IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

DARRICK TERRELL ADAWAY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner Darrick Terrell Adaway (defendant in the trial court and appellant in the District Court), seeks discretionary review of a decision of the Third District Court of Appeal that

expressly declared valid the provision of Section 775.082(1), Florida Statutes (1999), that imposes a mandatory sentence of life without parole for the unlawful oral-genital union that constitutes capital sexual battery in this case.

The symbol "A." refers to the Appendix to this brief, setting forth the opinion and order of the lower court.

STATEMENT OF THE CASE AND FACTS

The facts were stated as follows by the District Court:

> At the time of the events at issue defendant was thirty-six years of age and the victim was eleven. The defendant was charged in Count I with capital sexual battery "by placing his mouth in union with the vagina of [the victim] in violation of s.794.011(2) . . . Florida Statutes
> . . . ." Under section 794.011(2), Florida Statutes (1999) "[a] person 18 years of age or older who commits sexual battery upon . . . a person less than 12 years of age commits a capital felony. . . ." **The penalty is "life imprisonment and [the offender] shall be ineligible for parole."**
> **§ 775.082(1), Fla. Stat. (1999)**. After defendant was convicted, the trial court imposed that sentence.

(A. at 2, footnotes omitted, emphasis added).

The District Court cast the issue as follows:

> Darrick T. Adaway appeals his life sentence without parole for capital sexual battery on a minor. He contends that as applied to his case, the life sentence amounts to cruel and unusual punishment.

(A. at 1).

The District Court ruled as follows:

> Defendant argues that because capital sexual battery carries a mandatory penalty of life imprisonment without parole, the penalty is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and cruel or unusual punishment under Article I, section 17 of the Florida Constitution (1968). The defendant contends that the penalty of life imprisonment without parole is disproportionate where the crime consists of union with, but not penetration of, the sexual organ of the victim and no physical injury.
>
> We 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). ***But see Welsh v. State*, 850 So.2d 467, 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.").**

(A. at 2-3, footnotes omitted, emphasis added).

The District Court denied rehearing and certification on January 23, 2004 (A. 4).

SUMMARY OF ARGUMENT

The trial court sustained the validity of Section 775.082(1), Florida States, which imposes a mandatory sentence of life without parole for a capital sexual battery involving oral-genital union without penetration. The sentence imposed is not proportional to the offense and amounts to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States and Article I, Section 17 of

the Florida Constitution.

ARGUMENT

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

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

In 1974 the sexual battery statute replaced the rape statute, and made sexual battery of a child under 12 by an adult a capital felony; the punishment for a capital felony was also made life in prison without possibility of parole prior to 25 years. *See* §§ 794.011 and 775.082, Fla. Stat. (1974).

The definition of sexual battery adopted in 1974, and still in force, encompasses acts which had not been rape under the former rape statute. The acts charged in this case, involving oral genital-union without penetration, would not have been rape or a capital felony under the pre-1974 statute.

In *Banks v. State*, 342 So. 2d 469 (Fla. 1976), the Florida 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 oral

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 penalty was a disproportionate sentence for rape of an adult woman, because it was a punishment out of proportion to the severity of the crime. Indeed, "even where [a] 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 then held, in *Buford v. State*, 403 So. 2d 943, 950-54, (Fla. 1981), that the death penalty was also a disproportionate punishment for the rape of a child.

Solem v. Helm, 463 U.S. 277 (1983), held that the Constitution required a proportionality review of sentences, and that the sentence of life without parole there was disproportionate. 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; *see also Harmelin v. Michigan*, 501 U.S. 957 (1991).

Solem noted that the sentence of life without parole there it was "the most severe punishment that the State could have imposed on any criminal for any crime." *Solem*, 463 U.S. at 297. The Court noted that in South Dakota every life sentence was without possibility of parole, but that the fact that no one was eligible for parole did **not** mitigate the severity of the sentence of life without parole. *Solem*, 463 U.S. at 297.

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. *Id*.[1] *Hale* held that the sentence there, a habitual offender sentence, "simply [did] not rise to the level of cruel or unusual." *Id*. *See also Williams v. State*, 630 So. 2d 534 (Fla. 1994) (proportionality review).

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[1] 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).

In *Cotton v. State*, 769 So. 2d 345, 354-56 (Fla. 2000), this Court again held that the Constitutional ban on "cruel or unusual punishment," required a proportionality analysis guided by objective criteria. The Court relied upon *Gibson v. State*, 721 So. 2d 363, 368 (Fla. 2d DCA 1998), which had adopted the formulation in *Solem*, 463 U.S. at 292. The *Cotton* Court noted that, under *Solem* and *Gibson*, the relevant objective criteria for proportionality review 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. *Hale*, *Williams* and *Cotton* all upheld sentences enhanced because of 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 recidivism.

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, Fla. Stat. This increase in the sentence for capital sexual battery raised the question of whether contemporary standards of fairness and proportionality are consistent with a sentence of life without parole in cases such as this, involving only oral union, and not penetration, and no evidence of physical (or even emotional) injury.

In *Gibson v. State*, 721 So. 2d 363 (Fla. 2d DCA 1998) the Second District Court of Appeal held 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. 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 conduct involving only oral-genital union.

Life without parole is the most severe sentence the State of Florida can impose for any offense, except where 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.

It cannot be doubted that the oral-genital 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.[2] The Legislature has made the offense in this case 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,[3] deemed less serious than the Level 10 offenses that are life felonies or first-degree felonies. Lewd assault on a minor, under Section 800.04, Florida Statutes, is a Level 7 offense; prior to the adoption of the 1974 sexual battery statute, the conduct here, involving oral-genital union, would have been a lewd assault, a second-degree felony, punishable by only a 15 year sentence.

The record here does not reflect that the conduct for

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

[3] *See* Section 921.0022, Fla. Stat.

which defendant has been convicted caused any physical or emotional injury; the victim's trial testimony 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. We submit that the legislative classification of oral-genital contact between an adult and a child under 12 as a capital felony even absent any physical or emotional injury leads to the imposition of a grossly disproportionate sentence which the Legislature has made mandatory.[4]

The court in *Gibson* acknowledged that "Florida appears to impose the most severe punishment for a sexual battery without penetration," 721 So. 2d at 369. *Gibson* involved a more serious offense, sexual battery by "penile union with the

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[4] The court in *Gibson* indicated that the sentence appeared to be bad penology, but that this was immaterial to its constitutional analysis. *Gibson*, 721 So. 2d at 369-70. However, we submit that the absence of justification in penology further demonstrates that the penalty is disproportionate and excessive, based upon emotion, not reason.

vagina of a girl less than 12 years of age." *Gibson*, 721 So. 2d at 367.[5] 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 District Court'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 District Court 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. In *Welsh v. State*, 850 So.2d 467, 474 n. 8 (Fla. 2003), Justice Pariente

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[5] 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.

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. We submit that the crime in this case is less serious than the crime in *Gibson*, that the penalty here is more severe than the penalty in *Banks*, and that the greater disproportionality here offends the Constitution, so that the punishment in this case for the offense charged, involving oral union without penetration, amounts to unconstitutional cruel and unusual punishment.

CONCLUSION

The Court should grant discretionary review.

Respectfully submitted

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By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded 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 February 17, 2004.

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ROY A. HEIMLICH
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point, except that the headings are in 14 point proportionately spaced Times New Roman.

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ROY A. HEIMLICH
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A P P E N D I X