IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN WARNER,

Respondent.

S.Ct. Case No. 94842
DCA Case No. 97-2862

RESPONDENT'S BRIEF ON JURISDICTION

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CERTIFICATE OF TYPE FONT AND POINT SIZE

I HEREBY CERTIFY that the instant brief was prepared in 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the Fourth District Court of Appeal. Petitioner was the Prosecution and the Appellee, respectively, below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "ARB" will denote Appellant's Reply Brief in the district court.

STATEMENT OF THE CASE AND FACTS

Respondent submits that Petitioner's Statement of the Case and Statement of the Facts present facts irrelevant to this Court's decision to accept or reject jurisdiction. As recognized in *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986), "This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict." As set forth in *Reaves*,

> The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict...[W]e are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record...

Id.

In addition, Respondent adds the following as set forth in the decision: "After the trial court suggested the sentence it would impose in response to a plea to the charges, defendant, on a later date, pled guilty to three counts of driving under the influence arising out of one episode." *State v. Warner*, 721 So. 2d 767, 768 (Fla. 4th DCA 1998). The Fourth District reversed the downward departure sentence with written reasons finding that the trial

court based its downward departure on proffered information without taking testimony or receiving other evidence. *Id.* at 769.

SUMMARY OF THE ARGUMENT

This Honorable Court should decline to exercise jurisdiction over this cause. Respondent contends that this case does not provide a basis for the exercise of discretionary jurisdiction as he suggests that there is no express and direct conflict on the same question of law between the instant case and *State v. Gitto*, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998). Further, Petitioner, the state, ***prevailed*** in the Fourth District, obtaining a reversal of the downward departure sentence which is what it sought in the state appeal. Thus, there is no justiciable controversy between the parties who are affected by the decision and no present need for a resolution. Respondent suggests that discretionary review is not only not necessary, it is inappropriate under these circumstances. In addition, Respondent submits that the holding in *Gitto* is not technically final as rehearing is still pending in the Fifth District in *State v. Silas*, one of the five cases consolidated for consideration and decision in *Gitto*. Thus, this Court should decline to accept review of this cause.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT DISCRETIONARY JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(B)(3) OF THE *FLORIDA CONSTITUTION*.

Respondent contends that this Court should decline to accept jurisdiction of this cause pursuant to Article V, Section 3(b)(3) of the *Florida Constitution*.

In *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980), wherein this Court examined at length the effect of the 1980 constitutional amendment on its conflict jurisdiction, this Court recognized:

> 'We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising 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. To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition

> far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy. [Citations omitted].'

Id. at 1357-1358, quoting *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). Further, in *Lake v. Lake*, 103 So. 2d 639, 641-642 (Fla. 1958), this Court addressed the limits placed on its jurisdiction even then to prevent the intermediate appellate courts from "becoming way stations on the road to the Supreme Court." This Court wrote:

> *They [district courts of appeal] are and were meant to be courts of final, appellate jurisdiction.* (emphasis in original) (citations omitted). If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Lake, 103 So. 2d at 642.

Respondent initially addresses two threshold matters.

First, Respondent directs this Court's attention to the fact that, herein, Petitioner **prevailed** in the district court as the state had appealed the downward departure sentence which was

reversed by the Fourth District. The limited specific issue upon which discretionary review is sought on a conflict claim was not determined pertinent below. Review of the instant cause would not alter the relief accorded Petitioner. Therefore, Respondent submits that Petitioner is seeking review not to persuade this Court that the state should prevail in its appeal, as it already has, but solely to obtain what would effectively be an advisory opinion.[1] As set forth in Padovano, *Florida Appellate Practice*, § 1.3 (1998):

> An appellate court cannot properly exercise its judicial power to review the order of a lower tribunal merely to render a decision. The review proceeding must be one that presents a justiciable controversy between the parties who are affected by the order...There must be a real and substantial dispute and there must be a present need for a resolution...The appellate courts have an independent duty to consider each of these issues in every case and to dismiss a review proceeding that does not present a genuine controversy.

Second, the holding in the case Petitioner suggests conflicts

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[1] Respondent notes that recently, under similar circumstances in which the state had sought discretionary review in a case in which, although it had prevailed in the Fourth District, the Fourth had certified a question of great public importance, this Court dismissed the cause after hearing oral argument, finding that jurisdiction had been improvidently granted. *Thompson v. State*, 708 So. 2d 289 (Fla. 4th DCA 1998), *review dismissed, State v. Thompson*, 721 So. 2d 287 (Fla. 1998).

with the instant decision, *State v. Gitto*, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), is not technically final. *State v. Gitto* consists of five cases consolidated for consideration by the Fifth District. Defendant Silas [*State v. Silas* (97-1376)] sought rehearing in this consolidated case by the filing of a motion for rehearing on July 10, 1998. That motion for rehearing was *still pending* in the Fifth District as of the writing of this brief. According to the Clerk's Office, after holding the mandate in abeyance since July 10, 1998, the Fifth District issued its mandate in the lead consolidated case of *State v. Gitto* on March 3, 1999, despite the fact that the rehearing motion was still pending.[2]

Further, Respondent contends that this case does not provide a basis for the exercise of discretionary jurisdiction as Respondent suggests that there is no express and direct conflict on the same question of law between the instant case and *State v. Gitto*.

It is well-settled that conflict between decisions must be express and direct, the conflict must appear within the four corners of the majority decision. Neither a dissenting opinion nor

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[2] In two other cases consolidated for consideration, review was denied by this Court on December 2, 1998. *Perkins v. State* (Case No. 93,618); *State v. Harpin* (Case No. 93,620).

the record itself can be used to establish jurisdiction. *Reaves v. State*, 485 So. 2d 829, 830(Fla. 1986).

The case at bar is factually distinguishable from *State v. Gitto*. In *Gitto*, the Fifth District considered situations it considered plea bargains between the court and the defendants and held that the "trial court has no power unilaterally to enter into a plea agreement with the defendant and that such an agreement cannot form the basis of a downward departure from the guidelines." *State v. Gitto*, 23 Fla. L. Weekly D1550.

Whereas, at bar, the Fourth District considered a situation where, according to the four corners of the decision, "[a]fter the trial court suggested the sentence it would impose in response to a plea to the charges, defendant, on a later date, pled guilty..." *Warner*, 721 So. 2d at 768. The trial court set forth grounds for the downward departure sentence it imposed. The state did not object to the "straight up" plea, the state only objected when "it came time for imposition of the sentence" (ARB 10) to the downward departure sentence imposed. Indeed, Petitioner in its Reply Brief filed in the district court acknowledged that Respondent was entering an open plea to the court and that the "State tentatively agreed to an open plea." (ARB 10). The Fourth District, dealing

with clearly distinguishable circumstances, merely expressed its disagreement with the *Gitto* court "to the extent that it holds that a court can never, over the state's objection, advise the defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state." *State v. Warner*, 721 So. 2d at 769. However, as the Fourth District noted below, in the instant case the trial court was not "plea bargaining" with Respondent. Thus, *Gitto* is inapplicable herein.

Therefore, based on the foregoing, the decision of the Fourth District in the case at bar is not in express and direct conflict with *State v. Gitto* on the same question of law.

Further, review should be denied as the decision below is fully consistent with established law and review would merely be an unnecessary exercise of judicial resources and would render the district court a mere way station on the road to this Court. *See Davis v. State*, 308 So. 2d 27 (Fla. 1975); Committee Notes, *Fla. R. Crim. P.* 3.171. There is no genuine issue with respect to the propriety of the decision or the outcome of the appeal below.

Discretionary jurisdiction entails a judicial power to review a case, not an obligation to do so. In light of the policy considerations as well as many other reasons set forth above,

Respondent requests that this Honorable Court decline to accept jurisdiction to review the instant decision of the Fourth District Court of Appeal.

CONCLUSION

Therefore, Respondent urges this Honorable Court to decline to accept jurisdiction in this cause.

Respectfully submitted,

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I HEREBY CERTIFY that a copy hereof has been furnished to Assistant Attorney General Myra J. Fried, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier this 9th day of March, 1999.

Susan R. Cline

Attorney for John Warner

IN THE SUPREME COURT OF FLORIDA

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	)	
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_____	)	

APPENDIX

STATE of Florida, Appellant,
v.
John WARNER, Appellee.

No. 97-2862.

District Court of Appeal of Florida,
Fourth District.

Nov. 18, 1998.

Rehearing Denied Jan. 5, 1999.

Defendant pled guilty to three counts of driving under the influence (DUI) arising out of one episode. The Circuit Court, Broward County, Joyce Julian, J., accepted plea and entered downward departure sentence, and state appealed. The District Court of Appeal, Klein, J., held that downward departure sentence in DUI prosecution was not justified based on reasoning that offense was committed in unsophisticated manner and was isolated incident for which defendant showed remorse.

Reversed.

[1] CRIMINAL LAW ⚿273.1(2)
110k273.1(2)
Trial court is never bound to impose a specific sentence, even if the court has participated in the negotiations; if the trial judge decides not to impose the sentence commited to by the judge during plea discussions, the defendant is entitled to withdraw the plea.

[1] CRIMINAL LAW ⚿274(3.1)
110k274(3.1)
Trial court is never bound to impose a specific sentence, even if the court has participated in the negotiations; if the trial judge decides not to impose the sentence commited to by the judge during plea discussions, the defendant is entitled to withdraw the plea.

[2] CRIMINAL LAW ⚿273.1(2)
110k273.1(2)
Unlike trial courts, who are not bound to a specific sentence, agreements between the prosecutor and the defendant can be enforceable under contract law.

[3] CRIMINAL LAW ⚿273.1(4)
110k273.1(4)
Trial court can, even over the state's objection, advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state.

[4] CRIMINAL LAW ⚿273.1(2)
110k273.1(2)
Trial court cannot, over the state's objection, reduce the charge and accept a plea to a reduced charge. West's F.S.A. RCrP Rule 3.170(h).

[5] AUTOMOBILES ⚿359
48Ak359
Given state's strong public policy against driving under the influence (DUI), downward departure sentence in DUI prosecution was not justified based on reasoning that offense was committed in unsophisticated manner and was isolated incident for which defendant showed remorse. West's F.S.A. § 921.0016(3)(j).

[6] CRIMINAL LAW ⚿1309.1
110k1309.1
Trial court could not depart downward from sentencing guidelines based solely on proffered information without taking testimony or receiving other evidence. West's F.S.A. § 921.001(6).

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Michael J. Heise, Fort Lauderdale, for appellee.

*768 KLEIN, Judge.

After the trial court suggested the sentence it would impose in response to a plea to the charges, defendant, on a later date, pled guilty to three counts of driving under the influence arising out of one episode. The trial court accepted the plea and entered a downward departure sentence, as it had indicated it would, based on three mitigating factors in section 921.0016(4), Florida Statutes (1995). The state appeals, arguing that the court erred in entering the departure sentence over its objection. We reverse.

In State v. Gitto, 23 Fla. L. Weekly D1550, --- So.2d ---- (Fla. 5th DCA June 26, 1998), the Fifth

District Court of Appeal, en banc, held that the trial court has no authority to plea bargain with a defendant over the state's objection, and no authority to sentence a defendant in reliance on such a plea. The **Gitto** court relied on several cases from other jurisdictions, finding no Florida cases directly on point, and held:

> We conclude, consistent with courts of other jurisdictions, that the trial court has no power unilaterally to enter into a plea agreement with the defendant and that such an agreement cannot form the basis of a downward departure from the guidelines. The inability of the trial court to plea bargain with a defendant has its genesis in the doctrine of separation of powers, which is a cornerstone of our form of government. In Florida, the doctrine is incorporated in Article II, section 3, of the Florida Constitution.

Id. at D1551.

We have read the cases from other jurisdictions relied on by the fifth district. Although those cases contain language which can be interpreted as lending some support to the conclusion the court reached in **Gitto,** we find the cases to be factually distinguishable. [FN1]

> FN1. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) was a contempt case in which the Supreme Court reversed the lower court's appointment of a special prosecutor who was not impartial. Commonwealth v. Corey, 826 S.W.2d 319 (Ky.1992) was a death penalty case in which the trial judge had allowed the defendant to plead guilty in the guilt phase with the agreement that the defendant could withdraw his plea if he was sentenced to life in prison or death in the penalty phase. In State v. Williams, 277 N.J.Super. 40, 648 A.2d 1148 (N.J.Super.Ct.App.Div.1994), the trial court had vacated a conviction and allowed the defendant to accept an earlier plea offer which was no longer open. In People v. Mikhail, 13 Cal.App.4th 846, 16 Cal.Rptr.2d 641 (1993), a successor judge had set aside a plea of guilty that had been negotiated with the prosecution and was approved by the original judge.

[1] Although the **Gitto** court characterized the trial court's conduct as engaging in "plea bargaining," 23 Fla. Weekly at D1551, a court is never bound to impose a specific sentence, even if the court has participated in the negotiations. Goins v. State, 672 So.2d 30 (Fla.1996). If the judge decides not to impose the sentence committed to by the judge during plea discussions, the defendant is entitled to withdraw the plea. Goins, 672 So.2d at 32.

[2] A "plea bargain" to us, connotes an "agreement or contract." American Heritage Dictionary 107 (1981). Unlike trial courts, who are not bound to a specific sentence, agreements between the prosecutor and the defendant can be enforceable under contract law. State v. Frazier, 697 So.2d 944, 945 (Fla. 3d DCA 1997)(state required to nolle pross charges against third persons per plea agreement); State v. Davis, 188 So.2d 24 (Fla. 2d DCA 1966)(enforcing prosecutor's agreement not to prosecute if defendant passed polygraph test).

In Davis v. State, 308 So.2d 27, 29 (Fla.1975), our supreme court observed:

> [I]t is true that plea discussions in which the trial judge is involved have been categorized as "delicate" and that American Bar Association in its Standards for Criminal Justice Relating to Guilty Pleas has concluded that the trial judge should not participate in such plea discussions until after a tentative plea agreement has been entered into between counsel for the parties. Nevertheless, we refrain from condemning the practice per se since we are confident that the trial judges of this state will take all necessary precautions to assure that defendants' rights are protected ***769** by appropriate safeguards. [footnote omitted]

See also Barker v. State, 259 So.2d 200, 204 (Fla. 2d DCA 1972)(In plea bargaining discussions, the court can discuss sentencing concessions such as giving less than the maximum sentence, probation as an alternative or concurrent sentences rather than consecutive. The state's concurrence is not essential, although it is desirable.).

[3][4] We therefore respectfully disagree with **Gitto** to the extent that it holds that a court can never, over the state's objection, advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state. [FN2] Our holding is limited to cases in which the plea is to the charge determined by the prosecutor. The court cannot, over the state's objection, reduce the charge and accept a plea to the reduced charge. We note that Florida Rule of Criminal Procedure 3.170(h) requires the state's consent to a plea to lesser charges; however, rule 3.170 is silent on whether the state must consent where the plea is to the

charges.

FN2. We do agree with that portion of **Gitto** which holds that when the state is not a party to a plea agreement, the agreement itself cannot serve as a basis for a downward departure from the sentencing guidelines. State v. Kennedy, 698 So.2d 349 (Fla. 4th DCA 1997). That was not, however, the basis for the downward departure in this case.

[5][6] We now address the state's argument that there was an insufficient basis in the record to sustain the departure. The state argues that the trial court erred in departing without taking testimony or receiving other evidence. When the state pointed this out, the trial court responded that it was doing so based on proffered information. We agree with the state that a proffer is not evidence, and that the court erred in not taking evidence. See § 921.001(6), Fla. Stat. (1995)(the level of proof to establish a departure sentence is preponderance of the evidence); and State v. Baker, 713 So.2d 1027 (Fla. 2d DCA 1998).

One of the grounds for departure given by the trial court in this case was that "the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse." § 921.0016(3)(j), Fla. Stat. Defendant, whose blood alcohol tested between . 13 and .15, ran into the rear of a vehicle which struck another vehicle at a red light, resulting in serious injuries. Given the state's strong public policy against DUI, [FN3] we conclude that this reason for departure is not available in this case. If this DUI could be considered an isolated incident, then all first DUI's by people having clean records could be considered such. Nor do we think that drunk driving can be "committed in an unsophisticated manner." Accordingly, on remand, this reason for departure will not be available.

FN3. See Baker v. State, 377 So.2d 17 (Fla.1979); Ingram v. Pettit, 340 So.2d 922 (Fla.1976); Lindsay v. State, 606 So.2d 652 (Fla. 4th DCA 1992).

We are not deciding at this time the availability of the other reasons given by the trial court for departure; however, if the court does depart for other reasons they must be based on competent substantial evidence. Reversed.

DELL and GUNTHER, JJ., concur.

END OF DOCUMENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Appendix has been furnished by courier to Assistant Attorney General Myra J. Fried, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2999 on this 9th day of March, 1999.

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