IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-239

DARRICK TERRELL ADAWAY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISIONS

FLORIDA STATUTES

INTRODUCTION

This cause is before the Court on petition for discretionary review. The parties will be referred to as they stood in the trial court. The District Court affirmed defendant's sentence, expressly declaring valid the provision of Section 775.082(1), Florida Statutes (1999), that imposes a mandatory sentence of life without parole for the unlawful oral/vaginal union that constitutes the capital sexual battery in this case.

For purposes of this brief, the symbol "R." refers to the record on appeal filed in the District Court, the symbol "T." refers to the transcripts filed in the District Court, and the symbol "A." refers to the Appellant's Appendix, containing duplicate copies of papers filed in the District Court.

STATEMENT OF THE CASE AND FACTS

Mr. Adaway was charged with capital sexual battery, in violation of Section 794.011(2), Florida Statutes. Count 1 of the information alleged that Adaway was a person over the age of 18 years of age and that, on or about July 19, 2000, he had placed his mouth in union with the vagina of E.B., a person less than 12 years of age (R. 2, A. 1).

Mr. Adaway was also charged with lewd and lascivious molestation, in violation of Section 800.04(5)(b), Florida

Statutes. Count 2 of the information alleged that on or about July 19, 2000, Adaway had intentionally touched E.B.'s genitals in a lewd and lascivious manner (R. 3, A. 1).

At trial E.B. testified that she had been born on January 18, 1989 (T. 139). She said that her aunt's boyfriend, defendant Adaway (who E.B. called "Cadillac"), lived in the same house as she did (T. 143-45). One night Adaway came into the room where she was sleeping (T. 143-45). She testified that "[h]e told me to pull down my drawers. And he stuck his finger inside of my private part" (T. 145). She testified further that Adaway "[s]tuck [his tongue] inside of my private part" (T. 146).

E.B.'s mother testified that she got up to go to the bathroom during the night of July 19, 2000, and saw Adaway coming out of the room where E.B. was sleeping; she went in to check on her daughter (T. 158). E.B. told her Adaway had "stuck his finger in her vagina [then] started sucking on her" (T. 160).[1]

Detective Borges testified that E.B. told him Adaway had "inserted his finger in and out of her vagina" and "licked her

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[1] According to E.B.'s testimony, her age was 11 years, 6 months on July 19, 2000. Prior to trial the court had granted a motion to admit child hearsay, and ruled that E.B.'s statements to her mother and to Detective Borges on July 19, 2000 were admissible (R. 16-23).

vagina" (T. 182-83). Detective Borges also testified that Adaway admitted having both oral and digital contact with E.B.'s vagina, and gave a stenographically recorded statement to that effect which was transcribed, signed by Adaway and received in evidence (T. 195-96, R. 37-38).

Dr. Karen Simmons of the Rape Treatment Center testified that E.B. told her that someone touched and licked her genitals (T. 174). Dr. Simmons' examination of E.B. showed "a superficial scratch and redness" between the vagina and the rectum (T. 176); the injury was such that E.B. could have caused the injury herself (T. 178). There were no bruises (T. 177).

The jury found the defendant guilty (T. 261-63, R. 57-58), and the trial court adjudicated defendant guilty (R. 82-82, A. 2).

Section 794.011(2)(a), Florida Statutes, provides that sexual battery committed by a person over the age of 18, upon a person less than 12 years of age, is a capital felony, punishable as provided by Section 775.082. Section 775.082(1), Florida Statutes, provides that a person "convicted of a capital felony shall be punished by death" or "by life imprisonment and shall be ineligible for parole." Pursuant to these provisions, the trial court sentenced defendant to life in

prison without parole on the sexual battery charge (R. 85, A. 3).

The trial court also sentenced defendant to 30 years in State Prison, as a Prison Releasee Reoffender, on the lewd and lascivious molestation charge (R. 85-87, 116-17, A.3).

The District Court (A. 4) rejected defendant's claim that a mandatory sentence of life without parole was disproportionate to the crime of oral union with the sexual organ of the victim without penetration or physical injury (and without any showing of emotional injury), and that it therefore was violative of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.[2] The Third District ruled "[w]e agree with the analysis of the Second District in a similar case, *Gibson v. State*, 721 So.2d 363, 367-70 (Fla. 2d DCA 1998) and affirm on that authority. *See also Banks v. State*, 342 So.2d 469 (Fla. 1976)." The District Court noted the statement in *Welsh v. State*, 850 So. 2d 467, 474 n. 8 (Fla. 2003) (Pariente, J., concurring) that "the constitutionality of a mandatory punishment of life

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[2] As of the date of the offense in this case, Article I, Section 17 of the Florida Constitution prohibited "cruel or unusual punishment." *See Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

imprisonment for the specific crime of sexual battery without penile/vaginal union is a significant concern." *See Adaway v. State*, 864 So. 2d 36 (Fla. 3d DCA 2003).

This Court granted discretionary review.

SUMMARY OF ARGUMENT

The mandatory sentence imposed by the trial court on Count 1, pursuant to Section 775.082(1), Florida Statutes, life in prison without possibility of parole, is disproportionate to the capital sexual battery offense in this case and may not constitutionally be imposed.

ARGUMENT

I

THE SENTENCE OF LIFE WITHOUT PAROLE, MANDATED BY STATUTE FOR THE OFFENSE CHARGED, IS EXCESSIVE, DISPROPORTIONATE AND UNCONSTITUTIONAL

Prior to 1974 the Florida rape statute required proof of penetration, and made rape a capital felony, punishable by death. *See* Sections 794.01 and 775.082, Florida Statutes (1973).

In 1974 the sexual battery statute replaced the former rape statute, and made sexual battery of a child under 12 by an adult a capital felony;[3] contemporaneously, the punishment for

[3] In 1984 the language was changed from "11 years of age or younger" to "less than 12 years of age." *See* Laws of 1984, c. 84-86, § 1. In adopting the change, the legislature indicated that its purpose was to adopt the interpretation of the prior language in *Hansen v. State*, 421 So. 2d 504 (Fla. 1982), and to confirm that it reflected the legislative intent. *See*

a capital felony was made life in prison without possibility of parole prior to 25 years. *See* Sections 794.011 and 775.082(1), Florida Statutes (1974).

The definition of sexual battery adopted in 1974 remains in force in the current statute, which applies in this case. The sexual battery statute encompasses acts which had not been cognizable as rape (and which would thus have been other, non-capital offenses) under the former rape statute. The acts charged in this case as capital sexual battery, involving oral/vaginal union without penetration, are in that category, in that they plainly would not have been rape or a capital felony under the pre-1974 statute. *See* Section 800.04, Florida Statutes (1973).

In *Banks v. State*, 342 So. 2d 469 (Fla. 1976), the Supreme Court held that the imposition of a life sentence with no eligibility for parole for 25 years upon conviction of capital sexual battery involving only union, and not penetration, did not offend the prohibition upon cruel and unusual punishments. *Accord, Harrison v. State*, 360 So. 2d 421 (Fla. 1978).

Subsequent to *Banks* the United States Supreme Court held in *Coker v. Georgia*, 433 U.S. 584 (1977), that the death

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Note, Florida Statutes Annotated, Section 794.011 (2000).

penalty was a grossly disproportionate and excessive sentence for the crime of rape of an adult woman, because it was a punishment grossly out of proportion to the severity of the crime, and could not be constitutionally imposed. As Justice White said in *Coker*, "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." Moreover, "life is over for the victim of the murderer; for the rape victim [life] is not over and normally is not beyond repair." *Coker*, 433 U.S. at 598. Indeed, in Florida, as in Georgia, murder may be deliberate, with malice, or felony murder, but "even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion . . . that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer." *Coker*, 433 U.S. at 600.

The Florida Supreme Court thereafter held, in *Buford v. State*, 403 So. 2d 943, 950-52, 954 (Fla. 1981), that the death penalty was also a grossly disproportionate and excessive punishment for the rape of a child.

In *Solem v. Helm*, 463 U.S. 277 (1983), the United States Supreme Court indicated that the Constitution required a proportionality review of sentences in criminal cases, and that the sentence of life without parole imposed upon a repeat offender for issuing a $100 "no account" check was grossly disproportionate, excessive and unconstitutional. Indicating that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted . . . in common law jurisprudence," the Court held "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem*, 463 U.S. at 290.

In holding that courts reviewing the proportionality of sentences should be guided by objective factors, Mr. Justice Powell indicated three tests: "first, we look to the gravity of the offense and the harshness of the penalty." "Second . . . the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." "Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 290-92.

Holding that the sentence of life without parole there was excessive, the Court in *Solem* noted that it was "the most severe punishment that the State could have imposed on any criminal for any crime," 463 U.S. at 297. The Court noted that in South Dakota every life sentence was without possibility of parole, and indicated that it was not passing upon the general validity of sentences without possibility of parole. However, the Court indicated that the fact that no one was eligible for parole did **not** in anyway mitigate the severity of the sentence imposed, which was a sentence of life without parole. *Solem*, 463 U.S. at 297.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991) the United States Supreme Court confirmed that the federal constitution prohibits disproportionate sentences in non-capital cases, though it affirmed the mandatory sentence of life without parole imposed for possession of 650 grams of cocaine.

In *Hale v. State*, 630 So. 2d 521, 525-26 (Fla. 1994) the Florida Supreme Court acknowledged that the federal Constitution prohibits disproportionate prison sentences for non-capital crimes. The Court indicated that the Florida Constitution was arguably broader: "the federal Constitution protects against sentences that are *both* cruel and unusual. The Florida Constitution, arguably a broader constitutional provision,

protects against sentences and that are *either* cruel or unusual." *Id*. (emphasis in original)[4] However, the Court in *Hale* held that the sentence there, a habitual offender sentence for possession of cocaine with intent to sell, "simply does not rise to the level of cruel or unusual" and that "[a] more searching inquiry into the scope of the guarantee under the Florida Constitution is plainly not warranted at this time." *Id*. *See also Williams v. State*, 630 So. 2d 534 (Fla. 1994), where a habitual offender sentence was also at issue, and the Court quashed "that portion of the district court's decision which held that there can be no 'proportionality review' of criminal penalties other than death under . . . the Florida Constitution," and held that there can be such review in a proper case.

More recently, a similar result was reached in *Cotton v. State*, 769 So. 2d 345, 354-56 (Fla. 2000), where this Court upheld the Prison Releasee Reoffender Punishment Act against a challenge on "cruel or unusual punishment" and other grounds, again indicating that a proportionality analysis guided by objective criteria was appropriate. The Court cited with

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[4] Compare the Constitution of the United States, Amendment 8, with the provision of Article I, Section 17 of the Florida Constitution in effect as of the date of the offense in this case.

approval the decision in *Gibson v. State*, 721 So. 2d 363, 368 (Fla. 2d DCA 1998), which adopted the formulation in *Solem*, 463 U.S. at 292.[5] Notably, *Hale*, *Williams* and *Cotton* all upheld sentences that had been enhanced because of factors arising out of the defendant's criminal history and recidivism; the issue here, on the other hand, arises because of the mandatory sentence of life without parole imposed for the sexual battery offense in this case, without regard for a defendant's criminal history and recidivism.

Proportionality review requires, among other things, that the court "review the sentence in light of the facts presented in the evidence . . . and determine whether or not the punishment is too great." *Alvord v. State*, 322 So. 2d 533 (Fla. 1975); *accord, Rolling v. State*, 695 So. 2d 278, 297 (Fla. 1997). As this Court noted in *Cotton*, under *Solem* and *Gibson*, the relevant objective criteria include "(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 commission of the same crime in other jurisdictions." *Cotton*, 769 So. 2d at 355-56; *see also*

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[5] *Gibson* upheld the sentence of life without parole for sexual battery committed in a manner other than that shown by the evidence in this case, and will be discussed below.

Phillips v. State, 807 So. 2d 713, 715-20 (Fla. 2d DCA 2002) (upholding sentence of life without parole imposed upon 14-year old convicted of first-degree murder of younger child upon similar analysis).

In 1995, after *Hale* and *Williams* had been decided, the Florida legislature **augmented** the sentence for all capital felonies, including all capital sexual battery, increasing the sentence from a minimum of life with no possibility of parole for 25 years (the sentence upheld in 1976 in *Banks*), to life **absolutely** without parole, and making that sentence mandatory for all capital felonies. Section 775.082, Florida Statutes. This increase in the sentence for capital sexual battery raised the question of whether contemporary standards of fairness and proportionality are consistent with an increased sentence of life absolutely without parole in a case such as this, involving only oral/ vaginal union, and not penetration, and no evidence of physical (or even emotional) injury.[6] The question is whether the penalty of life without parole for oral/vaginal union is disproportionate in light of "contemporary values" and

[6] Defendant's claim that the sentence imposed violates the State and Federal Constitutions presents a claim of fundamental error. *See Maddox v. State*, 760 So. 2d 89, 97-101 (Fla. 2000).

"public judgment as to the acceptability of" such punishment. *See Coker v. Georgia*, 433 U.S. 584, 594, 596 (1977).

In *Gibson v. State*, 721 So. 2d 363 (Fla. 2d DCA 1998) the Second District Court of Appeal held, in what it indicated was a close case, that this provision was not unconstitutional as applied to "penile union with the vagina of a girl less than 12 years of age;" the opinion expressly stated that it did not "address the constitutionality of this mandatory sentence for **other** conduct that is defined as capital sexual battery." *Gibson*, 721 So. 2d at 367, emphasis added.

In *Jones v. State*, 861 So. 2d 1261, 1263 (Fla. 4th DCA 2003), the Fourth District held that a mandatory sentence of life without parole for sexual battery on a child under 12 years old did not violate the prohibition upon cruel and unusual punishment; the opinion did not indicate the nature of the sexual battery, and followed *Gibson* and *Banks*, indicating that if, as *Banks* held, a mandatory sentence of life without the possibility of parole for 25 years was valid, a sentence of life with no possibility of parole was also valid.

In *Welsh v. State*, 850 So.2d 467, 474 n. 8 (Fla. 2003), Justice Pariente indicated that "the constitutionality of a mandatory punishment of life imprisonment for the specific crime of sexual battery without penile/vaginal union" is a

significant open question. It does not appear that any Florida appellate court has passed upon the constitutionality of applying a mandatory sentence of life without any possibility of parole to the conduct, involving only oral/vaginal union, for which this defendant has been convicted of capital sexual battery.

The "union" provision of Section 794.011 allows the State to obtain a sexual battery conviction without proof of penetration; in some cases, and particularly where the victim is under 12, proof of penetration may not be available, but evidence of penile/vaginal "union" makes it unnecessary. Sexual battery convictions proven by such evidence of "union" are effectively the equivalent of rape convictions under the 1973 statute, though with a different name and altered standard of proof. The same cannot be said for convictions founded upon proof of oral/vaginal union; such convictions are the equivalent of lewd assault convictions under Section 800.04, Florida Statutes (1973), applicable prior to the adoption of the 1974 sexual battery statute; lewd assault was a second-degree felony, punishable by not more than 15 years in State Prison.

Moreover, the sexual battery statute is gender neutral; if the victim is under 12 years of age, consent not a defense. Thus, if the eleven and a half year old victim in this case had

been a boy, and the perpetrator had been his uncle's 19-year old girlfriend, oral/vaginal contact such that at issue in this case would equally have resulted in a capital sexual battery conviction and a mandatory sentence of life without parole.

Life without parole is the most severe sentence that the State of Florida can impose for any offense or series of offenses, except where the imposition of the death penalty is authorized. Accordingly, life without parole is the maximum sentence that can be imposed for murder, except where the death penalty is authorized. Life without parole is the maximum sentence that can be imposed for any rape; even a gang rape, a rape in public, a rape resulting in serious injuries, the rape of a small child by an adult male, or a rape in which the victim is left for dead, cannot be punished by the imposition of a sentence more severe than life without parole.

The imposition of a mandatory life sentence for this offence impairs the law's ability to deter additional offenses. A perpetrator familiar with Florida's statutes, who has just committed an offense similar to the one in this case, may feel he is already subject to the worst punishment that could be imposed upon him,[7] and that he therefore has no reason to

[7] Many would consider a sentence of life without parole a sentence of "death by imprisonment," and as bad as or worse than an actual death sentence. The matter can be argued

refrain from murder, arson or other offenses that might reduce the chances of detection, capture and successful prosecution. The defendant in *Buford* killed his victim for just this reason. The court in *Gibson* indicated that the sentence of life without parole appeared to be bad penology, because it might deter reporting of offenses or encourage jury pardons, but that these considerations were immaterial to its constitutional analysis. *Gibson*, 721 So. 2d at 369-70. The impairment of the law's ability to deter additional offenses that might conceal the crime or prevent a conviction, because the mandatory sentence of life without parole precludes any effective deterrence of additional offenses, further demonstrates the defect in the legislative scheme. We submit, however, that factors such as these are not only bad penology, but also demonstrate that the penalty of life without parole is disproportionate and excessive, based upon emotion, not reason, and that this excessiveness and disproportionality is inappropriate.

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either way, but it is difficult to see why, after *Buford* barred the death penalty for child rape, a sentence of life without parole for that offense, as imposed by the 1995 amendment to Section 775.082, would be presumed valid rather than being presumed to be with the prohibition of *Coker* and *Buford*. *Buford* involved the vaginal penetration of a 7-year old girl who was also murdered.

It cannot be doubted that the oral/vaginal contact in this case, between an adult and a child under 12, reflects a serious offense, warranting a severe punishment. On the other hand, the maximum penalty that could be imposed under Florida law upon an adult who cut off a child's hand for stealing would be 30 years, for aggravated child abuse.[8]

The offense in this case is a capital offense, outside the sentencing guidelines, whereas aggravated child abuse is a Level 9 offense under the Criminal Punishment Code's Offense Severity Ranking Chart (Section 921.0022, Florida Statutes), deemed less serious than Level 10 offenses that are either life felonies or first-degree felonies. Lewd assault on a minor, under Section 800.04, Florida Statutes, is now a Level 7 offense under the Criminal Punishment Code; prior to the 1974 substitution of the sexual battery statute for the former rape statute, the conduct here would have been a lewd assault, a second-degree felony, punishable by not more than 15 years in State Prison; *see* Section 800.04, Florida Statutes (1973).[9]

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[8] *See* Section 827.03, Florida Statutes (aggravated child abuse as felony of the first degree), Section 784.045 (aggravated battery) and Section 775.082, Florida Statutes (30 year maximum penalty for first-degree felonies other than those made punishable by death).

[9] The conduct here at issue may be compared to conduct which the legislature, by Section 921.0022, Florida Statutes, has made Level 9 and Level 10 offenses under the sentencing

The record here does not reflect that the conduct for which defendant has been convicted caused any physical injury; the record does not even indicate a serious emotional injury, and the trial record certainly suggests the absence of any debilitating emotional consequences. In this perspective, the sentence of life without parole seems disproportionate. Moreover, the sentencing scheme that makes consideration of any injury irrelevant and imposes mandatory life without parole regardless of any evidence as to injuries or consequences further suggests that the sentence is disproportionate, especially where no injury is shown. It seems apparent that the legislative classification of oral/vaginal contact between an adult and a child under 12 as a capital felony even when no physical injury is shown and no emotional injury is evident leads to the imposition of a grossly disproportionate sentence which the legislature has made mandatory.

The court in *Gibson* acknowledged that "Florida appears to impose the most severe punishment for a sexual battery without

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guidelines, rather than capital felonies. None of these are punishable by life without parole. Among these Level 9 and Level 10 offenses are DUI manslaughter, conspiracy to commit premeditated murder, accomplice to murder in connection with another felony, various varieties of kidnaping and false imprisonment, various other forms of sexual battery, robbery, carjacking, various drug trafficking offenses, unpremeditated murder, aggravated child abuse, and aggravated manslaughter of a child, elderly person or disabled person.

penetration," 721 So. 2d at 369. *Gibson* involved a more serious offense, sexual battery by "penile union with the vagina of a girl less than 12 years of age." *Gibson*, 721 So. 2d at 367.[10] The *Gibson* opinion expressly stated that it addressed only the propriety of the sentence "for the crime of penile union with the vagina of a girl less than 12 years of age," and did not "address the constitutionality of this mandatory sentence for **other** conduct that is defined as capital sexual battery." *Gibson*, 721 So. 2d at 367 (emphasis added). *Gibson* is therefore expressly not authority for the Third District's ruling in this case. *Banks* involved the same offense as was indicated by the evidence in this case, but approved a far less severe penalty, life without possibility of parole for 25 years. The suggestion in *Jones* that the difference between the two sentences is immaterial under the Constitution begs the question. *Banks* was decided a generation ago, before all of the above-cited cases assessing the impact of the prohibition upon cruel and unusual punishments, and under the community standards (*see Coker*, 433 U.S. at 594, 596) of a different era.

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[10] The effect of the penile union provision of Section 794.011, Fla. Stat., is to allow a prosecution for sexual battery without proof of penetration.

The Third District apparently ruled, on the basis of the analysis in *Gibson*, that the offense in this case is not so much less serious than the offense in *Gibson*, and that the penalty in this case is not so much more severe than the penalty in *Banks*, that the penalty in this case is not cruel and unusual. This is plainly a ruling of first impression, not directly supported by any prior ruling.

We agree that "the constitutionality of a mandatory punishment of life imprisonment for the specific crime of sexual battery without penile/vaginal union" is a significant open question. *Welsh v. State*, 850 So.2d 467, 474 n. 8 (Fla. 2003) (Pariente, J.). We submit that the crime in this case is less serious than the crime in *Gibson*. We submit that the penalty here is more severe than the penalty in *Banks*. We contend that developments in the law, changes in "contemporary values" and revised "public judgment" (*see Coker,* 433 U.S. at 594, 596) in the nearly 30 years since *Banks*, particularly with regard to the imposition of the death penalty,[11] the only penalty more severe than life without parole, indicate that the greater disproportionality here now offends the Constitution, so that the punishment in this case for the offense charged, involving

[11] *See Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny.

oral/ vaginal union without penetration, and without evidence of physical or emotional injury, amounts to unconstitutional cruel and unusual punishment.

Actually, the question here, though not previously determined, is not as open as might appear. *Buford* involved a penile/ vaginal penetration of a 7-year old girl by an adult male, who subsequently killed her. The *Buford* Court held that the death penalty was precluded for the capital sexual battery (though not for the killing). The *Buford* Court directed that the defendant be sentenced to life without parole for 25 years; this mandatory sentence been upheld five years earlier in *Banks*. The sentence today for the crime in *Buford* would be the sentence next in severity to the death penalty, life without parole. *Gibson* involved a penile/vaginal union, and upheld a sentence of life without parole, the sentence mandated by the 1995 amendment to Section 775.082, Florida Statutes, a more severe sentence than was authorized or imposed in *Buford*. This case presents the same sentence for oral/vaginal union with no evidence of any injury.

We submit that penile/vaginal penetration in *Buford* is a substantially **more** serious offense than the penile/vaginal union in *Gibson*, and that the oral/vaginal union in this case

is a far **less** serious offense than the penile/vaginal union in *Gibson*, which may have been rape in which penetration could not be proven. The fact that all three cases would require the imposition of the same mandatory sentence if they arose today is a clear demonstration that the sentence in this case is disproportional. Putting aside the propriety of imposing in *Gibson* the same sentence that would have been imposed in *Buford* if it arose today, it is plain that the imposition in this case of the same sentence as today would be imposed for the vaginal penetration of a 7-year old girl (as in *Buford*), upon evidence indicating that the victim would have suffered "excruciating pain," (*see Buford*, 403 So. 2d at 947) is not merely disproportional, but unconscionable.

One need only note that the legislature has mandated the same penalty for the sexual battery in *Buford*, for the offense in *Gibson* and for the offense in this case to demonstrate that the penalty in this case is not proportionate, and is unconstitutional for the same reason that the death penalty in *Coker* and *Buford* was unconstitutional.

The Court should hold here that the punishment in this case for the offense charged, involving oral/vaginal union without penetration, is disproportionate to the nature of this

offense and to the nature of other offenses for which a sentence of life without parole, the most severe available other than capital punishment, is imposed.

CONCLUSION

The sentence should be reversed and the matter remanded with directions to reduce the sentence.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the foregoing, and the attached Appendix, were delivered by hand to Paulette R. Taylor, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 on April 29, 2004.

_____

ROY A. HEIMLICH
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that the type font in this brief is Courier New 12 point, except that the headings are set in Times New Roman 14 point.

_____

ROY A. HEIMLICH
Assistant Public Defender