IN THE SUPREME COURT OF FLORIDA

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| MATTHEW THOGODE, | ) | |
| | ) | |
| Petitioner/Appellant, | ) | |
| | ) | |
| versus | ) | S.CT. CASE NO. 95,665 |
| | ) | |
| STATE OF FLORIDA, | ) | DCA CASE NO. 97-3117 |
| | ) | |
| Respondent/Appellee. | ) | |
| _____ | ) | |

**ON DISCRETIONARY REVIEW FROM**
**THE FIFTH DISTRICT COURT OF APPEAL**

# MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

Petitioner, Matthew Thogode, was charged by information filed on November 21, 1997, with six counts of capital sexual battery on a person under twelve years of age (R5-6). Petitioner filed a motion to suppress statements he made to Brooksville Police Detective Ron Woods (R109-110). Undersigned counsel did not raise this issue in the Fifth District Court and will not do so here. Facts surrounding the suppression motion are not dealt with here.

Appellant was tried on September 22 and 23, 1997, before the Honorable John W. Springstead in the Circuit Court for Hernando County (T1-468). During testimony by State Witness Ruth Owen, who was an investigator for the Department of Children and Families at the time of the crime, the defense objected to Owen testifying about a statement Petitioner made to her (T273)[1]. The objection was that there was an improper Miranda waiver prior to Petitioner's statement. Owen testified that she told Petitioner he did not have to speak to her, and told him she would give her notes to the State Attorney's Office (T272). Owen testified that Petitioner pointed his attorney out to Owen and said he was upset with his attorney (T272). At trial, the State argued that Owen told Petitioner his attorney could be present, but Owen gave no such

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[1] In these statements "T" denotes the trial transcript and "R" means the non-transcript portion of the record.

testimony (T275). The Circuit Court found that Owen was not a law enforcement officer and was not conducting a custodial interrogation (T278). The court also found that Petitioner was adequately warned by Owen (T279). The court found that the State could question Owen about Petitioner's admissions (T279).

The defense moved for a judgement of acquittal on Counts IV, V and VI, which alleged digital union or penetration (T397). The State argued that Petitioner made statements to Woods and Owen indicating that he had placed his finger in Victim's vagina (T398-399). The court seemed concerned that the number of times this happened was not clear, but found that when Woods used the term tickle in speaking with Petitioner, he meant digital manipulation or penetration (T399-401). The motion was denied (T401).

The jury found Petitioner guilty as charged on the first three counts (T461-462). As to the charged digital crimes, Petitioner was found guilty of attempted sexual battery on Count IV, and lewd act on Counts V and VI (T462-463).

Petitioner's recommended guideline sentence was 180-300 months imprisonment (R269). Petitioner was sentenced to life imprisonment on each capital offense, 22.3 years imprisonment for attempted sexual battery, and fifteen years imprisonment on each lewd act conviction, the sentences to run consecutive (R244-262). A notice of appeal was timely filed (R238-239).

This case was appealed to the Fifth District Court of Appeal, Thogode v. State, 24 Fla. L. Weekly D969 (Fla. 5th DCA April 16, 1999). The Fifth did not deal with the issues raised regarding Owen's testimony and denial of the Motion for Judgement of Acquittal, but affirmed the sentence on the basis of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), *review granted* Maddox v. State, 718 So. 2d 1696 (Fla. 1998). This Court accepted jurisdiction over this case on August 24, 1999, in Case number 95,665.

## STATEMENT OF THE FACTS

This statement deals only with evidence of digital sexual battery and the testimony of Ruth Owen.

The first witness was B. L., Victim's grandmother. Because D. L., Victim's mother, also testified, B. L. will be called B. in this statement. B. testified that Victim was born on July 6, 1989 (T203). B. testified that she met Petitioner through her daughter (T204). B. testified that she never saw Petitioner interacting with her grandchildren, aside from Victim (T205). B. testified that she saw Petitioner kiss Victim on the mouth and put his hand on her above the pubic area (T209-210). This caused B. to put Petitioner out of her home (T210). B. did not remember when this happened. B. called the police about Petitioner (T210).

D. L. is Victim's mother. L. testified that she became concerned because each time Petitioner was around Victim he would begin to get "an arousal" (T216).

L. testified that she talked to Victim about Petitioner during October of 1996, when she brought Victim to H.R.S. for a physical examination (T217-218). L. testified that Victim told her Petitioner had touched her, and pointed to Victim's crotch area (T219). L. testified that Petitioner wrote her letters from the time

the criminal investigation started (T225). In one of these letters Petitioner (according to L.) wrote that his confession was true except that he never penetrated Victim (T246).

On cross-examination L. testified that she never left Victim alone with Petitioner (T230). L. testified that the only improper touching she witnessed was Petitioner touching Victim's buttocks (T231).

The next witness was Ruth Owen, an investigator for the Department of Children and Families at the time of the alleged crimes (T257). Owen testified that her job was to investigate allegations of child abuse or neglect and determine whether the allegations had truth to them (T257). Owen testified that Victim said "no" when Owen asked if anyone had touched Victim in private places (T265). During this same interview Victim eventually told Owen that Matt had touched her and indicated that the touch had been in the crotch area (T268).

Owen testified that she interviewed Petitioner in the Hernando County Jail (T271). Owen assumed Petitioner had an attorney (T272). Owen told Petitioner she was writing everything down and the State Attorney's Office had access to her notes (T272). Petitioner said he was upset with his attorney and did not think he should have been charged as he was (T272). Owen testified that she told Petitioner he did not have to speak to her (T272).

Appellant told Owen that his fingers had explored Victim's vaginal area while Victim's mother was at church and Victim's sister was on the phone (T281). Owen could not remember specific dates Petitioner told her things happened (T282). Petitioner told Owen he once put his finger in the entry of Victim's vaginal area but stopped when Victim said "ouch" (T284).

On cross-examination Owen testified that Petitioner only described one attempt to put his finger in Victim's vagina (T285).

Dr. Richard Trump, who works for the Child Protection Team, testified that he examined Victim on October 28, 1996, and found no evidence of abuse or trauma (T287-293).

Detective Ronald Woods of the Brooksville Police Department was the next witness. Woods testified that when he interviewed Victim, she told him Petitioner had never touched her in a bad spot (T303-304).

In a statement he made to Woods, Petitioner said he inserted his finger in Victim's vaginal area (T319). Later, Petitioner said he once tried to insert his finger in Victim's vagina (T323). Petitioner said the last time he did "this" was last Saturday (T324). Brooks testified Petitioner made the statement on October 24th. (T305).

Woods testified that Petitioner was born on November 27, 1971 (T349).

## SUMMARY OF THE ARGUMENTS

The trial court departed by from the recommended guideline sentence in this case by more than twenty-seven years on the non-capital offenses. No reasons for departure, either written or oral, were given. Petitioner argues that this was reversible error, and that his sentences should be vacated.

Over defense objection, the court allowed a Department of Children and Families investigator to testify about a statement Petitioner made to her while he was incarcerated. The investigator did not give Petitioner Miranda warnings. Petitioner argues that the investigator was acting as a law enforcement agent and that the statement should have been suppressed.

## POINT I

THE CIRCUIT COURT ERRED BY SENTENCING PETITIONER TO 52.3 YEARS IN PRISON WHEN THE GUIDELINES MAXIMUM WAS 300 MONTHS.

This is the only issue the Fifth District Court of Appeal dealt with in its opinion. Allowing Ruth Owen to testify about her interview with Petitioner and denial of the motion for judgement of acquittal on counts IV, V and VI were also raised, but Judge Griffin wrote only that the court found no error to warrant reversal of the convictions.

The Fifth dealt with this issue by finding that it was not raised in the lower court, and citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998).

The guidelines do not apply to Petitioner's sexual battery convictions in this case. Petitioner's recommended guideline sentence was twenty years imprisonment, with a range of fifteen to twenty-five years. Petitioner was sentenced to more than twice the maximum sentence.

The court did not provide any reasons for departure, written or oral. The court knew it was departing, the prosecutor told the judge at the sentencing hearing (which is the final section of volume 2 of the record). The court said its sentence would stand (S16).

Departing from the guidelines without providing written reasons is reversible error,

Fla. Stat. §921.001(6)(1993), Fla. R. Crim. P. 3.988(b), Culver v. State, 727 So. 2d 278 (Fla. 2d DCA 1999), State v. Turro, 724 So. 2d 1216 (Fla. 3d DCA 1998).

In its opinion the Fifth noted that fundamental error was not argued on appeal. This is true. There are cases holding that departure without written reasons is not fundamental error, including the Fifth District's opinion in Maddox. Petitioner urges this Court to consider this issue in light of Maddox and its many related cases, which this Court is now considering. Fundamental error in sentencing cases is something which needs close examination at this time. Petitioner asks this Court to reconsider and reverse the thinking of some of the District Courts with regard to whether a departure without written reasons, clearly improper, is fundamental. Petitioner asks this Court to vacate his sentence and remand for resentencing.

## POINT II

THE CIRCUIT COURT ERRED BY ADMITTING INTO EVIDENCE PETITIONER'S STATEMENTS TO AN INVESTIGATOR FOR THE DEPARTMENT OF CHILDREN AND FAMILIES.

Ruth Owen was a protective investigator for the Department of Children and Families, which was once part of H.R.S. Owen testified that her job was to examine allegations of abuse and neglect and determine the truth of the allegations. When the defense objected to admitting Petitioner's statements to Owen on Miranda grounds, the court found that it was not a custodial interrogation, Owen was not a police officer, and Owen gave Petitioner adequate warnings (T278-279).

The first finding is difficult to explain. Owen was an investigator working for a State agency who questioned Petitioner in jail, several months after his arrest. The court did not explain why this was not custodial and Petitioner would argue that it clearly was.

The next issue is Owen's status. In Woods v. State, 538 So. 2d 122 (Fla. 1st DCA 1989), the defendant refused to talk to a police officer. The officer asked an H.R.S. investigator to question the defendant. The court found that Mr. Woods' statement to the investigator had to be suppressed because Woods had been arrested, was in custody and had not been rewarned of Miranda. In this case Petitioner made

statements to Detective Woods in October and was interviewed by Owen five months later. Petitioner was under arrest, in jail and was not rewarned of his rights. Owen told Petitioner she would turn her notes over to the State Attorney's Office. Owen's own statement to Petitioner seems to make her an agent of the prosecution. In any event Owen was an agent of the State hired to investigate crimes. See Christmas v. State, 632 So. 2d 1368 (Fla. 1994)(Statement made to bailiffs, absent Miranda warning, should be suppressed).

Owen may have given partial Miranda warnings in this case. She did tell petitioner he did not have to talk to her. In spite of State arguments at trial, Owen did not tell Petitioner he had the right to an attorney. Appellant testified that Petitioner identified a person outside the interview room as his attorney and said he was not happy with that person. This is not the same thing as telling Petitioner, who was given Miranda warnings five months prior to this, that he could have his attorney present at the interview. In the Woods case the H.R.S. investigator apparently interviewed the defendant shortly after the police officer did, and the court reversed, in part, because the defendant was not given Miranda warnings again.

It was clear error to allow Ruth Owen to testify about the statement Petitioner made to her at the jail. The defense objections should have been sustained. Petitioner's convictions must be reversed.

## CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court reverse his conviction.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

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COUNSEL FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Matthew Thogode, Inmate No. U-02064, MB# 1156, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 17th day of September, 1999.

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KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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| MATTHEW THOGODE, | ) | |
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A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

JANUARY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

MATTHEW THOGODE,

Appellant,

v.

CASE NO. 97-3117

STATE OF FLORIDA,

Appellee.

/



Opinion Filed April 16, 1999

Appeal from the Circuit Court
for Hernando County,
John W. Springstead, Judge.

James B. Gibson, Public Defender, and
Kenneth Witts, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Carmen F. Corrente,
Assistant Attorney General, Daytona Beach,
for Appellee.

GRIFFIN, C.J.

Matthew Thogode ["defendant"] appeals his judgments and sentences for thr counts of sexual battery upon a person less than twelve years of age, one count attempted sexual battery upon a person less than twelve years of age, and two counts committing lewd and lascivious acts upon a child. He received three life sentences for t sexual batteries.

Defendant was sentenced to 22.3 years in prison for the attempted sexual batte

and 15 years in prison for each lewd act, all to be served consecutively. We find no err that would warrant reversal of the convictions. Appellant contends for the first time appeal that it was error to make the sentences for the non-capital crimes consecuti because they constitute an upward departure sentence without written reasons. It is r claimed that this error is fundamental. Even if it were a fundamental error, it cannot raised first on appeal. *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *revi granted*, 718 So. 2d 169 (Fla. 1998).

AFFIRMED.

COBB and THOMPSON, JJ., concur.

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| | ) | |
| Respondent/Appellant. | ) | |
| | ) | |

## CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14 point CG TIMES, a proportionately spaced font.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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