IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1082

PATRICK MATCHETT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This is the Petitioner's brief on the merits requesting that this Court grant certiorari, quash the decision below, follow the prior decisions of this Court which are in express and direct conflict with the decision below on the same question of law. 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. The parties are referred to in this brief as Petitioner and Respondent. In this brief, the symbol "R" indicates the record on appeal, the symbol "T" indicates the transcripts of hearings, and the symbol "A." indicates the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner Patrick Matchett was convicted following a jury trial on four charges, first degree murder, armed robbery, aggravated assault with a firearm and possession of a firearm while engaged in a criminal offense. (R. 189). On count 1, first degree murder, The defendant was sentenced immediately following trial to life in prison with the possibility of parole in 25 years. (T. 761).

At a sentencing hearing, the trial court asked if anyone wished to be heard prior to pronouncing sentence, then sentenced the petitioner on counts 2, 3 and 4. (R. 218). [1] On the remaining counts, the petitioner's recommended sentencing guidelines score was 17 to 22 years in prison, with a permitted range on 12 to 27 years in prison. (R. 187). The court sentenced the petitioner to a consecutive term of natural life in prison on count 2 and a consecutive five year term on count 3. (R. 217-18). On the fourth count, the court suspended sentence. (R. 218-19). The trial court did not enter into a written order delineating its reasons for upward departure from the guidelines. The crime was committed on June 9, 1991. (R. 1). The sentencing order was entered on

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[1] A fifth count, possession of a firearm by a convicted felon, was severed by the trial court prior to trial. (T. 7). The defendant was separately charged in an unrelated information with another possession of a firearm by a convicted felon. (R. 204). Prior to sentencing on counts 2, 3 and 4, the state agreed to abandon the severed count in exchange for the petitioner's plea of guilt to the unrelated firearm charge. (R. 204).

October 9, 1997 (R. 193), the notice of appeal was dated November 6, 1997 and the Initial Brief was filed on October 27, 1998.

The Third District Court of Appeal affirmed in *Matchett v. State*, 755 So. 2d 778 (Fla. 3d DCA 2000), *reh'g denied, clarification granted and opinion superceded*, holding that the failure of the trial court to file a written order setting forth its reasons for departure was not preserved. (A. 1-2). The petitioner filed a timely notice to invoke discretionary review, briefed jurisdiction and this Court has granted review.

ISSUE PRESENTED

THE PETITIONER'S UPWARD DEPARTURE SENTENCE MUST BE REVERSED AND REMANDED FOR IMPOSITION OF A GUIDELINES SENTENCE WHERE THE TRIAL COURT FAILED TO FILE WRITTEN REASONS IN SUPPORT OF THE DEPARTURE, AND THIS ERROR CONSTITUTES FUNDAMENTAL SENTENCING ERROR WITHIN THE WINDOW PERIOD ESTABLISHED IN *Maddox v. State*, 760 So. 2d 89, 107 (Fla. 2000).

SUMMARY OF ARGUMENT

This Court held in *Maddox v. State*, 760 So. 2d 89, 106-07 (Fla. 2000), that the complete failure of a trial court to file written reasons for upward departure from the guidelines constitutes fundamental error which may be raised for the first time on direct appeal. The reason this Court concluded that this omission is an important on is that it "affects the integrity of the sentencing process concerning the critical question of the length of the sentence." *Id.* at 107.

This holding was limited to a window period between the enactment of section 924.051(3), Florida Statutes (1996 Supp.) and the enactment of the recent amendments to Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140 and 9.600, 761 So. 2d 1015 (Fla. 1999), *reh'g granted*, 761 So. 2d at 1025. The petitioner's case, initially briefed in October, 1998, falls within the window period. (A. 28).

Finally, the state's argument, that this sentence was part of a negotiated plea agreement should be rejected. The petitioner was sentenced following a jury trial on count 2 to a consecutive term of natural life in prison, the most severe upward departure possible. The fact that prior to sentencing the petitioner accepted a plea bargain on an unrelated gun charge and a fifth count of the indictment which had been severed prior to trial did not transform this life sentence into a "negotiated" plea.

ARGUMENT

THE PETITIONER'S UPWARD DEPARTURE SENTENCE MUST BE REVERSED AND REMANDED FOR IMPOSITION OF A GUIDELINES SENTENCE WHERE THE TRIAL COURT FAILED TO FILE WRITTEN REASONS IN SUPPORT OF THE DEPARTURE, AND THIS ERROR CONSTITUTES FUNDAMENTAL SENTENCING ERROR WITHIN THE WINDOW PERIOD ESTABLISHED IN *Maddox v. State*, 760 So. 2d 89, 107 (Fla. 2000).

It is undisputed that the petitioner was sentenced on count 2 to an upward departure sentence of life in prison and trial judge in the instant case failed to contemporaneously file written reasons in support of an upward departure.

This Court held in *Maddox v. State*, 760 So. 2d 89, 106 (Fla. 2000) that departure sentences in which the trial court failed to file statutorily required written reasons for departure must be remanded for imposition of a guidelines sentence, in accordance with *Pope v. State,* 561 So. 2d 554 (Fla. 1990) and *Ree v. State,* 565 So. 2d 1329 (Fla. 1990). This Court explained that

> strict adherence to the requirement of a written order was required because a "departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

760 So. 2d at 107 (quoting *Ree*, 565 So. 2d at 1332.). This Court added:

> We have also explained that written reasons for departure are statutorily required to enhance the uniformity of sentences.

> *See Davis v. State*, 661 So. 2d 1193, 1196 (Fla. 1995); *Smith v. State*, 598 So. 2d 1063, 1067 (Fla. 1992); *State v. Jackson*, 478 So. 2d 1054, 1056 (Fla. 1985). Further, we recognized that requiring written reasons allows effective appellate review of the trial court's decision to depart. *See, e.g.*, *Jackson*, 478 So. 2d at 1056. In fact, we considered the correction of this type of sentencing error so important to the sentencing decision that the failure to timely file reasons for departure resulted in the appellate court remanding for the imposition of a guidelines sentence. *See Pope*, 561 So. 2d at 554.

Maddox, 760 So. 2d at 107.

This Court clarified in *Collins v. State*, 766 So. 2d 1009 (Fla. 2000), that the holding in *Maddox* is limited to those appeals filed in the window period between the recent amendments to the rules of criminal procedure in *Amendments to the Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140 and 9.600*, 761 So. 2d 1015 (Fla.), *reh'g granted*, 761 So. 2d 1025 (Fla. 1999). The petitioner was sentenced on October 9, 1997 (R. 193), the Notice of Appeal was filed on November 6, 1997 (R. 224), and the initial brief was filed on October 27, 1998 and thus, this issue falls within the window period.

The Third District Court of Appeal's decision in the instant case represents an anomaly among the districts and in this Court. This Court and the First, Second, and Fifth Districts have reversed cases where defendants were similarly situated to the petitioner. *See Collins v. State*, 766 So. 2d 1009 (Fla. 2000); *Thogode v. State*, 763 So.

2d 281 (Fla. 2000); *Collins v. State*, 765 So. 2d 306 (Fla. 1st DCA 2000); *Butler v. State*, 765 So. 2d 274 (Fla. 1st DCA 2000); *Forman v. State*, 2000 WL 1629333 (Fla. 2d DCA November 1, 2000); *Perry v. State*, 2000 WL 1475727 (Fla. 5th DCA October 6, 2000); *Ward v. State*, 756 So. 2d 299 (Fla. 2000). While the Fourth District Court of Appeal has not, since *Maddox*, reviewed a case analogous to the petitioner's, the court held in *Carridine v. State*, 721 So. 2d 818 (Fla. 4th DCA 1998) that the failure of the trial court to timely sign a departure checklist warranted a reversal and remand within the guidelines. The Third District is the only court of this state which has denied relief on this issue, citing preservation as its justification.

The Third District affirmed this sentence on the ground that it was not preserved, relying upon *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). The Third District's reliance upon *Weiss* was misplaced. This Court in *Maddox* distinguished the error in *Weiss* -- late filing of written reasons -- from the error that occurred in the instant case -- complete failure to file written reasons -- and held that the complete failure to file written reasons may be raised for the first time on direct appeal. Late filing, however, does not constitute fundamental error and may not be raised on direct appeal unless preserved. *Maddox*, 760 So. 2d at 108. Where the trial court in the instant case failed to file written reasons at any time, *Weiss* does not apply. The

petitioner's sentence on count 2 should be vacated and remanded for imposition of a guidelines sentence.[2]

Wherefore, this Court, following *Maddox*, should vacate the petitioner's sentence on count 2 and remand for imposition of a guidelines sentence.

[2] The State argued in its Brief on Jurisdiction that the petitioner is not entitled to relief where his sentence was part of a negotiated plea bargain. This argument is fallacious. Prior to sentencing, the petitioner entered a plea of guilt on an unrelated gun charge and a fifth count of the indictment, which had been severed prior to trial. (R. 208-18). Thereafter, the court, stating its reason for departure, pronounced sentence on counts 2, 3 and 4. (R. 217-18). The fact that the petitioner entered a plea bargain that was unrelated to the jury verdict did not transform this upward departure sentence -- to natural life in prison-- into a negotiated plea bargain. The petitioner did not "agree" to an upward departure sentence. Nothing about this life sentence was "negotiated." Any argument by the State to the contrary should be rejected.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court quash the lower court's opinion in *Matchett v. State*, 755 So. 2d 778 (Fla. 3d DCA 2000), and remand for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered to Roberta Mandel, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida, this 7th day of November, 2000.

_____
LISA WALSH
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

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LISA WALSH
Assistant Public Defender