IN THE SUPREME COURT OF FLORIDA

STEPHEN A. ERVIN,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 97, 135
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 98-33 15
	)	
Respondent/Appellee.	)	
	)	

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0 147370
112 Orange Avenue, Suite A
Daytona Beach, Florida 32 114
Phone: 904-252-3367

COUNSEL FOR PETITIONER/
APPELLANT

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STATEMENT OF THE CASE AND FACTS

Stephen Ervin, appellant herein, participated in a jury trial as the defendant on June 29 and 30, 1998, before the Honorable Charles M. Holcomb in case number 97-12236-CFA. Prior to trial it was placed on the record that the defendant did not want to accept the state's offer that in exchange for a plea he would receive a low end guidelines sentence, followed by probation, in the court's discretion. (Volume 2, page 11) The court advised the jury that Mr. Ervin had been charged with one count of Lewd and Lascivious or indecent act upon a child. (Volume 2, page 19)

J. C., age 14, testified that the defendant had been a friend and was always down at the swimming pool. One night, she spent the night at the appellant's, She wore a long T-shirt and underwear. She felt someone rub her legs. The defendant was touching her. He rubbed her vagina on the outside of her clothing. When he did this, she closed her legs and pushed his hand away. He then got up and went to the bathroom. (Volume 2, pages 42-52)

On cross-examination, J. stated she had been over to his apartment about 12 times before. She had never had any problems with Mr. Ervin before and she had slept on the couch before, (Volume 2, pages 53-55) After the incident, she went back to sleep. (Volume 2, page 59) Prior to the incident, she had dreams

about Travis Tritt going to rape her. (Volume 2, page **62)**

R.C., father of J. C., was the second witness called by the state. Mr. C. and his family were living in the Imperial Towers in May, **1997.** He had **known** the defendant ever since they moved into the Imperial Towers. He had met the defendant by the swimming pool. They became friends. Mr. C[redacted] found out what his daughter said had happened, after J[redacted] returned from school that afternoon. Mr. C[redacted] called the police. (Volume **2,** pages **68-74)** On cross-examination, it was brought out that J[redacted] had stayed at Mr. Ervin's apartment because of the situation/problems the family was having with their older daughter. J. said nothing to her father when she went to school that morning. (Volume 2, pages **76-77)**

Officer Tom **Ganache** took statements about the incident, after which he placed Mr. Ervin under arrest. (Volume 2, pages **84-86)**

Defense counsel objected to the proposed Williams rule testimony as there were not enough points of similarity to warrant the testimony being admitted. (Volume **2, pages** 119- **120)**

A[redacted]P gave Williams rule testimony that around May **10, 1997,** she spent the night at Mr. Ervin's house. She was sitting on his lap and he was rubbing her legs and he went up her thighs and when he reached inside her pants up to

where her underwear line was, she got up. If she would have sat down, he would have reached under her pants and touched her vagina. Defense counsel objected and the objection was sustained. (Volume 2, pages 123-124) On cross-examination she said sitting on Mr. Ervin's lap only happened once in a while. He also rubbed other parts of her body like her arms and shoulders. He did not force her to sit on his lap. A[redacted] said she was good friends with the alleged victim, J.C., (Volume 2, pages 127-128) The state rested after this witness testified.

Motion for judgment of acquittal was made and denied. (Volume 2, pages 13 1-133) Defense rested and renewed its motion for judgment of acquittal, which was denied. (Volume 2, page 141) Defense counsel Mr. Deratany pointed out the verdict form said July instead of June -- which was corrected by the court. (Volume 2, page 183) The jury returned a verdict finding appellant guilty of lewd, lascivious and indecent act upon a child on June 30,1998. (Volume 2, page 185)

Sentencing took place of November 19, 1998. The scoresheet showed 119 points for a range of 9 1 to 113.7 months. (Volume 1, page 4) The alleged victim J. C. took the stand and stated the man deserved a penalty of 30 years. (Volume 1, pages 5-7)

Mr. Ervin told the court that since 1987, he had gone to trial on a capital sexual battery and the jury had found appellant guilty of the lesser included offense

of lewd and lascivious. The sentence was one year in jail and two years community control. There had been 10 years with a clean record and no other sex crimes between 1987 and 1997. (Volume 1, pages 10-12)

The court found the victim was especially vulnerable due to her age and found appellant used his position/status as her uncle. The defendant advised the court that he was not her uncle. The court departed upward and imposed a sentence of 15 years, the statutory maximum. (Volume 1, pages 22-23) This appeal resulted in a per curiam affirmed opinion which relied in part on Maddox v State, 708 So. 2d 617 (Fla 5th DCA 1998), ***rev. granted*** 728 So.2d 203 (Fla. 1999). Maddox was a decision holding that imposition of costs may not be raised on appeal when it was not raised pursuant to Florida Rule of Criminal Procedure 3.800(b) at trial. Maddox was an interpretation of the Criminal Appeal Reform Act.

Petitioner now seeks discretionary review by this Court.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal included in its decision in this case, Maddox v. State, 708 So. 2d 617 (Fla 5th DCA 1998), rev. *granted* 728 So.2d 203 (Fla. 1999). Also cited was Thogode v. State, 73 1 So. 2d 114 (Fla 5th DCA 1999) rev. *granted* 728 So.2d 203 (Fla. 1999).

In Maddox the Fifth District acknowledged it was in conflict with every other District Court of Appeal.

This Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL.

As mentioned, the decision in this case included a citation to Maddox v State, 708 So. 2d 617 (Fla 5th DCA 1998), rev. *granted* 728 So.2d 203 (Fla. 1999). The Court in Maddox decided that fundamental error did not exist in the context of sentencing, and that an illegal sentence would not be addressed on direct appeal unless the issue was raised by objection or 3.800(b) motion in the trial court. In its Maddox decision the Fifth District Court recognized that it was in conflict with the other Courts of Appeal on the issue of whether a sentencing error may be fundamental, citing Chojnowski v. State, 22 Fla. Law Weekly D2660 (Fla. 2d DCA November 19 1997), Pryor v, State, 22 Fla. Law Weekly D2500 (Fla. 3d DCA October 29, 1997), Johnson v. State, 701 So. 2d 382 (Fla. 1 st DCA 1997), and Collins v. State, 698 So. 2d 883 (Fla. 4th DCA 1997). There is a corrected opinion in Pryor at Pryor v. State, 704 So. 2d 217 (Fla. 3d DCA 1998). The Court also recognized conflict with other District Courts which have held that illegal sentences may be raised on appeal without preservation, citing State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997), and Sanders v. State, 698 So. 2d 377 (Fla. 4th DCA 1997).

In Harriel v. State, 23 Fla. Law Weekly D967 (Fla. 4th DCA April 15, 1997), the Court certified conflict with Maddox insofar as illegal sentences are concerned. Specifically, the Court said that a sentence in excess of the statutory maximum is an illegal sentence (as opposed to unlawful) which constitutes fundamental error correctable on direct appeal without objection.

Maddox is currently before this Court pending a decision on jurisdiction, Florida Supreme Court Case No. 92,805. The Fifth District Court did not use the "key-words" to recognize conflict with any other District Court in its decision in this case, however they did indicate review had been granted.

This Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court accept jurisdiction in this cause.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0 147370
112 Orange Avenue, Suite A
Daytona Beach, Florida 32 114
Phone: 904/252-3367

COUNSEL FOR PETITIONER/
APPELLANT

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 32 118, in his basket at the Fifth District Court of Appeal, and mailed to Stephen A. Ervin, Inmate No. 85080 1, Brevard County Detention Center, Post Office Box 800, Sharpes, Florida 32959-0800, on this 6th day of December, 1999.

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STEPHEN A. ERVIN, Petitioner/Appellant, vs. STATE OF FLORIDA, Respondent/Appellee.	S.CT. CASE NO. _____ DCA CASE NO. 98-33 15

APPENDIX

99-153 4/e

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1999

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

STEPHEN ERVIN,

Appellant,

v.

Case No. 98-33 15

STATE OF FLORIDA,

Appellee.

/

OCT 29 1999

PUBLIC DEFENDER'S OFFICE
7TH CIR. APP. DIV.

Opinion Filed October 29, 1999

Appeal from the Circuit Court
for Brevard County,
Charles M. Holcomb, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *Thogode* **v. State,** 73 1 So. 2d 114 (Fla. 5th DCA 1999), *rev. granted, No.* 95.665 (Fla. Aug. 24, 1999), *Maddox* v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted,* 728 So. 2d 203 (Fla. 1999).

ANTOON, C.J., DAUKSCH and PETERSON, JJ., concur.

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	)	

CERTIFICATE OF FONT

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

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0 147370
112 Orange Avenue, Suite A
Daytona Beach, Florida 32 114
Phone: 904/252-3367
COUNSEL FOR PETITIONER/
APPELLANT