**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC00-1082

**PATRICK MATCHETT**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

---

**ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

---

# RESPONDENT'S BRIEF ON THE MERITS

---


**ROBERT A. BUTTERWORTH**
**Attorney General**
Tallahassee, Florida

**MICHAEL J. NEIMAND**
**Assistant Attorney General**
Florida Bar Number 0239437
Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 950
Miami, Florida 33131
(305) 377-5441
fax 377-5655

**ROBERTA G. MANDEL**
**Assistant Attorney General**
Florida Bar Number 0435953

**TABLE OF CONTENTS**

**CERTIFICATE OF TYPE SIZE AND STYLE. . . . . .ii**

**TABLE OF CITATIONS . . . . . iii**

**INTRODUCTION . . . . . 1**

**STATEMENT OF THE CASE AND FACTS . . . . . 1**

**SUMMARY OF THE ARGUMENT . . . . . 2**

**ARGUMENT . . . . . 3-8**

**THE PETITIONER'S UPWARD DEPARTURE SENTENCE MUST BE AFFIRMED WHERE THE TRIAL COURT'S ALLEGED FAILURE TO FILE WRITTEN REASONS JUSTIFYING THE UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES WAS NOT PRESERVED FOR APPELLATE REVIEW AND WHERE THE FAILURE TO FILE WRITTEN REASONS TO SUPPORT A DEPARTURE SENTENCE DOES NOT CONSTITUTE A PREJUDICIAL ERROR PURSUANT TO THIS COURT'S DECISION IN MADDOX V. STATE, 760 So. 2d 89 (Fla. 2000). . . . . .**

**CONCLUSION . . . . . 9**

**CERTIFICATE OF SERVICE . . . . . 10**

**CERTIFICATE OF TYPE SIZE AND STYLE**

Undersigned counsel certifies that this brief was prepared using 12-point Courier New, a font that is not proportionately spaced.

## TABLE OF CITATIONS

**CASES** **PAGE**

Collins v. State,
766 So. 2d 1009 (Fla. 2000). . . . . .7

Jordan v. State,
728 So. 2d 748 (Fla. 3d DCA 1998), decision approved, 25 Fla. Law Weekly S499 (Fla. June 22, 2000). . . . . 4

Maddox v. State,
760 So. 2d 89 (Fla. 2000). . . . . 2,5,7,8

State v. Williams,
667 So. 2d 191 (Fla. 1996).. . . . . 2,7

Weiss v. State,
720 So. 2d 1113 (Fla. 3d DCA 1998), rev. granted,
729 So. 2d 396 (Fla. 1999), decision approved,
761 So. 2d 318 (Fla. 2000). . . . . .3

**OTHER AUTHORITIES:**

Section 924.051(3), Florida Statutes (1999). . . . . .3

Section 924.051(4), Florida Statutes (1999). . . . . .3

Florida Rule of Appellate Procedure 9.140. . . . . .3

Florida Rule of Criminal Procedure 3.800(b). . . . . .3,4

## INTRODUCTION

The Petitioner **PATRICK MATCHETT** was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, The State of Florida, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbol "A." will refer to the documents attached to the Petitioner's appendix. The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcripts of the lower court hearings.

## STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's statement of the case and facts as substantially correct. The State reserves the right to expand upon the facts in the argument section of this brief.

## SUMMARY OF THE ARGUMENT

This Court stated in Maddox v. State, 760 So. 2d 89 (Fla. 2000), that the Court did not intend to recede from the Court's previous cases holding that the failure to file written reasons for imposing a departure sentence pursuant to a negotiated plea agreement does not constitute reversible error. Maddox v.State, 760 So. 2d 89, 107 citing State v. Williams, 667 So. 2d 191, 193-194 (Fla. 1996).

The defendant readily entered into a valid plea bargain in which the State abandoned count five of the information, and the defendant agreed to enter a no contest plea and be sentenced to fifteen years on the felony count, with four and a half years credit time served. The sentence imposed in the defendant's other criminal case, circuit court case no. 91-10995B was imposed to run concurrently with the sentence involved in the instant case. (R. 210, 214, 215). Since the failure to file written reasons for departure is NOT fundamental error where the defendant agreed to the imposition of the departure sentence in the plea agreement, pursuant to this Court's decision in Maddox, this Court should affirm the decision of the Third District Court of Appeal.

## ARGUMENT

**THE PETITIONER'S UPWARD DEPARTURE SENTENCE MUST BE AFFIRMED WHERE THE TRIAL COURT'S ALLEGED FAILURE TO FILE WRITTEN REASONS JUSTIFYING THE UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES WAS NOT PRESERVED FOR APPELLATE REVIEW AND WHERE THE FAILURE TO FILE WRITTEN REASONS TO SUPPORT A DEPARTURE SENTENCE DOES NOT CONSTITUTE A PREJUDICIAL ERROR PURSUANT TO THIS COURT'S DECISION IN MADDOX V. STATE, 760 So. 2d 89 (Fla. 2000).**

Section 924.051(3), Section 924.051(4) Florida Statutes (1999) and Florida Rule of Appellate Procedure 9.140 provide that a sentencing error can ONLY be heard on direct appeal if the error was brought to the attention of the trial court at the time of sentencing or by motion pursuant to Florida Rule of Criminal Procedure 3.800(b). It is undisputed that the defendant failed to object with regard to the sentence imposed. Consequently the issue wasn't preserved for appellate review.

The Third District Court of Appeal appropriately affirmed the defendant's sentence given the fact that the issue was not preserved and appropriately relied upon its' earlier decision in Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), review granted, 729 So. 2d 396 (Fla. 1999), decision approved, 761 So. 2d 318 (Fla. 2000). In Weiss v. State, the Third District Court of Appeal held that even where a technical error occurs, it may not be made the basis of reversal under the operative provisions of the Criminal Appeal Reform Act of 1996, Section 924.051, Florida Statutes (Supp. 1996), which requires BOTH preservation and harm.

A departure sentence wasn't precluded in the instant case as there is absolutely no requirement that the defendant be sentenced within the sentencing guidelines. As the Third District Court of Appeal noted in Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998), decision approved 25 Fla. Law Weekly S499 (Fla. June 22, 2000), "the phrase 'pursuant to the sentencing guidelines' is a generic reference to all of the provisions of the guidelines which will allow upward departures where statutory or case law criteria are met." Id. The Court in Jordan, recognized that a prejudicial error is an error in the trial court that harmfully affected the judgment or sentence. This Court and the Florida Legislature have both concluded that sentencing errors should be treated the same as other trial errors. As the Court in Jordan noted, where a defendant fails to file a Rule 3.800(b) motion to correct a sentencing error, the defendant is barred because the point was not preserved. The point is also not deemed to be one which would constitute fundamental error. The Court reasoned that the entire point of the statutory and rule changes was to require this type of claim to be presented in the first instance in the trial court.

Even if this Court contends that the trial court erred in not filing departure reasons, a review of the record indicates that the error constituted no more than nonprejudicial harmless error. In the instant case the defendant was sentenced to life on

count II. Count II charged the defendant with armed robbery pursuant to Sections 812.13 and 775.087, Florida Statutes. A review of Section 812.13(2)(a) reveals that the statutory maximum for the offense was for a term of years not exceeding life imprisonment. This case, therefore, does not involve an alleged sentencing error which is in excess of the statutory maximum. Clearly, even where the defendant has pleaded guilty, the trial court may not impose a sentence exceeding the statutory maximum. Maddox v. State, 760 So. 2d at 101. Clearly patent and serious sentencing errors can be corrected on direct appeal as fundamental error. 760 So. 2d at 101. In the instant case, this Court isn't faced with an unpreserved error which resulted in a sentence in excess of the statutory maximum.

In the instant case, defense counsel asked the court to run the defendant's sentence in counts two and three concurrent with the first count. He noted that the defendant was already sentenced to a life sentence in count one. ( R. 217). Defense counsel specifically noted that "a life sentence is sufficient in this case." (R. 218). The Count noted that in count one, the Court had already imposed a life sentence without eligibility for parole for 25 years. The trial court thereafter imposed a life sentence on count two, to run consecutive to the sentence in count one of the indictment. The three year minimum mandatory sentence would also run consecutive to the sentence imposed. (R.

218-219). As noted above, the defendant failed to object to the sentence imposed.

Further review of the transcript reveals that the State asked the Court to go above the guidelines because according to the guideline score sheet, as to the first degree murder, there was no place for it to even be scored. (R. 215). The State reiterated that there were grounds to go above the guidelines. (R. 215). The State asked the Court to sentence the defendant to the maximum on each offense and to make it consecutive to the sentence which had already been imposed. The State argued that the sentence could be consecutive because there was evidence that the defendant committed a premeditated first degree murder. As to the robbery count, the State asked that the sentence run consecutive to the 25-year minimum mandatory imposed. So, the defendant would then have 28 years of minimum mandatory total. (R. 216). Defense counsel merely asked the trial judge to run the sentence concurrent since the defendant was already going to serve a life sentence. (R. 217). The State would respectfully submit that there was NO need to file written departure reasons, where the trial court did not depart from accurate sentencing guidelines. The prosecutor merely requested that the court sentence the defendant to the maximum on each offense. It is clear that as the prosecutor pointed out, without objection, the first degree murder wasn’t scored in formulating the sentencing

guidelines score sheet. (R. 215).

The defendant readily entered into a valid plea bargain in which the State abandoned count five of the information, and the defendant agreed to enter a no contest plea and be sentenced to 15 years on the felony count, with four and a half years credit time served. The sentence imposed in case no. 91-10995B was imposed to run concurrently with the sentence involved in the instant case. (R. 210, 214, 215).

In Maddox v. State, this Court distinguished between departure sentences involving those sentences which involved a negotiated plea. This Court specifically stated that a valid plea agreement constitutes clear and convincing grounds for the trial judge to impose a departure sentence, citing to this Court's earlier decision in State v. Williams, 667 So. 2d 191, 193-194 (Fla. 1996).

In Maddox, as noted above, this Court distinguished between those defendants who agreed to the imposition of a departure sentence in a plea agreement and those defendants, who did not. In Collins v. State, 766 So. 2d 1009, 1010 (Fla. 2000), this Court specifically stated as follows with regard to its' earlier ruling in Maddox: "We stated in Maddox that we did not intend to recede from our previous cases holding that the failure to file written reasons for imposing a departure sentence pursuant to a negotiated plea agreement does not constitute reversible error."

The defendant's appeal does not fit into the narrow class of unpreserved sentencing errors which can be raised on direct appeal as fundamental error as defined by this Court's decision in Maddox v. State. The failure to file written reasons for departure is NOT fundamental error where the defendant agreed to the imposition of the departure sentence in the plea agreement. This Court should affirm the defendant's judgment of conviction and sentence.

## CONCLUSION

Based upon the authorities and arguments cited herein, this Court should affirm the Third District's opinion in Matchett v. State, 755 So. 2d 778 (Fla. 3d DCA 2000).

Respectfully Submitted,

**ROBERT A. BUTTERWORTH**
**Attorney General**
Tallahassee, Florida

_____
**MICHAEL J. NEIMAND**
**Assistant Attorney General**
Florida Bar Number 0239437
Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 950
Miami, Florida 33131
(305) 377-5441

fax 377-5655

**ROBERTA G. MANDEL**
**Assistant Attorney General**
Florida Bar Number 0435953

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of November, 2000, to **LISA WALSH**, **Assistant Public Defender**, Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125.

**ROBERTA G. MANDEL**
**Assistant Attorney General**