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Florida Constitutional Law: Disregarding the Florida Constitution's Independent Prohibition Against "Unusual Punishment"

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CASE COMMENTS

FLORIDA CONSTITUTIONAL LAW: DISREGARDING THE FLORIDA CONSTITUTION'S INDEPENDENT PROHIBITION AGAINST "UNUSUAL PUNISHMENT"

Jones v. State, 701 So. 2d 76 (Fla. 1997)

*Michael G. Moore**

Respondent, the State of Florida, sentenced Petitioner[1] to death[2] by electrocution.[3] Petitioner claimed that execution by electrocution was "unconstitutional per se."[4] Furthermore, Petitioner contended that the administration of his death sentence would constitute "cruel or unusual" punishment based on reports that Florida's electric chair had malfunctioned during the course of a recent execution.[5] The Supreme Court of Florida, exercising all writs jurisdiction,[6] stayed Petitioner's execution[7] and called for an evidentiary hearing[8] to determine the present condition of the electric

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* This Case Comment is dedicated to Jennifer.

1. *See* Jones v. State, 701 So. 2d 76, 76 (Fla. 1997) (per curiam) (four to three decision).

2. *See id.* (stating that Petitioner "was under warrant of death"). The court did not reveal any details, or provide a description, of the crime itself. *See id.* However, it can be inferred that Petitioner was convicted of a capital felony pursuant to the Florida Statutes. *See* FLA. STAT. § 775.082 (1995) (stating, in relevant part, that "[a] person who has been convicted of a capital felony shall be punished by death").

3. *See* FLA. STAT. § 922.10 (Supp. 1996) (stating, in relevant part, that "[a] death sentence *shall* be executed by electrocution") (emphasis added).

4. Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997) [hereinafter *Jones I*]. *Compare Jones*, 701 So. 2d at 76 (stating that Petitioner argued "*execution* per se [was] *cruel and unusual* punishment") (emphasis added), *with Jones I*, 691 So. 2d at 482 (stating that Petitioner argued "execution by electrocution [was] *unconstitutional per se*") (emphasis added). The differences in wording are subtle, yet marked. Thus, the exact language and consequent substance of Petitioner's argument remains unclear.

5. *Jones*, 701 So. 2d at 76 n.1 (stating that during the execution of [Pedro] Medina, "flames were seen near the headpiece of the electric chair [as well as] smoke"). The trial judge characterized these events as being the result of a rare "malfunction." *See id.* at 77 ("The procedures used in the last seventeen Florida executions have been consistently followed, and no malfunctions occurred until the execution of Pedro Medina.").

6. *See* FLA. CONST. art. V, § 3, cl. b (providing, generally, for the Supreme Court of Florida's jurisdiction, including "all writs" jurisdiction as exercised here).

7. The Order staying Petitioner's execution was issued on April 10, 1997 and was to last until 7 a.m. on April 18, 1998. *See Jones I*, 481 So. 2d at 482. The *Jones I* court granted the trial court permission to extend the stay in the event that it were to "find by the greater weight of the evidence that electrocution in Florida's electric chair in its present condition [was] cruel or unusual punishment." *Id.*

8. The trial court that presided over Petitioner's postconviction proceedings was issued

chair.[9] Meanwhile, Petitioner's claim that electrocution was "unconstitutional per se" was rejected on procedural grounds.[10] After a four-day hearing, the trial court denied Petitioner's claim that Florida's electric chair was a form of "cruel and unusual punishment" because of its present condition.[11] On appeal, however, the Supreme Court of Florida vacated the trial court's order and called for another hearing.[12] The second hearing produced an adequate evidentiary record[13] and again resulted in the denial of Petitioner's claim.[14] Petitioner appealed, raising several objections.[15] The Supreme Court of Florida, however, rejected them in toto, vacated Petitioner's stay of execution, and HELD, that electrocution in Florida's electric chair in its present condition is not "cruel or unusual punishment."[16]

The United States Constitution generally empowers states to create and enforce their own substantive and procedural criminal law.[17] While states may not deny their citizens[18] federally guaranteed protections,[19] they may

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jurisdiction and ordered to conduct the evidentiary hearing in question. *See Jones I*, 691 So. 2d at 482. Petitioner would later argue that the trial judge was personally biased against him, presumably owing to the court's familiarity with Petitioner and his appeal. *See Jones*, 701 So. 2d at 80. This argument, however, was swiftly rejected. *See id.*

9. *See Jones I*, 691 So. 2d at 482 ("The [trial] court may receive the testimony of engineering and medical experts and such other witnesses as may be presented by the parties, and shall make its decision as expeditiously as possible.").

10. *Id.* The *Jones I* court added, however, that it would have denied Petitioner's claim "even if [it] were not procedurally barred." *Id.*

11. Jones v. Butterworth, 695 So. 2d 679, 680 (Fla. 1997) (per curiam) [hereinafter *Jones II*].

12. *See id.* at 680-81. A second hearing was held in order to accommodate more evidence and testimony. *See id.* Hence, the second hearing was intended to encompass the evidence and testimony presented at the first hearing, as well. *See id.* The Supreme Court of Florida, relinquishing jurisdiction for the second time to the same trial court, emphatically stated the purpose of the new hearing: "We reiterate that the sole issue to be determined is whether or not electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." *Id.*

13. *See Jones*, 701 So. 2d at 80 ("There is [now] competent substantial evidence in the record to support the order of the trial judge.").

14. *See id.* (stating that the "trial judge entered a twenty-six page final order denying [Petitioner's] claim that Florida's electric chair in its present condition was *unconstitutional*") (emphasis added).

15. *See id.* at 78-80. Altogether, Petitioner raised seven points on appeal. *See id.*

16. *Id.* at 80.

17. *See generally, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466-70 (1947) (Frankfurter, J., concurring) (providing a useful and comprehensive discussion of the United States's federalist concept of criminal justice, whereby states enjoy a monitored freedom to "carry out their own notions of criminal justice"); *cf.* Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992) ("[S]tate courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms.").

18. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States,

elect to expand those protections or establish new ones.[20] Thus, a state's interpretation of its own constitution is controlling unless it fails to satisfy the minimum guarantees of the United States Constitution.[21]

Based on these federalist principles, states may generally impose death sentences and perform executions without running afoul of the United States Constitution.[22] Nevertheless, federal courts have jurisdiction when a particular method[23] or proposed instance[24] of capital punishment is challenged on federal constitutional grounds.[25] An early case featuring a federally based challenge against a state court's decision to uphold execution under its own constitution was *In re Kemmler*.[26]

In *Kemmler*, the United States Supreme Court reviewed a decision of the Court of Appeals of New York[27] upholding a death sentence under the New York Constitution.[28] When *Kemmler* was decided, the New York

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and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction equal protection of the laws.")

19. *See generally Traylor*, 596 So. 2d at 961 ("Under our federalist system of government, states may . . . not . . . place more restrictions on the fundamental rights of their citizens than the federal Constitution permits." (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

20. *See, e.g., id.* ("[S]tates may place more rigorous restraints on government intrusion than the federal charter imposes . . . .").

21. *See Resweber*, 329 U.S. at 461-62 ("For matters of state law, the opinion . . . of [a state's highest court is] binding on this court.") (citation omitted).

22. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion) ("[W]e . . . hold that the punishment of death does not invariably violate the Constitution.").

23. *See, e.g.*, Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996) (holding that execution by lethal injection in California was unconstitutional pursuant to the Eighth and Fourteenth Amendments to the United States Constitution); Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) (en banc) (holding that execution by hanging in Washington did not violate the United States Constitution).

24. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 801 (1982) (five to four decision) (reversing the Supreme Court of Florida's decision to allow the execution of an inmate who did not personally kill or attempt to kill anyone).

25. *See generally, e.g.*, Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 466-80 (1997) (providing a useful overview of several recent federal cases).

26. 136 U.S. 436 (1890).

27. The Court of Appeals of the State of New York is that jurisdiction's court of last resort. *See id.* at 438 (stating that "[a] writ of error to the *highest court of a State* is not allowed as a matter of right") (emphasis added).

28. *See id.* at 442. The county judge, upon reviewing the original writ, was only concerned with the New York Constitution. *See id.* The judge's rationale was that the Eighth Amendment to the United States Constitution, which was, "in language almost identical to the New York Constitution," did not apply to "punishments inflicted in state courts for crimes against the State." *Id. See also, e.g.*, Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 597-98 (1994).

Constitution proscribed the infliction of "cruel and unusual punishment,"[29] hence adopting the conjunctive language of the Eighth Amendment to the United States Constitution.[30] Still, New York courts, prior to the *Kemmler* Court's acceptance of certiorari, decided to address the concepts of "cruel" and "unusual" separately.[31] This approach provided the courts with an opportunity to comment on the unusualness of electrocution as a method of execution and determine what legal significance, if any, attached to such a factual determination.[32]

The Court of Appeals of New York conceded that electrocution might be considered "unusual" because it was technologically new.[33] It rejected, however, the argument that electrocution was "cruel," and thus upheld the validity of electrocution under the New York Constitution.[34] In turn, the *Kemmler* Court found that New York's decision, based entirely on its own constitution, did not encroach upon any protections afforded by the Fourteenth Amendment[35] to the United States Constitution.[36]

A century after the Court of Appeals of New York ruled that executions by electrocution did not violate its state constitution, the Supreme Court of Florida, in *Buenoano v. State*,[37] could have reached the same conclusion under its own constitution.[38] In *Buenoano*, an inmate sentenced to die in Florida's electric chair[39] challenged the constitutionality of her anticipated punishment based on the device's malfunction in a recent execution.[40] The

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According to Professor Denno, *Kemmler*'s holding that the Eighth Amendment to the United States Constitution did not apply to the states was "overruled decades later in *Robinson v. California*[, 370 U.S. 660, 666-67 (1962),] which incorporated the Due Process Clause of the Fourteenth Amendment." *Id.*

29. N.Y. CONST. art. I, § 5.

30. U.S. CONST. amend. VIII (providing, in relevant part, that "cruel and unusual punishments [shall not be] inflicted"); *see Kemmler*, 136 U.S. at 445.

31. *See Kemmler*, 136 U.S. at 447. The *Kemmler* Court implied that all of the New York state courts that reviewed the appeal reached the same conclusion. *See id.* (referring simply to "[t]he courts of New York").

32. *See id.*

33. *Id.* (dictum).

34. *Id.*

35. U.S. CONST. amend. XIV, § 1 (providing, in relevant part, that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law").

36. *See Kemmler*, 136 U.S. at 447-48.

37. 565 So. 2d 309 (Fla. 1990) (per curiam) (four to three decision).

38. *See id.* at 311 (stating that "[d]eath by electrocution is not *cruel and unusual* punishment," thereby using the language of the United States Constitution).

39. *See id.* at 310.

40. *See id.* ("The crux of Buenoano's present claim relates to the circumstances surrounding the recent execution of Jesse Tafero . . . [, during which] smoke and flames instantaneously spurted from [Tafero's] head for a distance of as much as twelve inches."). In fact, Tafero was subjected to three discrete "jolt[s]" of electricity for fear that the initial two had not resulted in his death. *See id.* For a narrative account of Tafero's execution, see Denno, *supra* note 28, at 554-

inmate claimed in her petition that the Florida Department of Corrections was not competent to execute her because it had failed to remedy the inadequacies of the electric chair.[41]

The Supreme Court of Florida denied the claim and ruled that an evidentiary hearing was unnecessary because the Florida Department of Corrections had already determined that it could properly perform executions.[42] Thus, the *Buenoano* court did not perceive a judicial issue, but rather, an executive one.[43] Further, the *Buenoano* court was satisfied that the matter had already been resolved.[44]

The *Buenoano* court reinforced its holding by citing a United States Supreme Court case decided under the Eight Amendment.[45] Yet, the Supreme Court of Florida did not cite any Florida case law.[46] Although *Buenoano* upheld the constitutionality of execution in Florida's electric chair, it did not specify whether it was referring to the Florida Constitution, the United States Constitution, or both.

Earlier, the majority had used the phrase "cruel and unusual punishment," thereby invoking the language found in the United States Constitution.[47] Thus, *Buenoano*'s imprecision was furthered by Justice Shaw's dissent.[48] In his dissent, Justice Shaw remarked that executions in Florida must be administered in a fashion that is "neither cruel nor unusual," thereby invoking the disjunctive language of the Florida Constitution.[49]

In *Tillman v. State*,[50] the Supreme Court of Florida specifically called attention to the Florida Constitution's mutually exclusive prohibitions

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41. *See Buenoano*, 565 So. 2d at 311. Buenoano argued, specifically, that "the Department of Corrections [was] 'incompetent to carry out executions'" because it had not replaced the electric chair's "'homemade'" electrode such that she, like Tafero, would be subjected to a "slow death." *Id.* Buenoano argued that the electrode in question was not capable of conducting enough electricity to ensure a constitutional execution. *See id.*

42. The *Buenoano* court determined that the "irregularities" attaching to Tafero's execution were the result of a synthetic sponge, which should not have been used. *See id.*

43. *See id.* The Florida Department of Corrections is the province of the state's executive branch of government. *See id.*

44. *See id.*

45. *See id.* (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947)). The *Francis* Court determined that, following a failed execution attempt due to an "unforeseeable accident," an inmate could be subjected to a second execution attempt by the same means. *See Francis*, 329 U.S. at 464 (stating that "[t]he cruelty against which the Constitution protects a convicted man [sic] is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely") (dictum). The method used in the failed attempt was electrocution, via Louisiana's electric chair. *See id.* at 460.

46. *See Buenoano*, 565 So. 2d at 311.

47. *Id.*

48. *See id.* at 311-12 (Shaw, J., dissenting).

49. *See id.* at 312 (Shaw, J., dissenting).

50. 591 So. 2d 167 (Fla. 1992) (unanimous decision).

against "cruel punishment" and "unusual punishment," thus avoiding the *Buenoano* court's imprecision.[51] In *Tillman*, the appellant, a parolee, had pled guilty to a charge upon the State's agreement to withhold evidence during the penalty phase that would establish aggravating circumstances.[52] But the State breached its end of the bargain and the appellant was sentenced to death.[53] Upon remand, the appellant presented mitigating circumstances.[54] Still, a jury voted eight to four to impose the death penalty,[55] hence giving rise to the *Tillman* court's so-called "'proportionality review.'"[56]

In short, the expression "proportionality review" refers to the appropriateness of a death sentence vis-à-vis the nature and circumstances of a particular conviction.[57] The *Tillman* court, for example, determined that it would be "'unusual'" to execute the appellant in view of his mitigating evidence.[58] The *Tillman* court reached this conclusion by means of a comparative analysis. That is, the *Tillman* court prioritized the fact that other courts had "deemed [the death penalty] improper" in response to similar factual predicates.[59] In turn, the appellant's death sentence was commuted in order to comport with the Florida Constitution's independent prohibition against "unusual punishment."[60]

In the instant case, the Supreme Court of Florida affirmed the trial court's refusal to admit and consider evidence regarding the unusualness of Petitioner's anticipated execution.[61] The instant court found that the exclusion of this evidence was proper in light of Supreme Court of Florida precedent which held that execution by electrocution was not "per se unconstitutional."[62] Having rejected Petitioner's claim, the instant court deferred to both a Ninth Circuit opinion[63] and a Fourth Circuit opinion[64] for reinforcement, but did not invoke Florida law.[65]

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51. *Id.* at 169 n.2 (stating that "[t]he use of the word 'or' [in the phrase 'cruel or unusual punishment' in article 1, section 17 of the Florida Constitution] indicates that alternatives were intended").

52. *See id.*

53. *See id.*

54. *See id.* at 168-69.

55. *See id.* at 168.

56. *Id.* at 169.

57. *See id.*

58. *Id.*

59. *Id.* (citations omitted).

60. *See id.* The appellant's death sentence was reduced to life in prison without the possibility of parole for 25 years. *See id.*

61. *See* Jones v. State, 701 So. 2d 76, 79 (Fla. 1997).

62. *Id.* (citing Medina v. State, 690 So. 2d 1241 (Fla. 1997)).

63. *See id.* (citing Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994).

64. *See id.* (citing Hunt v. Nuth, 57 F.3d at 1327, 1338 (4th Cir. 1995).

65. *See id.*

The instant court's wholesale rejection of Petitioner's argument on the basis of Florida precedent and federal case law was complicated by Justice Shaw's dissent.[66] Emphasizing the importance of federalist principles, Justice Shaw argued that the Supreme Court of Florida should look first to the Florida Constitution when deciding matters that pertain to fundamental individual rights.[67] According to Justice Shaw, the need to consult the United States Constitution is obviated once a government action has been declared infirm under the Florida Constitution.[68]

In his dissent, Justice Shaw cited federal case law.[69] Unlike the majority and Justice Harding, who concurred separately, Justice Shaw used federal authority to delineate the outer limits of permissible punishment under the United States Constitution.[70] Hence, Justice Shaw did not rely on federal case law to elucidate the Florida Constitution's prohibition against "cruel or unusual punishments."[71] In turn, Justice Shaw, having distinguished the Florida Constitution from the United States Constitution, suggested that the Florida Constitution prohibits methods of execution that are "unusual," regardless of whether they are "cruel."[72]

Petitioner claimed that his execution would be "unusual" under the Florida Constitution based on comparative evidence.[73] Specifically, Petitioner intended to establish that other jurisdictions had abandoned electrocution in favor of other execution methods.[74] According to

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66. *See id.* at 82-88 (Shaw, J., dissenting).

67. *See id.* at 83 (Shaw, J., dissenting) ("When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." (quoting Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992))).

68. *See id.* (Shaw, J., dissenting) ("If a government practice fails under the Florida Constitution, *no further analysis is needed* under the federal charter.").

69. *See id.* (Shaw, J., dissenting).

70. *See id.* (Shaw, J., dissenting) (using the expression "constitutional floor" (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947)).

71. *Id.* n.15 (Shaw, J., dissenting) (distinguishing the Florida Constitution's prohibition against "cruel or unusual punishments" from the Cruel and Unusual Punishments Clause of the United States Constitution by citing two Florida cases that draw key distinctions thereunto, namely, *Allen v. State*, 636 So. 2d 494, 497 n.5 (Fla. 1994) and *Tillman v. State*, 591 So. 2d 167, 169 n.2 (Fla. 1992)).

72. *Id.* at 83 (Shaw, J., dissenting) ("Significantly, the framers of article I, section 17 of the Florida Constitution articulated the 'cruel or unusual' prohibition in the alternative, and this Court has always given the prohibition a literal interpretation . . . ."). Justice Shaw then went on to clarify his point: "[T]he prohibition contains no limiting language and, by its plain words, bars punishments that are cruel *or* unusual in any manner." *Id.* (emphasis added). *See also id.* at 84 (Shaw, J., dissenting) ("[I]f the Florida prohibition [against cruel or unusual punishment] is to have any meaning, it must at a minimum bar any punishment that is impermissibly cruel . . . as well as any punishment that is unusual.").

73. *Id.* at 79.

74. *See id.* Petitioner argued "there is a trend away from execution through the use of the

Petitioner, Florida was one of only six jurisdictions in the United States still using the electric chair during the pendency of his appeal.[75]

While Petitioner's definition of "unusual" was in line with Justice Shaw's,[76] it was different from Justice Anstead's.[77] In order to define "unusual," Justice Shaw consulted a regular dictionary and applied the word's plain meaning.[78] Justice Anstead, however, in a separate dissent, suggested that "unusual" in its present context also[79] referred to punishments that invoked "the dark ages and horror stories."[80] By this, Justice Anstead suggested that evolving standards of civility could render a particular method of punishment "unusual."[81] Adopting an originalist approach to constitutional interpretation, Justice Anstead further implied that electrocution was an "unusual" form of punishment simply because it was not in existence when the relevant portions of the Florida Constitution and United States Constitution were drafted.[82]

Apart from being nonconformist, Justice Anstead's interpretation of "unusual" was also nonexclusive.[83] That is, it referred to both the Florida and United States Constitution.[84] Moreover, Justice Shaw indicated that his interpretive approach toward the provision was only meant to be helpful, not conclusory.[85] Thus, instead of collaborating on a singular and cohesive definition of "unusual," pursuant to the Florida Constitution, Justice Shaw and Justice Anstead instead offered competing and somewhat conflicting interpretations.

The instant court differentiated the Florida Constitution from the United States Constitution by indicating that Petitioner sought protection under

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electric chair." *Id.*

75. *See id.*

76. *See id.* at 85 (Shaw, J., dissenting).

77. *See id.* at 88-89 (Anstead, J., dissenting).

78. *See id.* at 85 n.22 (Shaw, J., dissenting) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2514 (4th ed. 1976)).

79. Justice Anstead did not reject Justice Shaw's definition, but merely expanded on it. *See id.* at 89 (Anstead, J., dissenting).

80. *Id.* (Anstead, J., dissenting).

81. *See id.* (Anstead, J., dissenting) (referring to "civilized society" vis-à-vis the "21st century").

82. *See id.* (Anstead, J., dissenting) ("[I]t is also apparent that the drafters of the 'cruel and unusual' and 'cruel or unusual' provisions in our federal and state constitutions, would . . . have found the electric chair unusual *because of its later invention* . . . .") (emphasis added).

83. *See id.* (Anstead, J., dissenting) (referring to "the 'unusual' part of the *federal and state* constitutional limitations" on punishment) (emphasis added).

84. *See id.* (Anstead, J., dissenting) (referring to both the "drafters of the 'cruel and unusual' and 'cruel or unusual' provisions . . . [of] our state and federal constitutions").

85. *See id.* at 85 (Shaw, J., dissenting) ("While I would find lack of approval in a majority of jurisdictions a strong indicator that a method is impermissibly unusual, I recognize that this is not dispositive but rather is simply one factor—albeit a significant one—to be considered.").

both.[86] By using the expression "unconstitutional" without modifying it,[87] however, and freely alternating between the conjunctive language of the United States Constitution and the disjunctive language of the Florida Constitution,[88] the instant court proceeded to collapse this distinction. The instant court ignored basic federalist principles by failing to apply the Florida Constitution before the United States Constitution.[89]

By disregarding the Florida Constitution's independent prohibition against "unusual punishment," the instant court diminished Petitioner's chances for a successful appeal. The plain language of the Florida Constitution proscribes "unusual punishment."[90] Yet there is little in Florida's case law to give the phrase "unusual punishment" meaningful content.[91] Consequently, Petitioner's claim was rejected improvidently.

According to the instant court, Petitioner's claim was properly rejected by the trial court because execution by electrocution is not "per se unconstitutional."[92] What remains unclear, though, is whether this purportedly well-settled principle has ever been reached expressly under the Florida Constitution. In *Buenoano*, for instance, the Supreme Court of Florida stated that "death by electrocution is not cruel and unusual punishment," thereby using the language found in the United States Constitution.[93]

Petitioner claimed that his punishment would be "unusual" because, as a factual matter, electrocution was a comparatively rare method of execution during the pendency of his appeal.[94] Although the *Tillman* court

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86. *See id.* at 77 (comparing the Florida Constitution's prohibition against "cruel *or* unusual punishment" with the United States Constitution's prohibition against "cruel *and* unusual punishment") (emphasis added). Justice Harding emphasized this distinction in his concurring opinion, as well. *See id.* at 80 (Harding, J., concurring).

87. *See id.* at 77.

88. *See, e.g., id.* at 76-77 (using the expressions "cruel and unusual punishment" and "cruel or unusual punishment" in the same paragraph, without explanation or modification).

89. *See id.* at 77. The trial judge concluded as a matter of law that "[c]ruel *or* unusual punishment is defined by the [federal] Courts as the wanton infliction of unnecessary pain." *Id.* (citations omitted).

90. FLA. CONST. art. I, § 17.

91. *See infra* text accompanying notes 94-97.

92. *Jones*, 701 So. 2d at 79.

93. Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990) (emphasis added). Meanwhile, the instant court cited another case, Medina v. State, 690 So. 2d 1241 (Fla. 1997) (per curium), in order to establish that executions in Florida's electric chair were not "per se unconstitutional." *Jones*, 701 So. 2d at 79 n.3. Yet, the holding in *Medina* pertained to competency under the Florida Rules of Criminal Procedure, and was therefore not on point. *See Medina*, 690 So. 2d at 1242. The case was further problematic because it used the phrase "cruel and/or unusual punishment" in its procedural history section, thereby invoking a construction which is not found in either the Florida, or the United States Constitution. *Id.* at 1244.

94. *Jones*, 701 So. 2d at 79 (stating that "only six states currently employ the electric chair as a means of execution" during the pendency of Petitioner's appeal).

gave the phrase "unusual punishment" content, it never contemplated Petitioner's definition because it did not have to.[95] This suggests that Petitioner's claim was one of first impression. Although Justice Shaw[96] and Justice Anstead[97] mentioned the Florida Constitution's prohibition against "unusual punishment" in their dissents, neither invoked jurisdictional precedent.[98]

Federal courts, meanwhile, have not been willing to proscribe a given method of execution simply because it is comparatively rare.[99] *Kemmler* is a good illustration of this.[100] Hence, if "unusual punishments" are to be designated as such on the basis of mere novelty and accordingly banned under the Florida Constitution, Florida must establish its own case law to support such a rule.

The instant case presented the Supreme Court of Florida with an opportunity to expand and otherwise clarify the definition of "unusual punishment" under the Florida Constitution.[101] Instead, by deferring to federal case law, the instant court weakened the Florida Constitution. The *Tillman* court's definition of "unusual punishment" created a gap in Florida case law because it pertained to proportionality review, not method of execution review.[102] By overlooking this gap, the instant court diminished Petitioner's chances for a successful appeal. Furthermore, the instant court disserved future petitioners by rendering the Florida Constitution's independent prohibition against "unusual punishment" jurisprudentially vacant.

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95. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1992).

96. *See Jones*, 701 So. 2d at 82-88 (Shaw, J., dissenting).

97. *See id.* at 88-89 (Anstead, J., dissenting).

98. *See, e.g., id.* at 87 (Shaw, J., dissenting). Justice Shaw's engaging description of the Florida Electric Chair, for instance, as something "befitting the laboratory of Baron Frankenstein," was not supported by any precedent whatsoever.

99. *See generally, e.g.*, Beard, Comment, *supra* note 25, at 460-79 (suggesting that contemporary rarity alone is not a contestable issue under the United States Constitution).

100. *See In re Kemmler*, 136 U.S. 436, 447 (1890). *Accord* Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) ("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.").

101. *See Jones*, 701 So. 2d at 79.

102. *See id.* at 84 n.17 (Shaw, J., dissenting) (using the phrase "method of execution").