

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

KEMAR ROCHESTER  
Appellant,

vs.

S.C. Case No. \_\_\_\_\_  
4<sup>th</sup> DCA Case No. 4D10-512

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_ /

**PETITIONER'S JURISDICTIONAL BRIEF**

On Review from the District Court of Appeal, Fourth District,  
State of Florida

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i  
AUTHORITIES CITED..... ii  
PRELIMINARY STATEMENT..... 1  
STATEMENT OF THE CASE AND FACTS..... 2  
SUMMARY OF THE ARGUMENT..... 5

**ARGUMENT**

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION  
TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF  
APPEAL CONCERNING ITS HOLDING THAT §775.082(3)(a)4, Fla.  
Stat. (2008), PROVIDES FOR A MINIMUM MANDATORY PRISON TERM  
FROM WHICH A TRIAL COURT IS WITHOUT DISCRETION TO  
DOWNWARDLY DEPART..... 5  
CONCLUSION..... 9  
CERTIFICATE OF SERVICE..... 10  
CERTIFICATE OF FONT SIZE..... 10

**AUTHORITIES CITED**

**Cases**

Mancini v. State, 312 So. 2d 732 (Fla. 1975)..... 6, 9

Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010)..... 3 - 9

Rochester v. State, 37 Fla. L. Weekly D1874  
(Fla. 4<sup>th</sup> DCA August 8, 2012)..... 3, 4, 7, 8

**Statutes**

§775.021(1), Fla. Stat. (2008)..... 4

§775.082(3)(a)(4)(a)(II), Fla. Stat. (2008)..... 3, 4

§775.082(3)(a)(4), Fla. Stat. (2008)..... 2, 5, 7, 8

§775.082(3), Fla. Stat. (2008)..... 3, 7, 8

§800.04(5)(b), Fla. Stat. (2008)..... 5

§804.04(5)(b), Fla. Stat. (2008)..... 2

§921.0026(2)(j), Fla. Stat. (2008)..... 2

§921.0026(2), Fla. Stat. (2008)..... 9

**Other Authorities**

Article V, Section 3(b)(3) Fla. Const..... 5

**Rules**

Fla. R. App. P. 9.030(a)(2)(A)(iv)..... 6

**PRELIMINARY STATEMENT**

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and Appellant in the Fourth District Court of Appeal. Respondent was Appellee, below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

## STATEMENT OF THE CASE AND FACTS

Back in 2008, the State of Florida charged Petitioner, Kemar Rochester, by way of an information, with, inter alia, the crime of lewd or lascivious molestation of a child less than 12 years of age in violation of §804.04(5)(b), Fla. Stat. (2008). Petitioner went to trial and was convicted of this crime as charged. Prior to sentencing, Petitioner filed a motion for a downward departure sentence, under the statutorily recognized ground that his offense was committed in an unsophisticated manner, it was an isolated incident, and he had shown remorse for his crime. See §921.0026(2)(j), Fla. Stat. (2008). The trial court, in ruling on the motion, believed that he was without any lawful discretion to entertain Petitioner's motion, because the particular sentencing authority for violations of §804.04(5)(b) required the imposition of a minimum mandatory term of imprisonment upon conviction. See §775.082(3)(a)(4), Fla. Stat. (2008). The trial court sentenced Petitioner to a term of 25 years imprisonment.

Before the District Court, Petitioner argued that the trial court erred, because, contrary to its belief, it maintained the discretion to consider imposition of a downward departure sentence. Petitioner argued to the District Court that §775.082(3)(a)(4) provided that the imposition of a twenty-five year term was couched in permissive language, inasmuch as a

trial court "may" impose such a sentence, and, as such, the permissiveness provided a trial court with the discretion to entertain and rule on the merits of a motion for a downward sentence departure. The Fourth District Court of Appeal affirmed the trial court's imposition of the 25 year term of imprisonment. It employed two statutory construction rules providing that; (1) a "specific statute 'covering a particular subject matter is controlling over the same and other subjects in general terms,'" and, (2) a subsequently enacted statute which conflicts with an earlier version of the same statute prevails over the earlier version. Rochester v. State, 37 Fla. L. Weekly D1874 (Fla. 4<sup>th</sup> DCA August 8, 2012). In so doing, it concluded that the legislature's use of "may" in §775.082(3), Fla. Stat. (2008), limited a trial court's discretion to impose one of two alternative sentences, only; a minimum mandatory 25 year term of imprisonment or life imprisonment. The Fourth District, sub judice, recognized and certified conflict between its opinion and the Second District's decision in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010).

The Montgomery court held that the 25 year prison term provided by §775.082(3)(a)(4)(a)(II), Fla. Stat. (2008), the same sentencing law which applied to Petitioner, was not a minimum mandatory prison term, by its plain language, especially when compared to and contrasted with other statutes that have

been recognized as providing for minimum mandatory prison sentences. Id. at 188-9. The Montgomery court further held that if there were to be any ambiguity concerning whether §775.082(3)(a)(4)(a)(II) provided for a minimum mandatory term of imprisonment, the rule of lenity, §775.021(1), Fla. Stat. (2008) was to be applied and the ambiguity was to be resolved with a statutory construction most beneficial to the defendant. Id. at 189. The Fourth District, in Rochester, supra, disagreed with the holding in Montgomery, supra at 189, and held that lenity did not apply and the Florida Legislature intended the statute to provide for a minimum mandatory prison term of 25 years from which a trial court was without the discretion to depart downward.

Petitioner did not move for rehearing. On September 7, 2012, Petitioner filed his notice of invoking this Court's discretionary jurisdiction with the Fourth District Court of Appeal.

### SUMMARY OF THE ARGUMENT

This court has jurisdiction over the instant cause. The opinion of the Fourth District Court of Appeal, holding that with regard to imposition of sentence pursuant to §775.082(3)(a)4, for violations of §800.04(5)(b), the legislature established a 25 year minimum mandatory term of imprisonment, expressly and directly in conflicts with the decision of the Second District Court of Appeal, in Montgomery v. State, supra.

### ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONCERNING ITS HOLDING THAT §775.082(3)(a)4, Fla. Stat. (2008), PROVIDES FOR A MINIMUM MANDATORY PRISON TERM FROM WHICH A TRIAL COURT IS WITHOUT DISCRETION TO DOWNWARDLY DEPART.

### Conflict Jurisdiction

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. "Conflict" jurisdiction is properly invoked when: 1) the district court announced a rule of law which conflicts with a rule previously announced by the Supreme Court or by another district, or 2) the district court



applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Thus, in order for two court decisions to be in express and direct conflict for purposes of invoking this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv), the decision should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the results in each case would have been different had the deciding court employed the reasoning of the other court. See Mancini, supra.

**Rochester Directly and Expressly Conflicts with Montgomery**

The issue addressed by the decision of the Second District Court of Appeal in Montgomery v. State, supra, is identical to that of the instant case. Moreover, the Montgomery holding is the correct one to apply to the present case.

Montgomery held that by its plain language, the Florida Legislature, in enacting §775.082(3)(a)4 for the purpose of sentencing persons convicted of having violated §800.04(5)(b), did not legislate a sentencing law that provided for a minimum mandatory term of imprisonment, or, if there was any ambiguity concerning the meaning of the statutory language, the rule of lenity, §775.021(1), must be invoked and, construing the statute in a light most favorable to the criminal defendant,

§775.082(3)(a)4 would still not provide for a minimum mandatory prison term. Montgomery v. State, supra at 188-9. It arrived at this conclusion by comparing the plain language of the statute with other sentencing statutes that, by means of a plain reading, provided for, inter alia, explicit minimum mandatory prison terms; prohibited accumulation of gain-time; prohibited early, discretionary, conditional or controlled release from prison; and requirements that one-hundred percent of a sentence must be served or that release was authorized only upon expiration of a sentence. Id. Finding that §775.082(3)(a)4 was without similar, controlling language, the Second District concluded that this statute did not provide a minimum mandatory sentence. Id. at 189.

On the other hand, the Fourth District, in Rochester v. State, supra, while certifying conflict with Montgomery, concluded, inter alia, that lenity did not apply. Instead, it employed other statute construction rules and concluded that §775.082(3)(a)4 provided for a minimum mandatory term. The Fourth District construed the statutory language of §775.082(3)(a)4 as follows: The general provision, pursuant to §775.082(3), Fla. Stat. (2008), that a trial court's discretion, in that it "may" punish a person convicted of a life felony, was limited or restricted by more specific language of §775.082(3)(a)4, because the only choices provided for

sentencing a violation of §800.04(5)(b) was either 25 years imprisonment or imprisonment for life. It also concluded that because the latest amendment to this subsection removed it from the general, sentencing provisions of §775.082(3), Fla. Stat. (2008), the amendment reflected the legislature's intent that a court is without any discretion other than imposing a sentence of 25 years or life imprisonment.

At bar, Petitioner maintained that the construct of §775.082(3)(a)4 did not require reliance on legislative intent divining methods which focused on the specific over the general, last in time over first in time, or even whether "may" meant "shall" or vice versa. The plain language of the statute and its use of the permissive term "may," within the context of the entire sentencing scheme for persons convicted of life felonies, provided the sole ground upon which this statute is to be interpreted. To the extent there is any ambiguity concerning whether the legislature intended to provide trial court's with discretion not to impose a 25 year sentence, the rule of lenity applied.

The conflict between the Fourth District's opinion, in Rochester, and the Second District's decision in Montgomery, rests upon the issue as to whether the meaning of §775.082(3)(a)4 is to be construed by its plain language or lenity, versus whether the statute's meaning is uncertain to the

extent that other statutory construction rules, other than lenity, can be employed to determine the legislature's intent. Inasmuch as the Fourth District, in Rochester, rejected a plain reading or a lenity review of §775.082(3)(a)4, as provided for in Montgomery, and affirmatively recognized that its opinion was in conflict, the case at bar conflicts directly and expressly with the Second District's decision in Montgomery. Had the Fourth District, at bar, applied the Montgomery holding, that §775.082(3)(a)4, by its plain meaning or upon the application of lenity principles, did not provide for a mandatory minimum term of imprisonment, it would then have been bound to hold that a trial court would have discretion to impose a downward departure sentence, pursuant to §921.0026(2), Fla. Stat. (2008), so long as the statutory predicate for such a sentence was proven by competent, substantial evidence. Mancini v. State, supra at 733. Consequently, this Court should exercise its discretionary jurisdiction to resolve this conflict.

#### **CONCLUSION**

This court should accept jurisdiction pursuant to Article V, § 3(b)(3), Fla. Const. and order briefs on the merits from both parties.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished to Assistant Attorney General Richard Valuntas at [CrimAppWPB@myfloridalegal.com](mailto:CrimAppWPB@myfloridalegal.com); on this 13th day of September, 2012.

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Of Counsel

**CERTIFICATE OF FONT SIZE**

I HEREBY CERTIFY the instant brief has been prepared with 12 point "Courier" type.

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Of Counsel