IN THE SUPREME COURT OF FLORIDA

STEPHEN A. ERVIN,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 97,135
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 5D98-3315
	)	
Respondent/Appellee.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0147370
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904-252-3367
COUNSEL FOR PETITIONER/
APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Stephen Ervin, petitioner 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 petitioner'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. found out what his daughter said had happened, after J. returned from school that afternoon. Mr. C. called the police. (Volume 2, pages 68-74) On cross-examination, it was brought out that J. 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. 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. 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 131-133) 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 petitioner 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 91 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 petitioner 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 petitioner 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)

The 5th District Court of Appeal, by opinion dated October 29, 1999, issued a per curiam affirmance on the authority two cases, including Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, 728 So. 2d 203 (Fla. 1999).

This Court decided Maddox v. State, 25 Fla. L. Weekly S367 (Fla. May 11, 2000), which reads in part:

> We disapprove of the Fifth District's decision in Maddox to the extent it holds that no sentencing error may be considered on direct appeal unless such error has been preserved for review by either a contemporaneous objection during the sentencing hearing or a motion to correct sentence filed in the trial court after the sentencing hearing pursuant to rule 3.800(b).

Id. at S368.

SUMMARY OF THE ARGUMENT

Petitioner appeals his upward departure sentence, contending that the reasons

advanced by the trial court were invalid. Request is made for this Court to remand this case to the 5th District Court of Appeal with instructions to vacate the sentence and remand to the trial court, because the stated reasons constituted an impermissible basis for imposing a departure sentence herein.

ARGUMENT

THE TRIAL COURT ERRED WHEN IMPOSING THE STATUTORY MAXIMUM AS AN UPWARD DEPARTURE SENTENCE.

In Kipping v. State, 702 So. 2d 578 (Fla. 2d DCA 1997):

> [2] [3] The State concedes, and we agree, that disagreement with the guidelines and heightened degree of premeditation (numbers 10 and 11) are invalid reasons for departure. See Scott v. State, 508 So. 2d 335 (Fla. 1987); Taccariello v. State, 664 So. 2d 1118 (Fla. 4th DCA 1995). The State also concedes that protection of the public and the age of the victims (numbers 1 and 2) are insufficient departure reasons unless coupled with another valid reason. See Ready v. State, 657 So. 2d 53 (Fla. 2d DCA 1995); Lattimore v. State, 571 So. 2d 99 (Fla. 3d DCA 1990). Therefore, there is no need to analyze these two factors unless there exists another valid basis for departure in the remaining reasons. (emphasis added)

Id. at 581-582.

> [5] The trial court's departure reasons for the number of victims and the time over which the crime charged was committed (numbers 4 and 5) are inherent in the charge of scheme to defraud and are therefore invalid departure reasons. See State v. Fletcher, 530 So. 2d 296, 297 (Fla.1988) ("The facts that are essential to prove a statutory element of the crime are necessarily embodied in the recommended guidelines sentence.").

Id. at 582.

The age of the victim, in the case at bar, was an integral part of the charged

offense and thus was an invalid reason for departure. See Florida Statute Section 800.04, which refers to a child [victim] under the age of 16 years.

> [4] Emotional trauma (number 3) fails for insufficiency of evidence. This departure reason is founded on the prosecution's theory that the victims were traumatized because of the amount of money they had spent on dance lessons. Emotional trauma is a permissible basis for departure only if the trauma arises from extraordinary circumstances not inherent in the charged crimes, or if the victim suffers from "a discernible physical manifestation resulting from the psychological trauma." State v. Rousseau, 509 So. 2d 281, 284 (Fla. 1987). There was no testimony presented here of the extreme emotional trauma, including serious physical symptoms, necessary to support this basis for departure.

Id. at 582.

Similarly, in the case at bar, there was no testimony as to trauma not inherent in the crime charged. After the incident, J. even testified she went back to sleep. (Volume 2, page 59)

It was the trial judge who at sentencing stated: "... what you do to a child when you sexually abuse a child is sometimes worse than being in prison because they get a life sentence every time. The traumatic effect of it just never seems to go away. They live with it for the rest of their lives. I think that is inhumane and cruel..." (Volume 1, page 22)

> ...the record does not support a departure based on a breach of trust (number 7). Kipping's conviction was based on the

> activities of those employed by the dance studios. There was no evidentiary support for the trial court's conclusion that Kipping "fostered a position of trust with his victims and abused that position of trust in perpetuating the fraud."

Id. at 582.

Similarly, herein, the court also found appellant used his position or status to facilitate the commission of the offense because of his position of trust and confidence as her uncle. (Volume 1, page 22) Mr. Ervin explained that he was not the child's uncle. (Volume 1, page 23)

The court also found the defendant was involved in similar conduct in the past. (Volume 1, page 23) This was an invalid reason for upward departure. Such conduct was **not** an escalating pattern of criminal conduct. Prior record was already factored in as part of Appellant's scoresheet. (Volume 1, page 87) There had been 10 years with a clean record and no other sex crimes between 1987 and 1997. (Volume 1, pages 10-12) See Casteel v. State, 481 So. 2d 72 (Fla. 1st DCA 1986) (the court held **invalid** as a reason for departure the trial court's finding that Casteel's prior criminal history "establishes a pattern of conduct that renders him a continuing and serious threat to the community" because it was based on his prior record)(emphasis added)

CONCLUSION

Based on the argument contained herein, and the authorities cited in support

thereof, Appellant requests that this Honorable Court remand this case for re-sentencing to a guideline sentence without any upward departure.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0147370
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
Phone 904-252-3367

COUNSEL FOR PETITIONER
APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and to Mr. Stephen A. Ervin, Inmate No. 850801, Brevard County Detention Center, Post Office Box 800, Sharpes, Florida 32959-0800, on this 11th day of July, 2000.

_____
LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STEPHEN A. ERVIN,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	S.CT. CASE NO. 97,135
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 5D98-3315
	)	
Respondent/Appellee.	)	
_____	)	

A P P E N D I X