IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-

LOWER CASE NO.: 3D02-1907

DARRICK T. ADAWAY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent

ON APPLICATION FOR DISCRETIONARY REVIEW
DISCRETIONARY JURISDICTION

RESPONDENT'S BRIEF ON JURISDICTION

CHARLES J. CRIST, JR.
Attorney General

PAULETTE R. TAYLOR
Assistant Attorney General
Florida Bar Number 0992348
Office of the Attorney
General

Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441

Counsel for Respondent

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INTRODUCTION

This is a petition for discretionary review of a decision of the Third District Court of Appeal which affirmed Petitioner's life sentence without the possibility of parole for capital sexual battery. *Adaway v. State,* 2003 WL 22799622 (Fla. 3d DCA Nov. 26, 2003). (Exh. A). Petitioner **DARRICK T. ADAWAY,** was the Appellant below in the Third District Court of Appeal. Respondent **THE STATE OF FLORIDA** was the Appellee. In this brief, the parties will be referred to as they stand before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner, was charged with, *inter alia*, capital sexual battery on a minor in violation of section 794.011(2), Florida Statutes. *Adaway v. State,* 2003 WL 22799622 (Fla. 3d DCA, Nov. 23, 2003). Section 794.011(2), Florida Statutes (1999), provides that "[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...." *Id.* The information alleged that Petitioner committed the crime "by placing his mouth in union with the vagina of [the victim]." *Id.* At the time of the offense, Petitioner was thirty-six years old and the victim was eleven. *Id.*

A jury convicted Petitioner of the charge. *Id.* Section 775.082(1), Fla. Stat. (1999), provides for a sentence of life imprisonment without the possibility of parole for a conviction for capital sexual battery. *Id.* The trial court imposed the life sentence pursuant to section 775.082(1). *Id.*

On appeal to the Third District Court of Appeal, Petitioner argued that because capital sexual battery carries a mandatory penalty of life imprisonment without the possibility of parole, the sentence amounts to cruel and unusual punishment under the Eight Amendment to the United States Constitution and cruel or unusual punishment under Article I, section 17 of the Florida

Constitution (1968). *Id.* Petitioner contended that the sentence was disproportionate where the crime consists of union with, but not penetration of, the sexual organ of the victim and where the victim suffered no physical injury. *Id.*

The Third District affirmed Petitioner's sentence. *Id.* The court agreed with the analysis of the Second District in *Gibson v. State,* 721 So. 2d 363, 367-70 (Fla. 2d DCA 1998), which held that the life sentence without parole for capital sexual battery involving penile union with the vagina of a twelve year old girl did not amount to cruel or unusual punishment. *Adaway v. State,* 2003 WL 22799622 at *1. The court subsequently denied Petitioner's motion for rehearing, or in the alternative, motion for certification. (Exh. B).

Petitioner seeks discretionary review of the decision below contending that the court below "expressly declared valid the provision of Section 775.082(1), Florida Statute (1999)." (Petitioner's Brief on Jurisdiction at 1).

POINT ON APPEAL

WHETHER THE DECISION BELOW EXPRESSLY DECLARED VALID A STATE STATUTE

SUMMARY OF THE ARGUMENT

The decision below does not expressly declare valid a state statute. In the decision below, the court affirmed Petitioner’s sentence agreeing with the analysis of the Second District in a case which was factually similar to the facts of the instant case. Although the court implicitly found the statute valid, it did not expressly so state. Consequently, the decision below does not provide this Court with discretionary jurisdiction because it did not expressly declare the statute valid.

Furthermore, the decision below, affirming Petitioner’s mandatory life sentence for his conviction for capital sexual battery, is consistent with other decisions in this State, including a decision from this Court. Consequently, it is settled in this State that the sentence is not disproportionate. This Court should therefore deny review of this case.

ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY DECLARE VALID A STATE STATUTE

Petitioner seeks review of a decision of the Third District Court of Appeal which affirmed his life imprisonment without the possibility of parole sentence for his conviction for capital sexual battery. Petitioner claims that in affirming his conviction, the district court expressly declared valid the provision of section 775.082(1), Florida Statutes (1999), which mandated his sentence. Petitioner argues that his sentence is disproportionate to the offense and amounts to cruel and unusual punishment where the capital sexual battery involved oral-genital union without penetration or physical injury to the victim.

The requirements for the exercise of the discretionary jurisdiction of this Court to review decisions from the district courts of appeal are set forth in Florida Rule of Appellate Procedure 9.030(a)(2). A review of the decision below clearly does not satisfy any of the requirements for the exercise of discretionary jurisdiction of this Court. Contrary to Petitioner’s claim, although the court below affirmed Petitioner’s sentence, the court did not expressly declare valid section 775.082 (1), Florida Statute.

Rule 9.030(a)(2)(A)(i), Florida Rules of Appellate Procedure, provides for the discretionary jurisdiction of this Court to review decisions of the district courts of appeal that "expressly declare valid a state statute." *Id.* *See also,* Art. V, § 3(b)(3), Florida Constitution. "The 1980 amendments to Article V and this subsection [9.030(a)(1)(A)] require a district court to 'expressly declare' a state statute valid before the Supreme Court's discretionary jurisdiction may be invoked." *In re Emergency Amendments to Rules of Appellate Procedure,* 381 So. 2d 1370, 1374 (Fla. 1980). "Under former Rule 9.030(a)(1)(A)(ii), the Supreme Court's mandatory appellate jurisdiction could be invoked if a lower tribunal 'inherently' declared a statute valid." *Id.* *See also, Banks v. State,* 342 So. 2d 469 (Fla. 1976)(accepting jurisdiction where lower court's decision "inherently passed" on constitutionality of statute). Clearly, then, a lower court's decision that does not "expressly" declare a statute valid cannot invoke this Court's jurisdiction under rule 3.030(2)(A)(i).

In the instant case, the district court below identified the issue presented by Petitioner as whether his life sentence mandated by section 775.082(1), Fla. Stat. amounts to cruel and unusual punishment. *Adaway v. State, supra.* In its decision, the district court expressed its agreement with the analysis of

the Second District in *Gibson v. State,* 721 So. 2d 363 (Fla. 2d DCA 1998), and affirmed Petitioner's sentence on that authority. *Adaway v. State, supra* at *1. Although by affirming Petitioner's sentence the Third District implicitly found section 775.082(1) valid, it did not explicitly so state. Thus, the court did not "expressly" declare the statute valid. That decision therefore does not provide this Court with the discretionary jurisdiction to review the decision. Consequently, this Court should deny review.

Furthermore, Petitioner does not complain that section 775.082(1), Florida Statutes is unconstitutional on its face; he complains that the statute is unconstitutional as applied to the particular facts of his case. Review of this case would open the floodgate to any defendant who takes issue with his sentence. Such a result is not warranted by this case.

Nevertheless, Petitioner seeks review of the decision below which affirmed his life without parole sentence for capital sexual battery complaining that because he committed the sexual battery by oral-vaginal contact with no penetration and no physical injury to the victim, the sentence amounts to cruel and unusual punishment. Petitioner's complaint then, is that on the particular facts of his case, the sentence is disproportionate to the gravity of the offense. This Court should decline review

of this case.

In *Banks v. State, supra,* this Court held that life imprisonment with the possibility of parole after twenty-five years for capital sexual battery did not amount to cruel and unusual punishment. *See Banks v. State, supra.* The defendant in that case committed the sexual battery by "oral union with the sexual organ of" an eight year old boy. *Banks v. State,* 342 So. 2d at 469. In *Gibson, supra,* the court affirmed a life sentence without the possibility of parole for capital sexual battery. The defendant committed the sexual battery in that case by placing his penis in contact with his eight year old step-daughter's vagina. *Gibson v. State*, 721 So. 2d at 364. The decision below is consistent with *Banks* and *Gibson*. Thus, all of the courts in Florida that have addressed this issue, including this Court, have consistently held that the sentence is not disproportionate to the offense. It is therefore settled in Florida that the sentence is commensurate with the gravity of the offense. Consequently, then, review of this case by this Court is not warranted. This Court should therefore deny review.

CONCLUSION

Based upon the foregoing argument and cited authorities, this Court should not exercise its discretionary jurisdiction to review the decision below.

Respectfully Submitted,

CHARLES J. CRIST, JR.,
Attorney General

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PAULETTE R. TAYLOR
Assistant Attorney General
Florida Bar Number 0992348
Office of the Attorney General
Department of Legal Affairs
Rivergate Plaza., Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON JURISDICTION was furnished by mail to Roy A. Heimlich, Esq., Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 26th day of February 2004.

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PAULETTE R. TAYLOR
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 12 point Courier New Type.

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PAULETTE R. TAYLOR
Assistant Attorney General

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APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Exh. A *Adaway v. State,* 2003 WL 22799622 (Fla. 3d DCA Nov. 26, 2003).

Exh. B Order Denying Rehearing and Certification.