(o)2b(III) extending the state sales tax exemption to charitable institutions that seek to prevent suicide; § 231.17(2)(a)4, identifying the minimum competencies for teaching certificates to include skills in suicide prevention; §§ 382.011(1) and 406.11(1)(a)3, setting forth special procedures for death certificates, autopsies and examination in cases of death by suicide; § 440.09(3), denying workers' compensation coverage where the injury is primarily the result of a willful intent to commit suicide; § 365.171 (4)(b), including in the state plan for emergency telephone number "911" suicide prevention agencies; § 401.015, including suicide agencies in statewide emergency medical telecommunications system; § 934.15(1) authorizing law enforcement to cut, reroute or divert telephone lines when person is armed and threatening suicide; and § 394.463 identifying among the criteria for involuntary psychiatric examination

physical or mental condition or other attributes. Therefore, the legislation of the State of Florida, which unequivocally opposes suicide, provides no foundation for a reasonable expectation of privacy in suicide.

Florida has, since 1868, provided criminal penalties for assisting another in the act of self-murder. Presently codified in § 782.08 of the Florida Statutes, it reads:

> Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Contrary to the finding of the trial court, there was no evidence that our state legislature 129 years ago was ignorant of the dying process or oblivious to human suffering so as to be unable to anticipate that one might seek to assist in the self-murder of a competent, imminently dying adult. Clearly our legislature was aware of, and feared that situations of "humanitarian assistance in death" could take place. Would that not in fact be the primary situation the legislature sought to address via the statutory prohibition?

More recently, any question as to the legislative intent has been resolved with the explicit rejection of any act of euthanasia or other affirmative act to cause the death of a person suffering from an illness. Florida Statute § 765.309, adopted in 1984, declares the legislative intent that the legal vehicles created for the exercise of one's privacy interest in refusing life sustaining medical treatment not be construed to sanction mercy killing, euthanasia or assisted suicide. The statute reads:

> 1) nothing in this chapter shall be construed to condone, authorize, or approve

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threat of serious bodily harm to self; etc.

mercy killing or euthanasia, **or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying** *(emphasis added)*

A similarly explicit prohibition against a doctor's involvement in mercy killing or euthanasia appears in Fla. Stat. § 458.326 (4) (1995) of the Medical Practices Act. The legislation authorizes treatment and medication for a patient in intractable pain, acknowledging that in some cases adequate pain management may expedite death, but specifically admonishes:

> Nothing in this section 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 section was added by the legislature in 1994, 14 years after the adoption of a separate state constitutional right of privacy and four years after this Court's decision in Browning. The legislature reiterated the distinction between allowing to die and making die, arguably seeking to circumvent any claim of entitlement, even by terminally ill patients in intractable pain, to physician assisted suicide. Given the Legislature's unequivocal condemnation of any form of mercy killing, euthanasia or physician assisted suicide, plaintiffs may not reasonably infer from the statutes relating to informed consent, advance directives, etc., any societal inclination toward acceptance of assisted suicide, let alone a state protected right to assisted suicide.

3) The Jurisprudence

The courts of this state have undisputably recognized that an individual has a legitimate expectation of privacy in refusing medical care that would otherwise prolong one's natural life.[14]

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[14] Public Health Trust of Miami v. Wons, 541 So. 2d 96 (Fla. 1989)(refusal of blood transfusion necessary to sustain life); Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. 2d DCA) review denied, 492 So. 2d 1331 (Fla. 1986) (removal of nasogastric feeding tube from adult in permanent vegetative state); In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984) (removal of life support system from brain dead infant); Satz v. Perlmutter, 362 So. 2d 160 (Fla. 4th DCA 1978) *affirmed with opinion* 379 So. 2d 359 (Fla. 1980) (removal of respirator from competent adult, decided prior to passage of privacy amendment under general right of privacy).

However, no decision has suggested that the patient would have a legitimate expectation of privacy in a decision to commit suicide, physician assisted or otherwise. To the contrary, those decisions upholding the right to refuse life sustaining treatment, including hydration and nutrition, hold fast to the vital distinction already discussed between foregoing life-extending medical intervention and self-infliction of deadly harm (suicide).

In Satz v. Perlmutter, 362 So. 2d 160, 163 (Fla. 4th DCA 1978), *affirmed with opinion* 379 So. 2d 359 (Fla. 1980) the Fourth District Court of Appeal noted the distinction between a decision to terminate treatment and suicide, finding that the patient's "basic wish to live, plus the fact that he did not self-induce his horrible affliction, precludes his further refusal of treatment being classed as attempted suicide." The Satz court reasoned that the disconnecting of the patient's respirator, "far from causing his unnatural death by means of a "death producing agent" in fact will merely result in his death, if at all, from natural causes." Satz at 162. In its reliance upon Satz, the trial court below selectively incorporated language supportive of its desired conclusion, ignoring the critical distinction upon which the Satz decision was premised. This Court extending the right to decline medical treatment to an incompetent patient, in Browning relied upon the Satz distinction, stating that the state's interest in preventing suicide was not an issue where the discontinuation of life support "will merely result in ...death, if at all, from natural causes." Browning at 14. The court distinguished this act from the criminal act of euthanasia which was proscribed by § 782. 08 Fla. Stat. (1987) and § 765.11(1) Fla. Stat. (1987). Id. There was no intimation by this Court that the statutory ban on all forms of assisted self-murder was in any way brought into question by the right recognized in Browning.

In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990).

There are no cases under the assisted self-murder statute. However, the criminal case law clearly indicates that one's humanitarian motive for causing death and the consent of the victim do not change the character of the act - it is still murder. See, Gilbert v. State, 487 So. 2d 1185 (Fla. 4th DCA 1986) (defendant husband convicted of murder despite fact that gunshot wound administered to elderly, suffering, wife was at her request).

Both the health care decisions and criminal cases in this state have consistently affirmed the distinction between affirmative acts to kill a patient (an intervening cause of death) and the withdrawal or refusal of life-sustaining medical treatment which allows a natural death to occur. Consequently, Florida case law is devoid of any basis for even the inference that one has a protected privacy interest in third party assistance in self-murder.

4) The 1980 Privacy Amendment did not envision a right to suicide or assistance in suicide.

Finally, there is no indication that either the drafters of the privacy amendment or the voters meant to broaden the right of privacy as it relates to suicide, or that the validity or interpretation of those statutes designed to thwart suicide were to be affected by the privacy provision. Article I, § 23 must be interpreted in light of the law in effect at the time of its adoption. St. Petersburg v. Briley, Wild & Assoc., Inc. 239 So. 2d 817, 822 (Fla. 1970), Gallant v. Stephens, 358 So. 2d 536, 539 (Fla. 1978), Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). While the doctrine of informed consent and the negative right to be free from unwanted bodily intrusions were established in the common law prior to the adoption of a specific constitutional privacy right,[15]

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[15] Chambers v. Nottebaum, 96 So. 2d 716 (Fla. 3d DCA 1957). Even the common law origin of the right to refuse unwanted medical treatment illustrates how radically different it is from an affirmative act of homicide or suicide. The right to refuse medical treatment is rooted in the common law right to be free of unwanted bodily contact. Cruzan v. Director Missouri Department of Health, 497 U.S. 261, 269 (1990).

so as to be compatible with and subsumed within such a right, the same cannot be said of a right to self-murder or suicide.

The public policy of the state in 1980 clearly and without exception, disfavored suicide and assisted suicide, and the statute criminalizing assisted self-murder reflects this public policy. Therefore, while Article I, § 23 would have encompassed an existing right to decline life sustaining medical intervention, as such a right was recognized in law at the time of the amendment to the constitution, it would not have encompassed a privacy interest in the right to determine the time and manner of death, to hasten death, or to suicide, much less to assistance in these acts of self-destruction.

Given the strong public policy against suicide reflected in the English common law, the statutes and case law of the State of Florida, as well as ample evidence of community services focused on the prevention of suicide, any expectation of a protected "right" to suicide or physician assisted murder is unreasonable.

B. THE STATE DEMONSTRATED COMPELLING GOVERNMENTAL INTERESTS IN THE PRESERVATION OF LIFE, THE PROTECTION OF INNOCENT THIRD PARTIES, THE PREVENTION OF SUICIDE AND THE MAINTENANCE OF THE INTEGRITY OF THE MEDICAL PROFESSION, SUFFICIENT TO WARRANT ANY INTRUSION UPON THE APPELLEES' PRIVACY INTERESTS

The right to privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests. Winfield at 547. The relevant state interests identified and dismissed by the trial court below include 1) the interest in the preservation of life; 2) the need to protect innocent third parties; 3) the duty to prevent suicide; and 4) the obligation to maintain the ethical integrity of the medical practice. Satz v. Perlmutter, 362 So. 2d 160, 163 (Fla. 4th DCA 1978), *affirmed with opinion* 379 So. 2d 359 (Fla. 1980), Public Health

Trust of Dade County v. Wons, 541 So. 2d 96, 97 (Fla. 1989), Browning at 14. Each of these identified state interests is, of course, a corollary of the primary responsibility of the state - the protection and preservation of life. Each is compelling, but combined, there can be no question that the governmental interests furthered through the blanket prohibition of assistance in death are sufficient to override any privacy interests of Appellees in foreshortening Mr. Hall's life by a matter of days.

1) State Interest in the Preservation of Life

Our law presumes that the life of each individual is of benefit to the society and deserving of protection. Ours has always been a society that "strongly affirms the sanctity of life." Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J. concurring). The concept of equal protection of the law, critical to our system of justice, is tied to the recognition that all human life regardless of it aspects, -physical disability, race, intelligence, religious preference, gender, ethnic origin, etc, has a constant and intrinsic value apart from the subjective appreciation of the individual or third parties.

In recognizing a patient's privacy interest in refusing unwanted medical intervention the State does not relinquish or qualify its interest in preserving life based upon the perceived quality or value of that life. The right to be free from unwanted medical care extends equally to adults, incompetents, minors, regardless of whether the patient experiences a terminal illness.[16] It is the consent of the patient that is controlling. Neither the state nor the physician becomes involved in an attempt to assess the quality or value of another's life. Browning at 14.

However, in order to recognize a right to assisted suicide, the state would be required to 1) extend the right to all who consent or 2) to assert a qualified interest in the preservation of life

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[16]See cases cited under Section IV of this brief, at page 35-37.

based on conditions or attributes of the person. If based upon consent, the State would necessarily have to recognize the right to physician assisted suicide of not just the terminally ill, but any who subjectively perceived death as preferable to life. Far from seeking to discourage the self-destruction of its citizens, the State would be affirming and validating the citizen's inclination for death; facilitating their own right to determine the time and manner of death.

The only other means by which the State could recognize a right to physician assisted suicide would be to qualify its interest in the preservation of the life; by creating an exception in relation to particular persons or classes of persons, in this case Mr. Hall and those similarly situated. In so doing, the trial court has abrogated the concept of equal protection of the law by singling out a particular person or class of persons (terminally ill, competent adults) for disparate treatment under the State's homicide law.[17] The impact in other areas of legislation - the ADA, the ADEA, insurance, suicide prevention, etc., cannot be fully anticipated. A declaration that assistance in self-destruction is a "benefit" or "right" for one particular class of citizens is tantamount to deciding that some persons are truly better off dead than alive. How such a mandate could be rooted in our State Constitution defies reasoned explanation. The State of Florida should not abandon its unqualified interest in the preservation of each human life in favor of a variable or contingent interest.

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[17] What is it about a terminally ill patient that would justify the state's abandonment of its interest in preserving his or her life? Is it the anticipated brevity of his/her time on this earth? If that is the case, then the elderly should also have a right to suicide and assistance in suicide. Is it the unbearable pain and suffering which patients with such illnesses are generally understood to experience? If so, then what about those suffering from severe psychological injury or emotional trauma? Is it the loss of personal dignity associated with a debilitating illness and dependency on the care of others? If so, anyone experiencing a severely disabling condition should have such a right to assisted suicide. If the terminally ill are too much of a financial burden on the resources of their families or the state, then what of other members of society who impose an excessive burden on societal resources?

2) Protection of Innocent Third Parties

The State of Florida has a compelling governmental interest in the protection of innocent third parties from the risk of an involuntary assisted suicide. While much of the case law and the trial court below examined this interest in the narrow sense of the impact of an individual patient's decision on immediate family members and dependents, there is also a broader need to protect society from harm that has been recognized in the jurisprudence of this state. State v. Eitel, 227 So. 2d 489 (Fla. 1969). The trial court gave no consideration to this broader state interest. The law has always acted to restrain personal choices exhibited in *conduct* for the sake of the common good. Some conduct, which might at first glance appear exclusively personal, is subject even to outright prohibition for these reasons. Thus a person has a right to refuse medical treatment, but no right to refuse vaccination from contagious diseases. Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905). A person has a right to engage in sexual activity, but not to engage in such activity with children, prostitutes or non-consenting others. One has a right to marry, but not to marry one's sibling or one married to another.

Legal sanction of physician-assisted suicide will inevitably lead to abuses threatening the due process right to life of many innocent people. The specter was described by Professor Kass in the following manner:

> "Vulnerable life will no longer be protected by the state, medicine will become a death dealing profession, and isolated individuals will be technically dispatched to avoid the troubles of finding human ways to keep company with them in their time of ultimate need." Vol. 28, *Hastings Center Report*, p. 42.

In authorizing third parties to provide certain classes of persons with a deadly instrument for the purpose of effecting their own murder, all of society will be drastically altered. "For unless the state accepts of the job of euthanizer it would thus surrender its monopoly on the legal use of lethal force, a monopoly it holds and needs if it is to protect innocent life, its first responsibility."

Id. The state's interest in the protection of innocent parties via its uniform enforcement of the criminal law, necessary to protect the lives of those who wish to live no matter what their circumstances, is sufficiently compelling to override any interest Mr. Hall possesses in "foreshortening his existence by mere days" through the assistance of third persons.

3) Prevention of Suicide

The state of Florida has a compelling governmental interest in the prevention of suicide. This interest is both specific- as it relates to the life of any given citizen, and general, as a matter of public policy, for the common good - protection of society as a whole. While the state interest in the prevention of suicide is not implicated in those cases in which an individual merely seeks to forego medical intervention to *prolong* natural life, it is undeniably implicated when any person seeks judicial sanction of self-murder or exemption from state criminal penalties for those intentionally providing the means for death to occur. In such a case, a party intends to kill oneself via a death producing agent, just as readily as a gunshot to the head.

One of the chief responsibilities of government is the protection and preservation of the lives of its citizens. The State of Florida has asserted an interest in the preservation of the life of the individual "for his own sake." See, State v. Eitel, 227 So. 2d 489 (Fla. 1969). The state's interest in preventing the premature termination of the natural life of the individual, over the objections of that individual, is warranted since the concept of an autonomous, "rational suicide" is inherently suspect. While the general public and the trial judge below may perceive the suicides of the gravely or terminally ill as rational, intelligent and free choices that are different from other suicides, experts who treat suicidal patients deny this, and see all the elements of irrational suicides in those who are terminally ill and gravely suffering. See, David J. Mayo, *"Contemporary Philosophical Literature on Suicide; a Review"* in Suicide and Ethics 318, 340

(David Mayo ed., 1983). Further, terminally ill patients may opt for suicide or assistance in suicide based on erroneous expectations about their illness. One of their greatest fears is the fear that they will be unable to receive adequate pain relief, when in fact, for most patients, the pain can be controlled.[18] Moreover, as we necessarily interact with, and are somewhat interdependent upon our fellow man, the deliberate cessation of any person's natural life results in injury to others.

The State has a compelling interest in enforcing its expressed public policy against suicide for all its citizens, regardless of physical or mental condition. To recognize a constitutional right to suicide would be to discard centuries of precedent condemning this act and to redefine the primary responsibility of the state. No longer would the state seek to prevent injury to its citizens, but it would authorize and facilitate the killing of certain classes of its citizens whose lives are no longer valuable to the State.

4) Maintenance of Ethics of the Medical Profession

The State of Florida has a compelling governmental interest in the maintenance of the ethics of the medical profession that outweighs any intrusion into the privacy interests of Appellees in seeking physician assistance in suicide. Unlike the recognition of the right to refuse medical treatment which was regarded as consistent with existing medical mores and therefore did not threaten the integrity of the medical profession,[19] the recognition of a right to physician assisted suicide is wholly inconsistent, if not antithetical, to one of the most fundamental and long held

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[18]Foley, K.M.,The relationship of pain and symptom management to patient requests for physician-assisted suicide. *J. Pain Symptom Management*, 1991: 5:237-239.

[19]In Re Guardianship of Browning, 568 So. 2d at 14.

mores of the medical profession. The Hippocratic Oath requires that a physician "give no deadly drug to any, though it be asked of [them], nor will [they] counsel such."

The American Medical Association Council on Ethical and Judicial Affairs has taken the position that physician assisted suicide is fundamentally inconsistent with the physician's professional role as healer. See Code of Medical Ethics Reports, Vol V, #2, Report 59, July 1994. The AMA Council objected to a patient's demand for physician assistance in self-murder, noting:

> "there is a fundamental difference between refusing life sustaining treatment and demanding a life ending treatment. This right of self determination is a right to accept or refuse offered interventions, but not to decide what should be offered...The right to refuse life sustaining treatment does not automatically entail a right to insist that others take action to bring on death... Patients do not have a "right" to insist on treatments that are inconsistent with sound medical practices. The physician's role is to affirm life, not to hasten its demise."

Further, societal recognition of physician assisted suicide would force the physician, perhaps with judicial sanction, to make inappropriate value judgments about a patient's quality of life. With the right to refuse life sustaining treatment, society does not limit the right to only those patients who meet a specific standard of suffering, as would be the case with assisted suicide. Finally, the AMA Council recognized that permitting assisted suicide opens the door to policies that carry far greater risks, such as involuntary euthanasia.

The fact that the largest representative membership organization of the medical profession has taken the position that both physician assisted suicide and euthanasia are radically in conflict with the ethics of the medical profession and would compromise the role of the physician as healer, not to mention the public trust, supports the conclusion that the state has a compelling interest in the protection of the integrity of the medical profession. This interest is sufficient to warrant the limited intrusion on a patient's privacy created by a statutory restriction on third

party assistance in the act of suicide. While the state is free to legislatively regulate the practice of medicine it should not by judicial decision erode the moral and ethical underpinnings upon which the public safety and trust in the profession are grounded.

III. THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT COMPEL RECOGNITION OF A RIGHT TO ASSISTED SUICIDE IN THE LIMITED CLASS OF TERMINALLY ILL, MENTALLY COMPETENT ADULTS, BUT IN FACT PROHIBITS SUCH RECOGNITION.

The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 112 S. Ct. 2326 (1992). The court below concluded that § 782.08 of the Florida Statutes denies Mr. Hall equal protection of the law by restricting his "right to choose to hasten his impending death" (Judgment, p. 24) while allowing terminally ill persons whose treatment includes life support to exercise this choice with necessary medical assistance. However, it is only by virtue of the misidentification of the legal right in issue that there is created a fictional classification necessary to frame this query as an equal protection violation. If there is no recognition of a "right to choose to hasten death" that is extended to persons with a terminal illness who are dependent upon life support, there is no equal protection claim on the part of those to whom it is denied.

Death is inevitable for all persons. The cases regarding termination of life-sustaining medical treatment do not and cannot reasonably be construed to recognize a "right to choose to hasten impending death". They are, as has already been noted, premised upon the recognition of a liberty interest in being free from unwanted bodily intrusions. This right to forego or terminate medical treatment is not limited to those suffering from a terminal illness, the mentally competent, or adults. It extends equally to all persons whose life will terminate absent life-

sustaining medical care. Even those persons who will die from some underlying pathology if they decline the provision of life prolonging medical treatment have no "right" to demand the assistance of a physician or third party in prescribing or administering a death producing agent such as a lethal dose of drugs. They have no right to hasten inevitable death by introduction of an artificial agent, but only to forego life sustaining medical interventions. Consequently, there is no "right to choose to hasten impending death" extended to a mentally competent, terminally ill adult who will die absent life sustaining medical treatment that is being denied to the mentally competent, terminally ill adult who will not die absent life sustaining medical treatment.

Assuming that the jurisprudence recognizing one's liberty or privacy interest in foregoing life sustaining medical care could be characterized as "a right to choose to hasten impending death" and that § 782.08 of the Florida Statutes operates to create two classes of persons who are treated differently by the operation of the law, it was incumbent upon the Appellees to show that there is no conceivable factual predicate which would rationally support the classification under attack, or the statute must be sustained. Florida High School Activities Association, Inc. v. Thomas, 434 So. 2d 306 (Fla. 1983).[20] The Appellees failed to meet that burden.

The first step in determining whether legislation survives the rational-basis scrutiny is to identify a legitimate government purpose which the enacting body could have been pursuing - the actual motivations are irrelevant. Hayes v. City of Miami, 52 F. 3d 918 (11th Cir. 1995). Clearly in the case at bar, the legislature in criminalizing assisted suicide was acting to protect the lives of its citizens from harm; to prevent third parties from cooperating and facilitating

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[20] The Equal Protection Clause does not prohibit or prevent classification, provided such classification is reasonable for the purpose of the legislation, is not clearly arbitrary, and is based on proper and justifiable distinctions, considering the purpose of the law, and is not a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration. 16A Am. Jur. 2d, *Constitutional Law*, § 746.

suicide. The second step of this level of scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. Id. No doubt the Florida Legislature reasonably believed that providing a criminal penalty for assisting in the self-murder of another might dissaude third parties from such participation in death, thereby preserving the lives of its citizens regardless of their motivation for self-infliction of deadly harm. As recognized by the Florida Supreme Court in Junco v. State Board of Accountancy, 390 So. 2d 329 (Fla. 1990):

> "Equal protection of the laws does not require that legislation enacted pursuant to the police power must apply equally and uniformly to all. It is sufficient if the classifications created are reasonable and practical, bearing a rational relation to the governmental purpose to be served."

Where there is a reasonable and practical ground of classification[21] for the legislation, the statute should be upheld since the subject of police regulation and the nature and extent of such regulation must be left to the general lawmaking power. Davis v. Florida Power Co., 60 So. 759 (Fla. 1913).

Finally, the U.S. Constitution confers upon no individual the right to demand action by the state which will deny equal protection of the laws to other individuals. Shelly v. Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948). Rather than ensure equal protection of the law, recognition of "right to choose to hasten impending death" that is limited to terminally ill competent adults would arbitrarily denies equal protection of the law to those persons who do not meet whatever parameters may be fashioned for eligibility for assisted death - be they minimum standards for

[21]If any reasonable distinction between the subjects as a basis for classification can be found, the classification should be sustained; a "narrow" distinction will suffice. A common characteristic shared by both classes is not sufficient to invalidate a statute as violative of equal protection requirements when other characteristics peculiar to only one group rationally explain the statute's discriminatory treatment of the two groups. 16A Am. Jur. 2d, *Constitutional Law*, § 754.

mental competency, a time limited definition of "terminal", or age restrictions. It would also sanction unequal application of the state's homicide laws, creating two different standards for prosecution of persons deliberately assisting in self-murder. In relation to terminally ill persons, all that need be established after the fact in one's defense in that the assisted death was achieved with the victim's consent, while consent would be no defense to a claim of assisted self-murder of non-terminally ill persons. Such disparate treatment of persons with physical disabilities clearly conflicts with the purpose of the equal protection clause - to prevent any person or class of persons from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation. Davis v. Florida Power Co., 60 So. 759 (Fla. 1913).

IV. ASSISTED SUICIDE CANNOT BE LIMITED TO MR. HALL, A MENTALLY COMPETENT, TERMINALLY ILL ADULT UNDER THE STATE CONSTITUTIONAL RIGHT TO PRIVACY OF "EVERY NATURAL PERSON" OR UNDER THE FEDERAL EQUAL PROTECTION CLAUSE.

Under the jurisprudence interpreting Florida's privacy amendment, any right thereunder to suicide or assistance in suicide would extend not just to the competent adult with a terminal illness, but necessarily to "every natural person"[22], including 1) incompetent and mentally disabled persons; 2) those not suffering from terminal illness; and 3) minors (without parental consent). As held by the Florida Supreme Court in In Re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990), the privacy right (to choose to forego or terminate life sustaining medical treatment) is not lost or diminished by virtue of physical or mental incapacity:

> Thus, our cases have recognized no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons. Indeed, the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike. Browning at 12.

Rights that are determined to inhere within the state constitutional right to privacy may not be restricted to persons with a particular physical condition, such as a terminal illness. Browning noted that "a competent individual has the constitutional right to refuse medical treatment regardless of his or her medical condition." Browning at 10. See also, Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989) (upholding patient's refusal of blood transfusion which could treat uterine bleeding) If the privacy right of the natural person to forego lifesaving medical intervention cannot be limited based upon one's underlying physical condition or mental competency, what is the criterion for its exercise? Browning answered this

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[22] Article I, § 23 of the Florida Constitution provides in pertinent part: Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. Therefore, despite the trial court's statement that its decision is limited to the parties therein, any "right to choose to hasten ... death" that is grounded on the privacy amendment cannot be so limited.

question, stating, "Courts have properly regarded the subjective desires (of competent adults to forego medical intervention) as dispositive....the decision must ultimately belong to the one whose life is in issue." This would be true even if the life in issue is that of a minor as the right to privacy extends to every natural person, including minors. B.B. v. State, 659 So. 2d 256 (Fla. 1995); In Re T.W., 551 So. 2d 1186, 1193 (Fla. 1989). The privacy right of a minor to an abortion, may not even been limited by a requirement of parental consent. In Re T.W., 551 So. 2d 1186, 1195 (Fla. 1989). The same would likely be found as to a minor's right to physician assisted suicide.

Recognition of a constitutional right to suicide or assisted suicide cannot be limited to mentally competent, terminally ill adults. Once any right to assisted suicide is conceded for any class of persons, it will be impossible to confine the right to that class. Since all medical conditions can be placed on a continuum, any distinction will simply be challenged as arbitrary. There would be no principled basis for distinguishing among the malformed infant, the romantically devastated teenager, the depressed elderly.

Based upon the decisions of the Florida Supreme Court that identify the scope of the right to privacy, if assistance in suicide is subsumed within the constitutional right to privacy, the subjective desire of the individual will be dispositive of access to physician assistance in the act of self-murder, without consideration of one's medical condition, minority or physical or mental competence. Perhaps most disconcerting is the fact that with a general recognition of a constitutional "right" to physician assisted suicide, the right cannot be confined to those who freely choose death.[23] No matter how carefully guidelines are crafted, assisted suicide will be

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[23] Anyone who doubts this should consider the Netherlands' experience. The Dutch government's own 1991 report on euthanasia cited "2,300 cases of active voluntary euthanasia, 400 cases of physician-assisted suicide, and 1,000 cases of active involuntary euthanasia" every

practiced "through the prism of social inequality and bias that characterizes the delivery of services in all segments of our society, including health care."[24]

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year. R. Fenigsen, The Report of the Dutch Governmental Committee on Euthanasia, 7 Issues in Law & Medicine 339, 340 (1991) (citations omitted). To these must be added "8,100 cases in which morphine was given in excessive doses with the intent to terminate life, of which 4,941 cases, or 61%, were done without the patient's consent." Id. At 341. (Citations omitted) By this account, every year there are more cases of involuntary euthanasia (5,941) than of voluntary euthanasia (5,459) in the Netherlands each year.

[24] New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (1994). As noted by Leon R. Kass, a professor from the College and Committee on Social Thought, University of Chicago:

> The vast majority of persons who are candidates for assisted death are, and will increasingly be, incapable of choosing and effecting such a course of action for themselves. No one with an expensive or troublesome infirmity will be safe from the pressure to have his right to die exercised. *"Is There a Right to Die?" Hastings Center Report*, 23, No. 1 (1993).

CONCLUSION

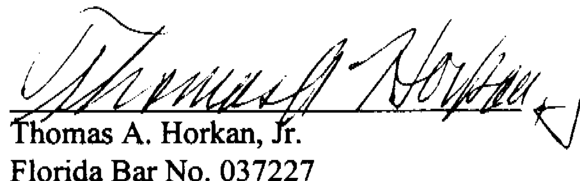
The withholding or withdrawal of life prolonging procedures under established statutory and decisional principles are not suicide, but rather an application of the right to be free from unwanted bodily invasion.

The constitutional right to privacy is an important one but it does not prevent every effort by the State to regulate personal conduct, such as the practice of prostitution, self mutilation or the use of illegal drugs. Laws regulating immunizations from contagious disease and the use of vehicular safety devices are permissible. Even the choice of a spouse, perhaps the most intimate of personal decisions, is qualified by concerns for the common good that are expressed in limitations based on affinity, consanguinity, and gender.

Well established principles for the application of Article I, § 23, Florida Constitution demonstrate that there is no constitutional privacy right to commit suicide, or to assist in the commission of suicide. Likewise, these actions are not protected under the Federal Constitution.

Therefore, this Amicus respectfully urges that the trial court's finding of a constitutionally protected right to commit suicide, and to assist in suicide, be reversed.

Respectfully submitted,



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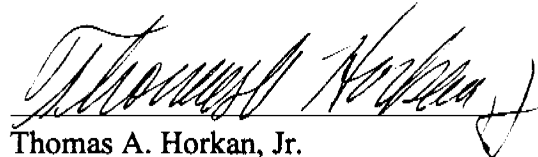
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curia, Florida Catholic Conference, In Support of Appellant, has been furnished by U.S. Mail to Robert Rivas, Esq., Rivas & Rivas, P.A., P.O. Box 2077, Boca Raton, Florida 33427-2177 and Michael A. Gross, Esq., Assistant Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050 this 6 day of ~~February~~ MARCH, 1997.



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