IN THE SUPREME COURT OF FLORIDA

MATTHEW THOGODE,

Petitioner,

v.

CASE NO. 95,665
DCA No.: 97-3117

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND FACTS

Petitioner's sentence was affirmed on appeal based on the precedent of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998).

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier.

SUMMARY OF ARGUMENT

Since the decision of the Fifth District Court of Appeal relies on a case currently pending in this court, this Court has jurisdiction to accept the appeal.

ARGUMENT

THIS COURT HAS THE DISCRETION TO ACCEPT JURISDICTION IN THE INSTANT CASE.

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court held that when a district court issues a decision where the controlling precedent is presently pending in this Court, there is "prima facie express conflict (which) allows this court to exercise its jurisdiction." Id. at 420. The decision of the Fifth District Court of Appeal in the instant case relied on Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998), which is currently pending review before this Court. This Court therefore has discretion to entertain the review sought by Petitioner.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court accept jurisdiction in this case pursuant to the holding in Jollie.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Kenneth Witts, counsel for the Petitioner, 112 Orange Ave. Ste A., Daytona Beach, FL 32114, this 14th day of June 1999.

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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 three counts of sexual battery upon a person less than twelve years of age, one count of attempted sexual battery upon a person less than twelve years of age, and two counts of committing lewd and lascivious acts upon a child. He received three life sentences for the sexual batteries.

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

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

AFFIRMED.

COBB and THOMPSON, JJ., concur.