

IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1656

NGOC C. THACH

Petitioner,

v.

STATE OF FLORIDA,

Respondent

AMENDED JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Ngoc C. Thach, was the defendant in the court below. This brief will refer to Petitioner as such, defendant or by proper name. Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State.

“JB” will designate Petitioner’s Jurisdictional Brief and will be followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State provides the following statement of the case and facts from the opinion of the First District:

In *Thach v. State*, 304 So. 3d 387, 388 (Fla. 1st DCA 2020), Petitioner challenged his convictions and sentences on four counts of lewd or lascivious molestation, which related to his three stepdaughters. During trial, the court permitted the State to amend four counts of the information (out of 15 counts) over Petitioner’s objection that he would suffer prejudice. *Id.* The four counts amended by the State were previously charged as sexual batteries. *Id.* The four

counts included two counts of sexual battery involving a child under 12, and two counts of sexual battery by familial authority involving a person between the ages of 12 and 18 years old. *Id.* Ultimately, Petitioner was found guilty on the four counts, as well as other counts. *Id.*

The First District determined that the State's substantive amendment of four counts from sexual battery to lewd or lascivious molestation did not prejudice Petitioner's substantial rights. *Id.* The First District stated that even though the two crimes were different, the manner in which the State charged Petitioner on the four counts made it such that the amended charges could not have been proven without proving the greater offenses. *Id.* As to the four counts at issue, the First District specifically referred to the “sexual activity” language that existed in the information prior to the amendment and to the language that Petitioner digitally or with his penis penetrated and/or made union with specific parts of his victims’ bodies. *Id.*

Moreover, the First District rejected Petitioner’s contention that he suffered prejudice. *Id.* at 389. The First District indicated that

Petitioner had sufficient notice because the State charged the greater crimes in a manner that encompassed the amended lesser crimes. *Id.* The First District further noted that even though Petitioner had been charged with other counts of lewd or lascivious molestation against the same victims before the amendment, he never questioned them in a way to suggest that they misinterpreted his actions or that they were not touched in a sensual manner. *Id.* The First District indicated that Petitioner's defense was that the victims fabricated the sexual abuse. *Id.*

STATEMENT OF THE ISSUES

Pursuant to Florida Rule of Appellate Procedure 9.210(f), if this Court grants review, the State does not intend to raise any affirmative issues on cross-review, which are independent of those on which jurisdiction is invoked and independent of those raised by Petitioner in his statement of the issues (or his jurisdictional brief since he filed his brief before this requirement).

SUMMARY OF ARGUMENT

Petitioner has not established a conflict of decisions. The First District did not determine that the elements of lewd or lascivious molestation were subsumed in those of sexual battery. Also, the First District did not permit the State to amend the information during trial to charge a completely different crime, to change the essential elements of the crime, and/or to inject new proof issues. For all these reasons, *Thach* does not conflict with the cases cited by Petitioner, and this Court should decline jurisdiction.

ARGUMENT

WHETHER THE DECISION FROM THE FIRST DISTRICT
CONFLICTS WITH DECISIONS FROM OTHER DISTRICT
COURTS OF APPEAL? (Restated)

Petitioner incorrectly argues that this Court has jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution, which provides that the Court “[m]ay review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.”

For this type of discretionary jurisdiction to exist, the conflict

“must be express and direct” and “must appear within the four corners of the majority decision.” *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); accord *Dept. of Health and Rehabilitative Services v. Nat’l Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (rejecting “inherent” or “implied” conflict). In *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958), this Court explained that “[i]t was never intended that the district courts of appeal should be intermediate courts.” Instead, Article V’s current jurisdictional requirements were “prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice.” *Id.* This Court therefore may “exercis[e] appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.” *Id.*

Moreover, Petitioner first argues that the decision in *Thach* conflicts with *Roughton v. State*, 185 So. 3d 1207 (Fla. 2016). Petitioner argues that the conflict exists because the First District

held that “the elements” of lewd or lascivious molestation are subsumed in those of sexual battery. (JB-7-8). However, the First District never held that the elements of lewd or lascivious molestation are subsumed in those of sexual battery. In fact, the language in *Thach* refutes Petitioner’s argument.

In *Thach v. State*, 304 So. 3d at 388-89, the First District indicated:

In Appellant's case, we agree with the trial court's conclusion that the State's substantive amendment of four counts from sexual battery to lewd or lascivious molestation did not prejudice Appellant's substantial rights. **While the two crimes are different, the manner that these four sexual battery counts were charged in the second amended information were such that the amended lewd or lascivious molestation charges could not help but have been proven if the greater offense allegations were proven. Specifically, before the amendment, the second amended complaint alleged “sexual activity” in each of the four sexual battery counts and that Appellant digitally or with his penis penetrated and/or made union with specific parts of his victims’ bodies.** The witness testimony supporting the State's case proved the allegations, except that the sexual-touch evidence fell short of proving the “penetration and/or union” elements of the sexual battery charges. The apparent absence of “penetration and/or union” evidence on these counts prompted the State to seek amendment of the four charges to lewd or lascivious molestation, which required a lesser showing of sexually oriented touching—only that Appellant “intentionally touche[d] ... the ... genitals, genital area, or buttocks, or the clothing

covering them” of his victims in a lewd or lascivious (i.e., unchaste or sensual) manner. See § 800.04(5)(a), Fla. Stat.; *Lara-Castillo v. State*, 244 So. 3d 354, 355 (Fla. 1st DCA 2018) (discussing the definition of “lewd or lascivious manner”); see also *Anderson v. State*, 291 So. 3d 531, 538 (Fla. 2020) (recognizing the State's prerogative to amend an information based upon subsequent factual developments)

(Bold emphasis and underlining added).

The language used in *Thach* shows that the court did not determine that the elements of lewd or lascivious molestation were subsumed in those of sexual battery. The First District specifically indicated that the manner in which the sexual battery counts were charged in the Second Amended Information made it such that the lewd or lascivious molestation charges had to be proven if the greater offenses were proven. In fact, the First District later indicated, “...the second amended information charged Appellant with committing sexual acts and ‘engag[ing] in sexual activity’ such that Appellant was on notice of the sexual nature of the incidents charged by the State. Because the State charged the greater crimes in a manner that encompassed the amended lesser crimes, it caused no prejudice by amending the information. We therefore agree with the trial court's

prejudice assessment and decision to allow the State to amend the information at trial.” *Id.* at 389.

The holding in *Thach* does not conflict with *Roughton*. *Roughton* held that convictions for lewd or lascivious molestation and sexual battery arising from the same act did not violate the prohibition against double jeopardy because each offense required proof of an element that the other did not. *Id.* at 1210. *Roughton* does not bear any resemblance to *Thach*, and the language used in the case does not conflict with any of the language used by the First District. As noted above, the First District indicated that the language used in the second amended information put Petitioner on notice of the lewd or lascivious molestation and that there was no prejudice when the State amended the information during trial.

Second, without much explanation, Petitioner argues that *Thach* conflicts with *Simbert v. State*, 226 So. 3d 883 (Fla. 4th DCA 2017), *Diaz v. State*, 38 So. 3d 791 (Fla. 4th DCA 2010), and *Green v. State*, 728 So. 2d 779 (Fla. 4th DCA 1999). Petitioner further argues that *Thach* conflicts with *Viladoine v. State*, 268 So. 3d 804

(Fla. 4th DCA 2019) and *Blue v. State*, 876 So. 2d 1273 (Fla. 2d DCA 2004). (JB-8).

However, once again, there is no conflict. In *Simbert*, the Fourth District held that the State was precluded from amending the information to charge the defendant with digital penetration, instead of oral penetration, because the State charged a completely new crime by substituting an essential element. *Id.* at 885-86. Similar circumstances existed in *Diaz* and *Green*. In *Green v. State*, 728 So. 2d at 781, the State amended the information to allege a different victim, and in *Diaz v. State*, 38 So. 3d at 792-93, the State amended the information to allege oral union, instead of digital penetration. In *Thach*, the State did not amend the information to charge a completely new crime or to change the essential elements of the charged offense.

Furthermore, as to *Viladoine* and *Blue*, the *Thach* court specifically stated:

Finally, the cases cited by the dissent are different than the circumstances presented here because the amended charges in those cases were not subsumed within the prior charges and trial evidence as they are here. See, e.g., Wright,

41 So. 3d at 926 (amendment at trial raised new proof issues regarding the use of a deadly weapon); *Viladoine v. State*, 268 So. 3d 804, 806 (Fla. 4th DCA 2019) (amendment at trial raised new evidentiary issues regarding the existence of a specific object); *Blue v. State*, 876 So. 2d 1273, 1274 (Fla. 2d DCA 2004) (amendment of the alleged missile target injected new proof issues).

Id. at 389. (Bold emphasis and underlining added).

The State notes that Petitioner does not provide any argument as to why the First District was incorrect regarding its analysis as to *Viladoine* and *Blue*, nor does he explain why there is a conflict of decisions. Therefore, Petitioner has not established that *Thach* conflicts with any of the decisions cited in his jurisdictional brief.

CONCLUSION

WHEREFORE the State urges this Court to decline jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was submitted via e-Filing Portal to A. Victoria Wiggins, Assistant Public Defender, at Victoria.Wiggins@flpd2.com, on this 14th day of January 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing contains 1,844 words, per the “word count” feature in Microsoft Word, and was printed in 14-point Bookman Old style. This satisfies the requirements of Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(A).

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