IN THE SUPREME COURT OF FLORIDA

HARRY PAUL OYARVID,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC10-1372

JURISDICTIONAL BRIEF OF RESPONDENT

BILL MCCOLLUM
ATTORNEY GENERAL

EDWARD C. HILL, Jr.
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 238041

MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 177008

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Harry Paul Oyarvid, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name. "PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal. See *Oyarvid v. State*, Case No. 1D09-2848 (Fla. 1st DCA Jun. 22, 2010)

SUMMARY OF ARGUMENT

The Petitioner fails to demonstrate how the decision of the lower court, which addresses the Petitioner's as applied challenge to the Constitutional validity of his sentence, and which fails to even mention the particular statute that authorized the sentence under review, expressly declares *775.082(3)(a)(4), Florida Statutes* valid.

ARGUMENT

ISSUE

DOES THE DECISION BELOW EXPRESSLY DECLARE *SECTION 775.082(3)(a)(4), FLORIDA STATUTES*, VALID? (Restated)

To form the basis for discretionary review under Rule 9.030(a)(2)(A)(i), the decision of a District Court of Appeal must expressly declare a state statute valid; the implication of validity or the tacit approval of a statute cannot suffice. See Philip J. Padovano, *Florida Appellate Practice §28:2*, p.691 (2010 ed.):

> The supreme court's power to review a district court of appeal decision that declares a state statute valid is limited to those decisions expressly holding that the law in question is valid. District court decisions are not reviewable merely because they have the effect of upholding the validity of a statute. Frequently, a district court of appeal will imply that a state statute is valid, or tacitly approve of a statute in the process of deciding a case, but that does not render the decision subject to discretionary review by the supreme court on the ground that upholds the validity of a statute.

In order for a decision to expressly declare a state statute valid, that decision should involve a facial challenge to the Constitutional validity of that particular statute. See e.g. *Albertson's, Inc. v. Department of Professional Regulation*, 681 So. 2d 708, 708-09 (Fla. 1996):

> We have for review *Albertson's, Inc. v. Florida Department of Professional Regulation*, 658 So. 2d 134 (Fla. 1st DCA 1995), where the district court expressly declared a state statute valid. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const...
>
> Albertson's brought a facial challenge to the section, arguing that it illegally limits certain Florida-based companies' access by barring both all pharmacies licensed

> under another state's law and all pharmacies with more than twelve Florida locations.

See also *Simmons v. State*, 944 So. 2d 317, 321 (Fla. 2006):

> We have for review a decision of a district court of appeal that expressly declares a state statute valid. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const...
>
> On appeal, Simmons brought facial constitutional challenges to sections 847.0135 and 847.0138.

See also *Wright v. State*, 920 So. 2d 21, 25 (Fla. 4th DCA 2005) ("[W]e reject Appellant's substantive due process challenge to the facial constitutionality of section 893.101, Florida Statutes, expressly declaring it valid."); but see *Barley v. South Florida Water Management Dist.*, 823 So. 2d 73 (Fla. 2002):

> We have for review *Barley v. South Florida Water Management District*, 766 So. 2d 433 (Fla. 5th DCA 2000), a decision of the Fifth District Court of Appeal which expressly declared a Florida statute valid and expressly construed a provision of the Florida Constitution. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const...
>
> ... Respondent's levy of 0.1 mill tax and other ad valorem taxes in conformity with the EFA is not unconstitutional ***as applied to petitioners***. The decision of the district court of appeal is approved. (Emphasis added)

The State recognizes that a cruel and unusual punishment claim often involves an as applied challenge to the Constitutional validity of a defendant's sentence; reviewing courts often construe such claims as an as applied challenge to the particular statute that authorized the sentence under review. See e.g. *Banks v. State*, 342 So. 2d 469, 470 (Fla. 1976):

> Appellant attacks the constitutionality of the minimum 25 years imprisonment prior to eligibility for parole found in Section 775.082(1), Florida Statutes, ***as it applies to***

> ***him*** sub judice by Section 794.011(2), Florida Statutes, on the basis that said punishment is cruel and unusual in light of the act committed by him. We cannot agree. (Emphasis added)

In a more recent example, the Third District addressed a claim that a life sentence without parole for a defendant convicted of capital sexual battery constitutes cruel and unusual punishment as applied to that particular defendant. See e.g. *Adaway v. State*, 864 So. 2d 36, 37 (Fla. 3d DCA 2003) ("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."). When this Court addressed the defendant's claim, however, the Court used language suggesting a facial challenge. See *Adaway v. State*, 902 So. 2d 746, 747 (Fla. 2005) ("We review *Adaway v. State*, 864 So. 2d 36 (Fla. 3d DCA 2003), which expressly declared valid a state statute mandating life imprisonment without the possibility of parole ***for persons*** convicted of capital sexual battery.") (Emphasis added). However, subsequent factual comparisons in *Adaway* suggest that this Court analyzed the claim as an as applied challenge. See *Adaway*, infra.

If the decision below only involves an as applied challenge, however, then the lower court need not necessarily addresses the validity of the statute in all situations. See generally *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004), cited with approval

in *Florida Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005):

> A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards.

See also *Florida Dept. of Revenue v. City of Gainesville* at 256 ("[A] a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid."). In the context of a Cruel and Unusual Punishment claim, a court addressing an as applied challenge can uphold the validity of a defendant's particular sentence without expressly validating the statute that authorizes that sentence.

When a defendant alleges that his particular sentence violates the Cruel and Unusual Punishment Clause, a reviewing court must make a threshold determination of whether or not the punishment imposed qualifies as "grossly disproportionate" to the offense committed; if the sentence fails to qualify as such, then the court can terminate its analysis and affirm the sentence. See *Adaway*, 902 So. 2d at 750:

> We read the decisions in [*Solem v. Helm*, 463 U.S. 277 (1983)], [*Harmelin v. Michigan*, 501 U.S. 957 (1991)], and [*Ewing v. California*, 538 U.S. 11 (2003)] as requiring, for a prison sentence to constitute cruel and unusual punishment solely because of its length, that at a minimum the sentence be grossly disproportionate to the crime.

The level of analysis mandated by *Adaway* does not require the reviewing court to determine the validity of the particular statute that authorized the sentence; rather, the court need only compare the

sentence under review with the sentences upheld by the highest Court in *Harmelin* and *Ewing*. See *Adaway*, at 751:

> A comparison of the crime in this case to those involved in the relevant United States Supreme Court decisions strengthens our conclusion. The Court has upheld a life sentence without the possibility of parole for the possession of 672 grams (about 1.5 pounds) of cocaine, *Harmelin*, 501 U.S. at 979, and a sentence of twenty-five years to life for shoplifting three golf clubs after previous convictions of three burglaries and a robbery, *Ewing*, 538 U.S. at 11. The Court concluded that neither sentence was grossly disproportionate to the crime. To classify Adaway's life sentence without parole as grossly disproportionate, we would have to conclude that an adult's oral union with the vagina of an eleven-year-old girl is an objectively *lesser* offense than possessing one and a half pounds of cocaine or shoplifting three golf clubs after previous convictions of three burglaries and a robbery. We are unable to do so. Indeed, Adaway's sexual abuse arguably constitutes a substantially *greater* offense. (Emphases in original)

In other words, if a life sentence without the possibility of parole for the possession of 672 grams (about 1.5 pounds) of cocaine (*Harmelin*) and a sentence of twenty-five years to life for shoplifting three golf clubs (*Ewing*) fail to qualify as grossly disproportionate to the offense, then an "adult's oral union with the vagina of an eleven-year-old girl" cannot qualify. Importantly, however, this Court only held in *Adaway* that the particular facts under review (an "adult's oral union with the vagina of an eleven-year-old girl") failed to demonstrate the gross disproportionality of one particular sentence; the decision failed to expressly declare that ***all*** violations of Florida's capital sexual battery statute necessarily result in Constitutionally valid sentences. Hence under *Adaway*, an

as applied challenge to the Constitutional validity of a particular sentence does not require the reviewing court to expressly address the validity, *vel non*, of the sentencing statute that authorizes that sentence. The reviewing court need only conduct a factual comparison and conclude that the facts *sub judice* demonstrate a greater offense than that at issue in *Harmelin* and *Ewing*.

The distinction between a facial challenge and an as applied challenge remains highly important when addressing the possibility of discretionary review under Rule 9.030(a)(2)(A)(i) because the term "validate" connotes an official endorsement that a particular statue remains incontestable. See *American Heritage Dictionary*, p. 1335 (2d College Ed.):

> Valid. 3. Legally sound and effective; incontestable: *valid title*.
>
> Validate. 1. To declare or make legally valid. 2. To mark with an indication of official sanction. 3. To substantiate; verify.

See also *ibid* at 652:

> Incontestable. Incapable of being contested; unquestionable: *incontestable proof*.

If the lower court upholds a defendant's sentence without directly addressing the validity of the statute that authorized the sentence, then the defendant cannot claim that the lower court's decision expressly endorsed the validity of that statute.

In the case *sub judice*, the Petitioner brought an as applied challenge to the Constitutional validity of his particular sentence.

See *Oyarvid v. State*, Case No. 1D09-2848 *3 (Fla. 1st DCA Jun. 22, 2010):

> Appellant's final claim is that, ***as applied to him***, the statutory scheme which requires a sentence of either life in prison or not less than 25 years in prison followed by probation or community control for the remainder of the offender's life constitutes cruel and unusual punishment in violation of the state and federal constitutions. (Emphasis added)

Because the Petitioner only challenged the Constitutional validity of his particular sentence, the lower court never addressed the facial validity of the statute that authorized that sentence. Freed of any requirement to address the validity of the sentencing statute, the lower court followed the analysis suggested by this Court in *Adaway* and concluded that the Petitioner's sentence fails to qualify as grossly disproportionate to the offense he committed. See *Oyarvid* at *3:

> We are unable to agree that this punishment is "grossly disproportionate" to the offense appellant committed. Accordingly, pursuant to the analysis set out in *Adaway v. State*, 902 So. 2d 746 (Fla. 2005), the punishment is not cruel and unusual pursuant to either the state or the federal constitution.

While the lower court certainly upheld the Petitioner's sentence, it never expressly endorsed the validity of *Section 775.082(3)(a)(4), Florida Statutes* in all situations. Indeed, the First District does not mention that particular statute anywhere in its decision. Given the narrow confines of the lower court's holding, the Petitioner

cannot establish that the decision expressly declares *Section 775.082(3)(a)(4)* valid.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Glen P. Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on August 12, 2010.

Respectfully submitted and served,

BILL MCCOLLUM
ATTORNEY GENERAL

_____
EDWARD C. HILL, Jr.
Tallahassee Bureau Chief,
Criminal Appeals
FLORIDA BAR NO. 238041

_____
MICHAEL T. KENNETT
Assistant Attorney General
Florida Bar No. 177008

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L10-1-19421]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Michael T. Kennett
Attorney for State of Florida

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