**IN THE SUPREME COURT OF FLORIDA**

CASE NO.: SC04-239

LOWER CASE NO.: 3D02-1907

**DARRICK TERRELL ADAWAY,**

Petitioner,

-vs-

**THE STATE OF FLORIDA**,

Respondent

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON THE MERITS

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## INTRODUCTION

Petitioner, **DARRICK TERRELL ADAWAY**, petitions for discretionary review of a decision of the Third District Court of Appeal which affirmed his life sentence for capital sexual battery. *Adaway v. State,* 864 So. 2d 36 (Fla. 3d DCA 2003). (Appendix 1). Petitioner was the appellant in the district court. Respondent, the **STATE OF FLORIDA** was the appellee. In this brief, the parties will be referred to by their proper names. The symbol "R." refers to the record on appeal and the symbol "T." refers to the transcript of proceedings. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The facts of the case are not in dispute. In the early hours of the morning of July 19, 2000, Mr. Adaway, then thirty-six years old, sexually assaulted eleven year old E.B. E.B. was asleep in the bedroom which she shared with her siblings. (T. 144). Mr. Adaway entered the bedroom, woke E.B. and told her to pull down her underwear. (T. 145-146). He then inserted his finger, and then his tongue into E.B.'s vagina. (T. 146, 160, 174, 182-183, 195-196, 207-209). The result of E.B.'s examination at the Rape Treatment Center was consistent with her account of the assault. (T. 176-177).

On November 2, 2000, the State filed an information charging Mr. Adaway with sexual battery on a minor by an adult in violation of section 794.011(2), Fla. Stat., and with lewd and lascivious molestation on a child under twelve in violation of section 800.04(5)(B), Fla. Stat. (R. 1-4). A jury convicted Mr. Adaway of the charges. (T. 261-262, R. 57-58). The Court entered judgement against him in accordance with the verdict. (R. 82-83). Following a sentencing hearing, the court sentenced Mr. Adaway to, *inter alia,* life imprisonment without the possibility of parole for the sexual battery conviction. (R.

85-87).

On appeal to the Third District Court of Appeal, Mr. Adaway claimed that the life imprisonment sentence imposed upon him is disproportionate and unconstitutional. He argued that because the sexual battery involved oral-genital contact without penetration, the life sentence is disproportionate where there was no evidence that the victim suffered any physical or emotional injury. Mr. Adaway acknowledged that in *Banks v. State,* 342 So. 2d 469 (Fla. 1976), this Court affirmed a life sentence for oral-genital contact but argued that subsequent to that decision, the Florida Legislature augmented the sentence for all capital felonies by eliminating the possibility of parole. Thus, according to Mr. Adaway's argument, while this Court has previously upheld a life sentence for conduct identical to his conduct, the life sentence in that case was with the possibility of parole while his life sentence has no possibility of parole.

The Third District Court of Appeal affirmed Mr. Adaway's sentence. The court agreed with the analysis in *Gibson v. State,* 721 So. 2d 363 (Fla. 2d DCA 1998). In that case, the Second District Court of Appeal held that the life sentence

without the possibility of parole for capital sexual battery committed by penile union with the vagina of a twelve year old girl was not cruel or unusual punishment. *Id.* at 367-370. The Third District also cited for authority *Banks v. State, supra.* The court however, noted the concurring opinion in *Welsh v. State,* 850 So. 2d 647, 474 n. 8 (Fla. 2003)(Pariente, J., concurring)("the constitutionality of a mandatory punishment of life imprisonment for the specific crime of sexual battery without penile/vaginal union is a significant concern."). *Adaway v. State,* 864 So. 2d at 38.

This Court granted review.

## ISSUE PRESENTED

**WHETHER LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IS A DISPROPORTIONATE SENTENCE FOR CAPITAL SEXUAL BATTERY COMMITTED BY ORAL-GENITAL CONTACT**

## SUMMARY OF ARGUMENT

The sentence of life in prison without the possibility of parole for capital sexual battery committed by oral-genital contact is not disproportionate. This Court has previously affirmed a sentence of life in prison without the possibility of parole for twenty-five years for capital sexual battery committed by oral-genital contact. The elimination of the possibility of parole does not render the sentence unconstitutional where parole was not a guarantee of early release and where the sentence is still the second most severe sentence in Florida.

When compared to sentences for other crimes in Florida, the sentence is not out of line. Florida has a history of imposing lengthy sentences, it had previously prescribed the death penalty of this offense. The sentence is also not out of line with lengthy sentences imposed for relatively minor offenses under recidivist statutes. Nor is the sentence out of line with sentences imposed for the same conduct in other jurisdictions.

The sentence is evidence that the people of Florida consider sexual battery on a child absolutely intolerable. The sentence is therefore a decision by out Legislature that one capable of

committing such a crime is not fit to live amongst us. Hence, this Court should affirm the sentence.

## ARGUMENT

**LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IS NOT A DISPROPORTIONATE PUNISHMENT FOR CAPITAL SEXUAL BATTERY COMMITTED BY ORAL-GENITAL CONTACT**

Petitioner complains that his mandatory sentence of life in prison without the possibility of parole for his conviction of capital sexual battery is excessive where he committed the offense by placing his mouth in contact with the eleven year old's vagina. Petitioner asks this Court to reverse his sentence and "remand with directions to reduce the sentence." Petitioner's Brief at p. 22. Petitioner cites no authority by which this Court can set the sentence for a crime.

This Court has long recognized that the legislature has the power to define crimes and to set punishments. *See e.g., Rusaw v. State,* 451 So. 2d 469, 470 (Fla. 1984) ("It is well settled that the legislature has the power to define crimes and to set punishments."), *State v. Griffith,* 561 So. 2d 528, 529 (Fla. 1990) (same). "[T]he length of the sentence actually imposed is generally said to be a matter of legislative prerogative." *Hale v. State*, 630 So.2d 521, 526 (Fla.1993).

The legislature has classified sexual battery on a child

twelve years old or less as a capital felony and set the punishment of mandatory life imprisonment for that crime. *See* § 794.011(2)(a), Fla. Stat. (1999). The legislature has provided no alternative penalties for that crime. "The responsibility for making this choice rests with the legislature and is entitled to substantial deference." *Phillips v. State,* 807 So. 2d 713, 717 (Fla. 2nd DCA 2002). "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle,* 445 U.S. 263, 272 (1980). *see also Phillips v. State,* 807 So. 2d 713, 716 (Fla. 2d DCA 2002), *State v. Benitez*, 395 So.2d 514 (Fla.1981). This case is not one of those "exceedingly rare" cases that presents a successful challenge to the proportionality of the sentence.

The Eighth Amendment to the United States Constitution[1] and article I, section 17 of the Florida Constitution[2] have historically been used to protect individuals against the method of punishment, not the length of a sentence. *See Harmelin v.*

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[1]The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[2]Article I, section 17, of the Florida Constitution states: "Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden."

*Michigan*, 501 U.S. 957, 979 (1991); *Hall v. State*, 823 So.2d 757 (Fla.2002). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Harmelin, 501 U.S. at 1001, (Kennedy, J., concurring). This Court has long recognized that the Legislature has the authority to enact mandatory life in prison sentences. *See e.g., O'Donnel v. State*, 326 So. 2d 4 (Fla. 1975), *Owens v. State*, 316 So. 2d 537 (Fla. 1975).

Section 794.011(1)(h), Florida Statutes (1999), defines sexual battery, in part, as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another...." Section 794.011(2)(a), Florida Statutes provides:

> A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injuries the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141.

§ 794.011(2)(a), Florida Statutes (1999). Section 775.082(1), Florida Statutes provides a sentence of life imprisonment without the possibility of parole for the conviction of a capital felony where the death penalty is not imposed.

> The crime of sexual battery on a child less than twelve set forth in Florida Statutes section 794.011(2)(a) is referred to as "capital" sexual battery because the crime historically has been statutorily punished by death. However, in *Bufford v. State,* 403 So. 2d 943, 951 (Fla. 1981), this Court determined that the sentence of death for the crime of "capital sexual battery" constituted cruel and unusual punishment in violation of the Eighth Amendment.

*Welsh v. State*, 850 So. 2d 467, 468 fn 1 (Fla. 2003).

In *Banks v. State*, 342 So. 2d 469 (Fla. 1976), this Court held that a sentence of life imprisonment without the possibility of parole for twenty-five years was not a cruel and unusual punishment for the sexual battery on a child eleven[3] years old or younger. The defendant in that case committed the sexual battery by placing his mouth in contact with an 8 year old boy's penis. *Id.* at 469.

In the instant case, Mr. Adaway, having been convicted of capital sexual battery for placing his mouth in union with eleven year old E.B.'s vagina, complains that the life imprisonment sentence imposed upon him is disproportionate and unconstitutional. He contends that because the sexual battery

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[3] In 1994, the Florida legislature increased the age from "11 years of age or younger" to "less than 12 years of age." *See* Chapter 84-86 § 1, Laws of Florida.

involved oral-genital contact without penetration, the life sentence is disproportionate where there was no evidence that the victim suffered any physical or emotional injury.

Mr. Adaway acknowledges the decision in *Banks v. State*, but argues that subsequent to that decision, the Florida Legislature augmented the sentence for all capital felonies by eliminating the possibility of parole.[4] Thus, according to Mr. Adaway's argument, while this Court has previously upheld a life sentence for conduct identical to his conduct, the life sentence in that case was with the possibility of parole while his life sentence has no possibility of parole. His argument then, is that the loss of the possibility of parole renders his life sentence for capital sexual battery by oral-genital contact disproportionate.

In *Gibson v. State*, 721 So. 2d 363 (Fla. 2d DCA 1998), the Second District Court of Appeal, after conducting a thorough proportionality analysis, held that a sentence of life imprisonment without the possibility of parole was a proportionate sentence for a conviction for capital sexual battery. *Id.* at 369. The defendant in that case placed his penis in contact with his 8-year-old stepdaughter's vagina. *Id.*

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[4]See Chapter 95-294, § 4, Laws of Florida (1995).

at 364. Mr. Adaway argues that the decision in *Gibson* is not applicable to his case because the court in that case explicitly stated that the opinion did not address the constitutionality of the mandatory sentence for other conduct that is defined as capital sexual battery. He claims that capital sexual battery by oral-genital contact falls under the "other conduct" not addressed in *Gibson*. Mr. Adaway also cites Justice Pariente's concurring opinion in *Welsh v. State*, *supra.* at 474 fn 8 (Fla. 2003), in support of his argument. In that opinion, Justice Pariente expressed her concern about the constitutionality of the mandatory life imprisonment for capital sexual battery not involving penile-vaginal union. *Id.*

PROPORTIONALITY ANALYSIS

As mentioned above, the court in *Gibson v. State*, conducted a thorough proportionality analysis of the mandatory life imprisonment sentence for capital sexual battery by genital-genital contact and concluded that the sentence is a proportionate punishment. The court, acknowledging that the contours of the proportionality analysis are unclear, utilized the following three criteria enunciated by the Court in *Solem v.*

*Helm*, 463 U.S. 277 (1983): (i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for the commission of the same crime in other jurisdictions. *Gibson v. State*, 721 So. 2d at 368.

In *Cotton v. State*, 769 So. 2d 345 (Fla. 2000), this Court cited with approval the proportionality analysis utilized in *Gibson. Id.* at 354-355. In applying that analysis to the facts of the instant case, it becomes readily apparent that Defendant's sentence is commensurate to the gravity of the crime that he committed against the child.

(i) **<u>Gravity of the Offense and Harshness of the Penalty</u>**

"The legislature, by setting sexual battery of a child apart from other sexual batteries, has obviously found that crime to be of special concern." *Rusaw v. State,* 451 So. 2d at 470. The court in *Gibson* did not question the legislature's wisdom in deciding that this crime was a "very grave offense warranting severe punishment." *Gibson v. State,* 721 So. 2d at 368. In describing the gravity of the offense, the court stated:

> Even when it leaves no physical scars, it can create emotional damage that lasts a

> lifetime. There is evidence that victims of abuse become abusers and that this crime can transmit its injuries across generations. *See* Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use Of Norplant As A Condition Of Probation,* 78 Iowa L.Rev. 779, 794 (March 1993); Charles A. Phipps, *Children, Adults, Sex And The Criminal Law: In Search Of Reason,* 22 Seton Hall Legis. J. I, 107 (1997). Because victims hesitate to report this crime and proof of the offense is often difficult to obtain, there is a risk that perpetrators will believe they can escape detection and punishment. As a result, there is a need for a harsh penalty to act as sufficient deterrent.

*Gibson v. State*, 721 So. 2d at 368-369. *See also State v. Harris*, 844 S.W.2d 601 (Tenn. 1992)(describing injury to child caused by touching child in her genital area over her shorts as "the traumatic memory of this battery may remain with the victim for life, perhaps to fester and manifest in as yet unknown manners."). *Cf. Coker v. Georgia*, 433 U.S. 584, 597 (1977)(describing rape a the "ultimate violation of self" short of homicide).

Mr. Adaway, however, attempts to make a distinction between penis-vaginal contact with a child and oral-genital contact with the child. He suggests that his conduct in performing cunnilingus on the child is less grave than if he had put his penis in contact with the child's vagina. Our legislature sees

no such distinction. Section 794.011(2)(h) defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object...." The act makes no distinction between oral-genital contact and genital-genital contact, they both result in the invasion of the child's genitalia and constitute sexual battery.

Florida is not the only state which makes no distinction between oral-genital contact and genital-genital contact. Louisiana, for example, defines rape to include "[a]nal, oral, or vaginal sexual intercourse...." La. R.S. 14:41(A) (2004). Rhode Island defines "Sexual penetration" to include "sexual intercourse, cunnilingus, fellatio, and anal intercourse..." R.I. G.L. 1956 § 11-37-1(8). Texas defines "Aggravated Sexual Assault" to include "causes the sexual organ of a child to contact or penetrate the mouth ... of another person, including the actor." TX. Pen. § 22.021(B)(iii). Mississippi's definition of "sexual penetration" includes cunnilingus. Miss. Code. Ann. § 97-3-97 (2004). Clearly, since it is the invasion into the child's genitalia that is prohibited, it matters not by what method the invasion is accomplished. In the instant case then, the fact that Mr. Adaway committed the sexual battery with

his mouth does not decrease the severity of the crime; it is still an invasion into the child's genitalia, it is sexual battery.

(ii) **Sentences Imposed on Other Criminals in this Jurisdiction**

The *Gibson* court noted that Florida has essentially always utilized the death penalty and has a history of imposing lengthy prison sentences for many offenses. *Gibson v. State*, 721 So. 2d at 369. The court also noted the difficulty in comparing the type of sexual offenses such as occurred in that case, penis-vagina union, to other crimes against persons. It nevertheless observed that

> [m]urder takes a person's life with no chance that it can be returned; capital sexual battery inflicts lasting emotional scarring and takes a child's innocence with no chance that it can be returned. Robbery steals a person's property and risks personal safety; capital sexual battery steals a person's sense of self with an equal risk to personal safety.

*Gibson v. State*, 721 So. 2d at 369. The court concluded that the punishment of life in prison without the possibility of parole is not disproportionate to the punishment provided for

other offenses involving "cherished personal rights." *Id.*

As mentioned above, in *Banks v. State*, this Court affirmed a sentence of life in prison without the possibility of parole for twenty-five years for capital sexual battery committed by placing the defendant's mouth in contact with an 8 year old boy's penis. *Banks v. State,* 342 So. 2d at 470. Prior to the elimination of parole for capital offenses, life imprisonment with no possibility of parole for twenty-five years was the second most severe sentence that could have been imposed in Florida, death penalty being the most severe. *See*, Section 775.082(1), Fla. Stat. (1975). With the elimination of the possibility of parole, life imprisonment is now the second most severe sentence that can be imposed in Florida. Defendant's sentence in this case is consistent with the sentence upheld in *Banks* since both sentences are the second most severe sentence that can be imposed in Florida.

Sentences Imposed on Other Criminals in Other Jurisdictions

Moreover, when compared to sentences upheld by the United States Supreme Court under Eighth Amendment analysis, Florida's mandatory life imprisonment without the possibility of parole

for capital sexual battery is not disproportionate. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court affirmed a sentence of life in prison without the possibility of parole for a conviction of possession of 672 grams of cocaine. The Court in that case rejected the defendant's argument that the sentence was unconstitutional because it was disproportionate to the crime and because it was mandatory.

In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court affirmed the defendant's life in prison sentence for a third degree felony of obtaining $120.75 by false pretenses. The sentence in that case was imposed pursuant to the state's recidivist statute. In affirming the sentence, the Court acknowledged the state's valid interest in dealing in a harsher manner with those class of persons who, by their repeated criminal acts, have shown that they are incapable of conforming to the norms of society. *Id.* at 276. *See also Lockyer v. Andrade,* 538 U.S. 63 (2003) (affirming life sentence for two counts of petty theft under California's Three Strikes law.); *Ewing v. California,* 538 U.S. 11 (2003)(affirming under Three Strikes law a 25 year to life sentence for theft of three golf clubs).

In *State v. Guthmiller,* 667 N.W.2d 295 (S.D. 2003), the Supreme Court of South Dakota affirmed the defendant's sentence of life in prison without the possibility of parole based on the testimony of the four-year-old victim that the defendant "licked my butt." *Id.* at 299. Although that offense was the defendant's first sexual offense, his prior convictions were drug related, the defendant was sentenced as a habitual criminal. The court there held that considering the defendant's conduct and his past criminal history, the sentence was not disproportionate. *Id.* at. 311-312. Although the sentences in *Harmelin, Rummel, Lockyer, Ewing* and *Guthmiller* were based on the states' recidivist statutes, the fact remains that the sentences were in fact for relatively minor offenses. Surely, then if the sentences in those cases were not unconstitutional, Mr. Adaway's sentence of life in prison without the possibility of parole for capital sexual battery is not so out of line with those sentences so as to render the sentence unconstitutional.

(iii) **Sentences Imposed For The Same Crime In Other Jurisdictions.**

> Justice Kennedy suggests that precedent establishes several common Eighth Amendment

> principles that effectively require the courts to give broad deference to the substantive penological policies announced by the state legislature without undue comparison to the policy decisions of other states.

*Gibson v. State,* 721 So. 2d at 368, *citing Harmelin v. Michigan,* 501 U.S. at 998-99. The court in *Gibson* compared Florida's sentence to its neighbouring states, Mississippi, Alabama and Georgia. It found that

> [i]n Mississippi, sexual battery is defined similarly to capital sexual battery in Florida. See Miss.Code Ann. § 97-3-95(1)(d) (1997). A person who is convicted of sexual battery in Mississippi and is 18 years of age or older shall be imprisoned for life or such lesser term of imprisonment as the court may determine, but not less than 20 years. See Miss.Code § 97-3-101(3) (1997). Alabama's legislature defines rape in the first degree similarly to the Florida Legislature's definition of sexual battery. See Ala.Code 13A-6- 61(a)(3) (1997). Those convicted of rape in the first degree in Alabama can be punished by imprisonment for life or not more than 99 years or less than 10 years. See Ala.Code 13A-5-6(a)(1) (1997). Finally, Georgia's statute is hard to equate to Florida's statute because Georgia still relies on the common law concept of "carnal knowledge" to define rape. However, a person convicted of the offense of rape in Georgia may be punished by death, by imprisonment for life, or by imprisonment for not less than 10 or more than 20 years. [FO] See Ga.Code Ann. § 16-6-1(b).

*Gibson v. State,* 721 So. 2d at 369. The court concluded that although it had no data to determine whether Florida is the only state which consistently imposes the mandatory life without the possibility of parole for capital sexual battery, Florida's sentence is not so out of line as to render the sentence unconstitutional. *Id.*

Louisiana defines aggravated rape to include "[a]nal, oral, or vaginal sexual intercourse...." La. R.S. 14:41(A). Louisiana provides the death penalty or life in prison at hard labour without the benefit of parole for aggravated rape of a child less than twelve years old. *See* La. R.S. 14:42(C) (1995). In *State v. Wilson,* 685 So. 2d 1063 (La. 1996), the Louisiana Supreme Court upheld the statue against an excessive punishment claim. The court concluded that "given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old." *Id.* at 1070. The court was not influenced by the fact that Louisiana is currently the only state to prescribe the death penalty for this crime.

Instead, it noted that new laws would never be passed if no state could ever take the initiative to be the first. *Id.* at 1069.[5] *See also State v. Brown,* 746 So. 2d 643 (La.App. 4th Cir. 1999)(affirming sentence of life in prison at hard labour without the possibility of parole for rape of six year old girl); *State v. Barnes,* 800 So. 2d 1124 (La. App. 4th Cir. 2001) (affirming, *inter alia*, sentence of life in prison at hard labour for rape of 10 year old girl).

In South Dakota, the penalty for a first sexual offense against a victim less than thirteen years of age by a person twenty-six years of age or older is up to life in prison with a twenty-five years mandatory minimum. A second offense carries a mandatory life sentence without parole. *See State v. Guthmiller,* 667 N.W.2d at 308. In that case, the four-year-old victim testified that the defendant "licked my butt." *Id.* at 299.

In *State v. Higginbottom*, 324 S.E.2d 834 (N.C. 1985), the Supreme Court of North Carolina affirmed the defendant's life in

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[5]The Court predicted that other state's will likely follow Louisiana's lead in providing the death penalty for the rape of a child if in the future it sees a "drastic reduction in the incidence of child rape, an increase in cooperation by rape victims in the apprehension and prosecution of rapists, and greater confidence in the role of law on the part of the people." *State v. Wilson,* 685 So. 2d at1073.

prison sentence for a first degree sexual offense. The defendant in that case committed the offense by making the four year old girl "suck on his penis." *Id.* The court, noting that the legislature had determined that "whether or not accompanied by violence or force, acts of a sexual nature when performed upon a child are sufficiently serious to warrant the punishment", held that the sentence was not so disproportionate as to constitute a violation of the Eighth Amendment. *Id.* at 837. *See also State v. Green,* 502 S.E.2d 819 (N.C. 1998)(affirming thirteen-year-old defendant's sentence of, *inter alia,* life imprisonment for first-degree sexual offense against adult woman).

For the instant offense then, Mr. Adaway could be sentenced to life in prison in Alabama, Mississippi and South Dakota and could be sentenced to death in Louisiana.[6] His sentence of life in prison with no possibility of parole is therefore not so out of line with the other states as to render it unconstitutional.

As mentioned above, in *Banks v. State,* this Court affirmed the sentence of life imprisonment without the possibility of parole for twenty-five years for capital sexual battery

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[6]See Appendix 2, for a compilation of the definition and punishment for oral-genital contact on a child in all 50 states.

committed by placing the defendant's mouth in contact with an eight year old boy's penis. *Banks v. State,* 342 So. 2d at 470. The defendant in that case was determined to be a mentally disordered sex offender, yet, this Court felt

> constrained to point out that the totality of the circumstances, particularly in view of the psychiatric reports, indicate that a re-evaluation of the sentence may be in order; but this Court has long been committed to the proposition that if the sentence is within the limits prescribed by the legislature, we have no jurisdiction to interfere.

*Id.* at 670. Surely, if life imprisonment without the possibility of parole for twenty-five years was not a disproportionate sentence for a mentally disordered offender, life with no possibility of parole for the same offense committed by an offender who is not mentally disordered is not disproportionate. This is so because the possibility of parole came with no guarantee that prisoner would ever be paroled. As the court noted in *Gibson,* "[f]or many prisoners, the sentence imposed for capital sexual battery prior to October 1995 may result in a sentence just a long as a sentence imposed after 1995." *Gibson v. State,* 721 So. 2d at 369. This is so because "the legislature has made clear that no inmate has an absolute

legal right to receive parole. Instead, the decision to parole an inmate from the incarcerative portion of his sentence is an act of grace extended by the state." *Tubb v. Florida Parole Com'n,* 850 So. 2d 616, 619 (Fla. 5th DCA 1991), citing § 947.002(6), Fla. Stat. (1989).

Further, prior to the elimination of parole for capital offenses, life imprisonment with no possibility of parole for twenty-five years was the second most severe sentence that could have been imposed in Florida, the death penalty being the most severe. *See*, section 775.082(1), Fla. Stat. (1975). With the elimination of the possibility of parole, life imprisonment is now the second most severe sentence that can be imposed in Florida. Mr. Adaway's sentence is consistent with the sentence upheld in *Banks* since both sentences are the second most severe sentence that can be imposed in Florida.

Additionally, that Mr. Adaway is not eligible for parole is no guarantee that he will in fact spend the rest of his life in prison. There still remains the possibilities of retroactive legislative reduction and executive clemency. *Harmelin v. Michigan,* 501 U.S. at 996.

"In a democratic society legislatures, not courts, are

constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia,* 408 U.S. 238, 383 (1972). *See also*, *Penry v. Lynaugh.* 492 U.S. 302, 331 (1989)("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."). *See also Stanford v. Kentucky*, 492 U.S. 361 (1989) ("'First' among the '"objective indicia that reflect the public attitude toward a given sanction"' are statutes passed by society's elected representatives."). In *Coker v. Georgia,* 433 U.S. 584 (1977), the Court suggested that in determining whether a particular penalty is excessive, courts should take into account the "evolving standards of decency", and in making that determination, the courts should look to the conceptions of modern American society as reflected in state legislations. *Id.* at 592. In this State, the sentence of life in prison with no possibility of parole as punishment for capital sexual battery by oral-genital contact is evidence that Florida considers this offense "one of the most heinous and despicable offenses imaginable..." *Kendry v. State,* 517 So. 2d 78, 79 (Fla. 1st DCA 1987).

**CONCLUSION**

Based upon the foregoing argument and cited authorities, this Court should affirm the decision below.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to Roy A. Heimlich, Assistant Public defender, 1320 N.W. 14th street, Miami, Florida 33125 on this 23rd day of June 2004.

______________________________

PAULETTE R. TAYLOR
Assistant Attorney General

**CERTIFICATE OF TYPE SIZE AND STYLE**

I HEREBY CERTIFY that this brief is composed in 12 point Courier New type.

PAULETTE R. TAYLOR
Assistant Attorney General

**IN THE SUPREME COURT OF FLORIDA**

CASE NO.: SC04-239

**DARRICK T. ADAWAY,**
Petitioner,

vs **APPENDIX**

**THE STATE OF FLORIDA,**
Respondent.

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**INDEX TO APPENDIX**

**Appendix 1** District Court Opinion

**Appendix 2** Chart of definition and punishment for same offense in other jurisdictions

# APPENDIX 1

## APPENDIX 2

| STATE | STATUTES | DEFINITION | PENALTY |
|---|---|---|---|
| ALABAMA | Codes of Ala. 13A-6-60 13A-6-63 13A-6-66 | Sodomy: Deviate sexual intercourse: involving sex organs of one person and the mouth or anus of another (victim less than 12 years old) | Class A felony: life or not more than 99 years or less than 10 years |
| ALASKA | Alaska Stat. § 11.41.434 § 11.81.900(58) § 12.55.125(c) | Sexual penetration - includes oral contact (victim less than 13) | Class A felony: not more than 20 years in prison |
| ARIZONA | Arizona Stat. § 13-601.01 | Dangerous crimes against children: sexual contact with minor 12 or younger | Life with no possibility of parole for 35 years |
| ARKANSAS | Arkansas Codes § 5-14-101 § 5-14-103 § 5-14-125 | Rape includes "Deviate Sexual Activity" includes oral contact, victim less than 14 | Class Y felony: not less than 10 years or more that 40 Years or life |
| CALIFORNIA | Cal. Pen. Code § 288(a) | Oral Copulation: victim under 14 and Perpetrator more than 10 Years older than victim | 3, 6, or 8 years in prison |
| COLORADO | C.R.S. 18-3-405 18-1.3-401(IV) | Sexual assault on a child, victim less than 15, perpetrator more than 4 years older than victim | 2-8 years imprisonment |
| CONNECT-ICUT | Conn. Gen. Stat § 53a-65 § 53a-70 | "Sexual Intercourse" includes cunnilingus, sexual intercourse with | Class A felony: other than murder, not |

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| victim under 13 and perpetrator more than 2 years older than victim, is sexual assault in the first degree, class A felony | less than 10 nor more than 25 years in the prison |

| DELAWARE | Del. Code<br>11 Del. C. §773<br>11 Del. C. §761<br>11 Del. C. 4205 | "Sexual Intercourse" felony: includes cunnilingus sexual intercourse, with victim less than 12 is rape in the first degree | Class A not less than 15 years up to life in prison |
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| FLORIDA | Fla. Stat.<br>§ 794.011<br>§ 775.082 | Sexual battery, including oral sexual contact with child 12 years old or less is a capital offense | Capital offense punish-able by death or life in prison without parole |
| GEORGIA | Official Code of Ga.<br>16-6-2<br>16-6-4<br>17-10-6.1 | sexual act involving sex organ of one person and mouth or anus of another is sodomy. Sodomy on child less than 16 is aggravated child molestation | Not less than 10 nor more than 30 years, mandatory 10 years in prison |
| HAWAII | Haw. Rev. Stat.<br>§ 707-700<br>§ 707-730<br>§ 706-659 | "Sexual penetration" includes cunnilingus, sexual penetration of child less that 14 years old is sexual assault in the first degree, a class A felony | Class A felony: indeterminate term of imprisonment of 20 years with-out possibility of parole |
| IDAHO | Idaho Code<br>§ 18-1508 | oral-genital contact with victim less than 16 is lewd conduct | Imprisonment for term not more than life |
| ILLINOIS | Il. Com. Stat. | "Sexual penetration" | Class X |

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| | 720 ILCS 5/12-14.1(a)(1) 5/12-12(f) 730 ILCS 5/5-8-1 | includes contact between sex organ and mouth sexual penetration of a child under 13 years of age is predatory criminal sexual assault, a class X felony | felony: Imprisonment for not less than 6 years not more than 30 years |
| INDIANA | Burns Ind. Code Ann. § 35-41-1-9 § 35-42-4-3 § 35-50-2-4 | "Deviate sexual conduct" Includes contact between sex organ and mouth deviate sexual contact with a child less than 14 years old is child molesting, a Class A felony if the offender is at least age 21 | Imprisonment for a fixed term of not more than 30 years |
| IOWA | Iowa Code § 702.17 § 709.1 § 709.3 § 909.9 | "Sex act" includes contact between mouth and genitalia, sex act involving a child less than 12 years old is sexual abuse in the second degree, a class B | Class B felony: confinement for not more than 25 years |
| KANSAS | Kansas Statutes § 21-3501 § 21-3506 § 21-4704 | "Sodomy" includes oral contact with female genitalia. Aggravated criminal sodomy when victim is under 14 years of age, Level 2 personal felony | Sentencing grid range of 109-123 months recommended 117 months in prison |
| KENTUCKY | Ky. R. Stat. 510.010 510.040 | "Deviate sexual inter-course" includes sex organs of one person and | Class A felony: not less than 20 years nor |

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| | 532.020 | mouth or anus on another, sexual intercourse with a person less than 12 years old is a class A felony | more than 50 years, or life imprisonment |
| LOUISIANA | La.R.S.<br>14:41<br>14:42 | “Aggravated rape” includes oral sexual intercourse on a person under 13 years old | Life in prison without parole, if the victim is less than 12 years old, possibly death |
| MAINE | M.R.S.<br>17-A M.R.S<br>§ 251<br>§ 253<br>§ 1252 | “Sexual act” includes oral-genital contact, sexual act with a person less than 14 years old is gross sexual assault, a Class A crime | Class A crimes: definite term of imprisonment not to exceed 40 years |
| MARYLAND | Md.Criminal Law Code<br>§ 3-301<br>§ 3-306 | ”Sexual act” includes cunnilingus, sexual act upon a child under 14 years old by a person more than 4 years older than the victim is a sexual offense in the second degree | Imprisonment not exceeding 20 years |
| MASSACHU-SETTS | Laws of Massa-chusetts<br>GL ch. 265<br>§ 23 | Rape, including unnatural sexual intercourse, with child under 16 years old | Imprisonment for life or for any term of years |
| MICHIGAN | Michigan Compiled Laws | “Sexual penetration” includes cunnilingus, | Imprisonment for life or any |

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| | MCL<br>§ 750.520 | sexual penetration of a<br>child under 13 years<br>is criminal sexual<br>conduct, a first degree<br>felony | term of years<br>old |
| MINNESOTA<br>payment<br>fine | Minn. Stat.<br>§ 609.341<br>§ 609.342 | "Sexual penetration"<br>includes cunnilingus,<br>more<br>sexual penetration of a<br>years<br>child less than 13 years<br>old by a person more than<br>36 months older than the<br>child is criminal sexual<br>Conduct in the first<br>degree | Imprisonm<br>ent<br>for not<br>than 30<br>and/or<br>of $40,000 |
| MISSISS-<br>IPPI | Miss. Code<br>§ 97-3-95<br>§ 97-3-97 | "Sexual penetration:<br>includes cunnilingus,<br>such lesser<br>penetration of a child<br>under age 14 is sexual<br>battery if the offender<br>is 24 months or more<br>older than the child | Life in prison<br>or<br>term as<br>the<br>court may<br>determine but<br>not less than<br>20 years |
| MISSOURI<br>if<br>cannot be | R.S.Mo.<br>§ 566.010<br>§ 566.062 | "Deviate sexual inter-<br>course" includes genitals<br>a term<br>of one person and, *inter*<br>years not<br>*alia*, mouth, tongue of<br>another, deviate sexual<br>intercourse with a person<br>who is less than 14 years<br>old is statutory sodomy<br>in the fist degree | life imprison-<br>ment or<br>of<br>less than 5,<br>the victim is<br>less than 12,<br>the term of<br>years<br>less than 10 |
| MONTANA | Mont. Code<br>§45-2-101(67) | "Sexual intercourse"<br>includes penetration of | Life imprison-<br>ment or for |

| § 45-5-503 | the vulva or anus of one person by a body member of another person. Sexual intercourse with a victim who is less than 16 years old and the offender is 3 or more years older than victim is sexual assault | term of years not less than 4 or more than 100 |
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| NEBRASKA | R.R.S. Neb.<br>§ 28-105<br><br>§ 28-318(6)<br>§28-319 | "Sexual intercourse" includes cunnilingus,<br><br>sexual intercourse with a person who is less than 16 years old by a person who is 19 years or older is sexual assault in the first degree, a Class II felony | maximum 50 years in prison |
| NEVADA | N.R.S<br>§ 200.364<br><br>§ 200.366 | "Sexual penetration" includes cunnilingus,<br><br>sexual penetration of a child less than 16 years old is sexual assault, a category A felony | Life with the possibility of a parole after 20 years if the child is under 14 years old |
| NEW HAMPSHIRE | RSA<br>§ 632-A:1<br><br>§ 632-A:2<br><br>§ 651:6 | "Sexual penetration" includes cunnilingus,<br><br>sexual penetration of a child under age 13 is aggravates felonious sexual assault | Extended term of imprisonment with minimum of not more than 10 years and maximum of not more than 30 years |
| NEW JERSEY | N.J. Stat.<br>§ 2C:14-1<br>§ 2C:14-2<br><br>§ 2C:44-1<br><br>§ 2C:43:6.4 | "Sexual penetration" includes cunnilingus,<br>sexual penetration of victim who is under 13 is aggravated sexual assault, a first degree crime | Presumptive sentence of 15 years in prison followed by community supervision for life |
| NEW MEXICO | N.M. STAT.<br>§ 30-9-11 | "Criminal sexual penetration" includes | 18 years imprisonm |

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| | § 31-18-15 | cunnilingus, sexual penetration in the first degree where child victim is less than 13 | ent, basic sentence |
| NEW YORK | N.Y.Penal.L. § 130.00 § 130.35 § 130.50 § 70.02 § 60.05 | “Oral sexual conduct” is criminal sexual act in the first degree when committed upon a person who is less than 13 years old by a person who is 18 years old or more, a class B felony violent felony offense | Indeterminate sentence of imprisonment, must be at least 5 years and not more that 25 years |

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| NORTH-CAROLINA | N.C. Gen. Stat. § 14-27.1 § 14-27.4 § 15A-1340.17 | ”Sexual act” includes cunnilingus, sexual act with a child who is under 13 is a sexual offense in the first degree, a Class B1 felony | Maximum sentence of 372 months in prison |
| NORTH DAKOTA | N.D. Cen. Code § 12.1-20-03 § 12.1-32-01 § 12.1-20-02 | “Sexual act” includes contact between mouth and vulva, sexual act on a child less than 15 years Old is gross sexual imposition, a Class A felony | Maximum, 20 years in prison and/or $10,000 fine |
| OHIO | O.R.C. § 2907.01 § 2907.02 § 2929.14 | “Sexual conduct” includes cunnilingus, sexual conduct with person less that 13 years of age is rape, a first degree felony | 3-10 years in prison; life in prison if victim is less that 10 years Old |
| OKLAHOMA | 21 Okl. St. § 886 § 888 | “Detestable and abominable crime against nature” includes oral sodomy, sodomy committed by person over 18 years old on victim who is under 16 years old is forcible sodomy | Not more than 20 years imprisonment |
| OREGON | ORS § 163.305 § 163.405 § 161.605 § 161.535 | “Deviate sexual intercourse” includes contact between sex organ of one person and mouth of another. Deviate sexual intercourse on a victim who is under 12 | 20 years imprisonment |

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| | | years old is sodomy in the first degree, a Class A felony | |
| PENNSYL-VANIA | 18 Pa.C.S. § 3101 § 3121 | "Sexual intercourse" includes "*per os*", sexual intercourse with child who is less than 13 years of age is a felony of the first degree | Imprisonment for not more than 40 years |

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| RHODE ISLAND | R.I. Gen. Laws § 11-37-1 § 11-37-8.1 § 11-37-8.2 | “Sexual penetration” includes cunnilingus. Sexual penetration with a person 14 years of age and under in first degree child molestation sexual assault | Imprisonment for not less than 20 years an may be imprisoned for life |
| SOUTH CAROLINA | S.C. Code § 16-3-651 § 16-3-655 § 16-3-653 | “Sexual battery” includes cunnilingus. Sexual battery on a child who is 14 years of age or less but who is at least 11 years of age is criminal sexual conduct in the second degree | Imprisonment for not more than 20 years |
| SOUTH DAKOTA | S.D. Codified Laws § 22-22-1 § 22-22-2 | “Sexual penetration” includes cunnilingus. Sexual penetration on a victim who is 10 years of age but less than 16 years of age by a person who is at least 3 years older than the victim is rape in the third degree, a Class 3 felony | Minimum 10 years imprisn-ment for first conviction |
| TENNESSEE | Tenn. Code § 39-13-501 § 39-13-522 § 40-35-110 § 40-35-111 § 40-35-112 | “Sexual penetration” includes cunnilingus. Rape of a child includes the unlawful sexual penetration of victim who is less than 13 years of age; a Class A felony. | Imprisonment for not less than 15 nor more than 25 years if no prior convictions |
| TEXAS | Tex. Penal Code § 12.32 | ”Aggravated sexual assault” means, *inter* | Imprisonment for life or |

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§ 21.01 *alia*, causing the sexual any term of
not
§ 22.021 organ of a child to more than 99
contact or penetrate the years or
less mouth of the actor. If
than 5 years.
the victim is younger May also be
than 14 years of age, assessed
fine
aggravated sexual assaultof not more
is a felony of the first than
$10,000.00
degree

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| UTAH | Utah Criminal Code<br>§ 76-5-403.1 | oral-genital contact with a child who is under the age of 14 is sodomy on a child, a first degree felony | Imprisonment for an indeterminate term of not less than 6, 10, or 15 years and may be for life |
| VERMONT | Vt. Stat.<br>13 V.S.<br>§ 3251<br>§ 3252 | "Sexual act" includes contact between mouth and vulva. Sexual act with a person who is under the age of 16 is sexual assault | Imprisonment for not more than 20 years or $10,000.00 fine or both |
| VIRGIN ISLAND | Virgin Island Code<br>14 V.I.C.<br>§ 1699<br>§ 1700 | "Sodomy" is carnal knowledge by mouth. Sodomy with a person who in under the age of thirteen is aggravated rape in the first degree | Imprisonment for life or for any term of years, but not less than 15 years mandatory minimum. |
| VIRGINIA | Va. Code<br>§ 18.2-67.1 | "Forcible sodomy" includes cunnilingus on a person who is less than 13 years of age | Imprisonment for life or for any term not less than 5 years. |
| WASHINGTON | Rev. Code of Wash.<br>§ 9A.44.073<br>§ 9A.20.021 | "Sexual intercourse" includes contact between sex organs of one person and mouth of another. Sexual intercourse with | Imprisonment for life or by fine of $50,000 or both |

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| | | a child who is less than 12 years old is rape of a child in the first degree, a class A felony | |
| WEST VIRGINIA | W. Va. Code § 61-8B-1 § 61-8B-2 § 61-8B-3 | “Sexual intercourse” includes contact between the sex organs on one person and the mouth of another. Sexual intercourse by a person who is at least 14 years old with a child who is 11 years old or less is sexual assault in the first degree | Imprisonment for not less that 15 nor more than 35 years or fined not less than $1,000.00 nor more than $10,000.00 and imprisonment for not less than 15 nor more than 35 years |
| WISCONSIN | Wis. Stat. § 939.50 § 948.01 § 948.02 | “Sexual intercourse” includes cunnilingus. Sexual intercourse with with person who has not attained the age of 13 is a first degree sexual assault, a Class B felony | Imprisonment not to exceed 60 years |
| WYOMING | Wyo. Stat. § 6-2-301 § 6-2-303 § 6-2-306 | “Sexual intrusion” includes cunnilingus. Sexual intrusion of a victim who is less than 12 years of age by a person who is at least 4 years older than the victim is sexual assault in the second degree | Imprisonment for not more than 20 years |