IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
Petitioner,)
)
vs.) CASE NO. 95,087
)
ESTEVAN FIGUEROA,)
)
Respondent.)
)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS	PAGE
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
CERTIFICATE OF FONT SIZE	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
POINT ON APPEAL	
THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION TO REVIEW THE FINAL ORDER WITHHOLDING ADJUDICATION OF GUILT AND PLACING RESPONDENT ON PROBATION, WHERE THE DISPOSITION CONSTITUTED NEITHER A DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES NOR AN ILLEGAL SENTENCE.	4
CONCLUSION	18
CERTIFICATE OF SERVICE	18

AUTHORITIES CITED

CASES CITED PAGE

State v. Creighton, 469 So. 2d 735 (Fla. 1985), *receded from on other grounds*, *Amendments to Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (1996) 6

B.H. v. State, 645 So. 2d 987 (Fla. 1994) *cert. denied*, 515 U.S. 1132 115 S.Ct. 2559, 132 L.Ed. 2d 812 (1995) 10

C.L.S. v. State, 586 So. 2d 1173 (Fla. 1st DCA 1991) 6

Chiles v. Children A,B,C,D,E, & F, 589 So. 2d 260 (Fla. 1991) 9

Cleveland v. State, 417 So. 2d 653 (Fla. 1982) 10

Davis v. State, 661 So. 2d 1193 (Fla. 1995) 13

Dorminey v. State, 314 So. 2d 134 (Fla. 1975) 10

Gartrell v. State, 626 So. 2d 1364 (Fla. 1993) 15

Grimes v. State, 616 So. 2d 997 (Fla. 1st DCA 1993) *rev. dism'd*, 617 So. 2d 319 (Fla. 1993) 10

Hopping v. State, 708 So. 2d 263 (Fla. 1998) 14

People v. Cobbs, 505 N.W. 2d 208 (Mich. 1993) 11

R.J.B. v. State, 408 So. 2d 1048 (Fla. 1992) 6

Rigabar v. State, 658 So. 2d 1038
(Fla. 4th DCA 1995) rev. denied,
664 So. 2d 248 (Fla. 1995) 11, 12

Simms v. State, Dept. of Health & Rehab., 641 So. 2d 957
(Fla. 1994) rev. denied,
649 So. 2d 870 (Fla. 1994) 9, 12

Smith v. State, 537 So. 2d 982
(Fla. 1989) 10

State v. Bloom, 497 So. 2d 2
(Fla. 1986) 10

State v. Evans, 693 So. 2d 553
(Fla. 1997) 14

State v. F.G., 630 So. 2d 581
(Fla. 3rd DCA 1993) approved,
638 So. 2d 515 (Fla. 1994) 15

State v. Figueroa, 728 So. 2d 787
(Fla. 4th DCA 1999) 4

State v. Gaines, 731 So. 2d 7
(Fla. 4th DCA 1999) 13

State v. Gitto, 731 So. 2d 686
(Fla. 5th DCA 1998) 8

State v. Jogan, 388 So. 2d 322
(Fla. 3rd DCA 1980) 10

State v. Mancino, 714 So. 2d 429
(Fla. 1998) 7, 14

State v. Pettis, 520 So. 2d 250
(Fla. 1988)(quoting State v. Wilson,
483 So. 2d 23 (Fla. 2d DCA 1985)
affm'd, 520 So. 2d 566 (Fla. 1988)) 16, 17

State v. Riley, 648 So. 2d 825
(Fla. 3rd DCA 1995) 15

State v. Vesquez, 24 Fla. L. Weekly D1519 (Fla. 4th DCA June 30, 1999) 12

State v. Warner, 721 So. 2d 767 (Fla. 1998) rev. granted, No. 94,842 4

State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA Mar. 10, 1999) 11

Valencia v. State, 645 So. 2d 1985 (Fla. 3rd DCA 1994) 15

Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA Mar. 26, 1999) 11

Young v. United States ex rel. Vuitton et Fits S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed. 2d 740 (1987) 12

FLORIDA CONSTITUTION

Article II, Section 3 . . . . 5, 8, 9
Article V, Section 4(b)(1) 5, 16
Article V, Section 4(b)(3) 16

FLORIDA STATUTES

§ 924.07 (1997) 6, 7
§ 924.07(1)(e) (1997) 7
§ 924.07(1)(i) (1997) 5
§ 924.071 (1997) 6, 7

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.800(a) 8, 14

FLORIDA RULE OF APPELLATE PROCEDURE

Rule 9.030(b)(2)(A) & (B) 16
Rule 9.140(c)(1)(J) 13

OTHER AUTHORITIES CITED

P. Padavano, Florida Appellate Practice
§ 25.9 (2d ed. 1997) 6

PRELIMINARY STATEMENT

Respondent was the appellee in the Fourth District Court of Appeal and the defendant in the Seventeenth Judicial Circuit, In and For Broward County, Florida. Petitioner was the appellant and the prosecution below. In this brief the parties will be referred to as they appear before the Court.

The symbol "R" will denote the record on appeal, which consists of the relevant documents filed in the trial court.

The symbol "T" will denote the transcript.

CERTIFICATE OF FONT SIZE

In accordance with the Florida Supreme Court Administrative Order, issued on July 14, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

Respondent is in agreement with the statement of the case and facts submitted by petitioner in its initial brief on the merits.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

After the trial court made a pre-plea pronouncement of the sentence it intended to impose upon a plea, respondent pled no contest to a number of felonies and was sentenced within the guidelines. Petitioner unsuccessfully objected to the sentence, arguing that the pre-plea sentencing pronouncement violated the separation of powers clause and sought review in the Fourth District Court of Appeal. Agreeing with respondent that the sentence was neither illegal nor a guidelines departure, the district court dismissed petitioner's appeal.

The state can only appeal those final orders in a criminal case that the legislature has authorized it to by statute. Section 924.07(1)(e), Florida Statutes (1997) permits that state to appeal a sentence on the ground that it is illegal. Petitioner argues that the pre-plea sentencing pronouncement violated the separation of powers clause, rendering respondent's sentence illegal and allowing it to appeal. Petitioner's argument is fatally flawed in two respects: pre-plea sentencing pronouncements do not violate the separation of powers clause and, even if they did, the resulting sentence, if within the statutory minimum and maximum, is not illegal. Accordingly, the district court correctly concluded that

petitioner had no right to appeal the trial court’s sentencing order.

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION TO REVIEW THE FINAL ORDER WITHHOLDING ADJUDICATION OF GUILT AND PLACING RESPONDENT ON PROBATION, WHERE THE DISPOSITION CONSTITUTED NEITHER A DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES NOR AN ILLEGAL SENTENCE.

Respondent, whose guideline score sheet permitted imposition of a one year state prison sentence or any non-state prison sanction, pled no contest to a number of felonies after the trial court announced it was willing to withhold adjudication of guilt and place him on probation. *R 4-6, 8-9, 12-13; T 4-6.* The announced sentence was subsequently imposed over petitioner's separation of powers objection. *R 10-11, 15-16; T 4-5, 13, 15-17.* Petitioner sought review of the sentence in the Fourth District Court of Appeal, but the cause was dismissed for want of jurisdiction. *State v. Figueroa, 728 So. 2d 787 (Fla. 4th DCA 1999).*[1] In this Court, petitioner argues that the pre-plea

[1] The district court addressed the merits of petitioner's separation of powers argument in *State v. Warner, 721 So. 2d 767 (Fla. 1998) rev. granted, No. 94,842,* where the sentence imposed departed downward from the guidelines, concluding that pre-plea sentencing pronouncements, which require a plea to the offenses charged by the state, do not violate the separation of powers clause. Oral argument in *Warner,* is scheduled for October 5, 1999.

sentencing pronouncement violated the separation of powers clause,[2] rendering respondent's sentence illegal and authorizing it to seek review in the district court.[3] Respondent disagrees.[4]

I

APPELLATE JURISDICTION

The appellate jurisdiction of the district courts of appeal is delineated by the Florida Constitution in the following manner:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

Art. V, § 4(b)(1), Fla. Const.

Article V, section 4(b)(1) provides that the appellate jurisdiction of the district court's to review final orders is conferred by statute, while the authority to review non-final orders emanates from rules promulgated by the Florida Supreme Court. *R.J.B. v.*

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[2] Article II, § 3, Florida Constitution.

[3] Petitioner acknowledges that the sentence is not a downward departure from the guidelines, appealable under section 924.07(1)(i), Florida Statutes (1997).

[4] Although petitioner does not argue that the alleged sentencing error is reviewable by way of certiorari, respondent addresses that avenue of relief in this brief.

State, 408 So. 2d 1048, 1050 (Fla. 1992); *See also State v. Creighton*, 469 So. 2d 735, 740 (Fla. 1985)(the substantive right of the state to appeal from final orders entered in criminal cases must be conferred by statute) *receded from on other grounds*, *Amendments to Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (1996). An order withholding adjudication of guilt and placing a defendant on probation is a final order. *P. Padavano, Florida Appellate Practice*, § 25.9 (2d ed. 1997); *See C.L.S. v. State*, 586 So. 2d 1173, 1175 (Fla. 1st DCA 1991). Absent a statute permitting it to do so, the state has no right to appeal a final order withholding adjudication of guilt and placing a defendant on probation. *Creighton*, 469 So. 2d at 740.

The right of the state to appeal in criminal proceedings is governed by sections 924.07 and 924.071, Florida Statutes.[5]

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[5] Those statutes read in relevant part:

924.07 Appeal by state.-

(1) The state may appeal from:
(a) An order dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a criminal offense, the violation of probation, the violation of community control, or the violation of any supervised correctional release.
(b) An order granting a new trial.
(c) An order arresting judgment.
(d) A ruling on a question of law when the defendant is convicted and appeals from the judgment. Once the state's cross-appeal is instituted, the appellate court shall review and rule

Neither section 924.07 nor 924.071 permit the state to appeal from a final order withholding adjudication of guilt and placing the defendant on probation. However, section 924.07(1)(e) permits the state to appeal from a sentence on the grounds that it is illegal. Relying upon *State v. Mancino, 714 So. 2d 429 (Fla. 1998)*, petitioner contends that respondent's sentence is illegal. In *Mancino*, which held that credit for time served can be sought through a Florida Rule of Criminal Procedure 3.800(a) motion in some instances, this Court said, "[a] sentence that patently fails

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upon the question raised by the state regardless of the disposition of the defendant's appeal.

(e) The sentence, on the ground that it is illegal.

(f) A judgment discharging a prisoner on habeas corpus.

(g) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure.

(h) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.

(i) A sentence imposed outside the range permitted by the guidelines authorized by chapter 921.

(j) A ruling granting a motion for judgment of acquittal after a jury verdict.

(k) An order denying restitution under s. 775.089

(l) An order or ruling suppressing evidence or evidence in limine at trial.

924.071 Additional grounds for appeal by the state; time for taking; stay of cause.-

(1) The state may appeal from a pretrial order dismissing a search warrant or suppressing evidence, however obtained, or which directly and expressly conflicts with an appellate decision of a district court of appeal or the Florida Supreme Court. The appeal must be taken before trial.

to comport with statutory or constitutional limitations is by definition 'illegal'." *Id. at 433.* Petitioner argues that the pre-plea sentencing pronouncement violated the separation of powers clause, a patent failure to comport with constitutional limitations, rendering respondent's sentence illegal. Petitioner's argument, heavily influenced by the en banc decision of the Fifth District Court of Appeal in *State v. Gitto, 731 So. 2d 686 (Fla. 5th DCA 1998)*,[6] is fatally flawed in two respects: pre-plea sentencing pronouncements do not violate the separation of powers clause and, even if they did, the resulting sentence, if within the statutory minimum and maximum, is not illegal. Accordingly, the district court correctly concluded that petitioner had no right to appeal the trial court's sentencing order.

A

PRE-PLEA SENTENCING PRONOUNCEMENTS DO NOT VIOLATE THE SEPARATION OF POWERS CLAUSE

Article II, section 3, of the Florida Constitution reads:

> The powers of state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch

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[6] *Gitto,* extensively discussed the separation of powers clause vis-a-vis pre-plea sentencing pronouncements, but did not address the jurisdictional issue decided by the fourth district in *Figueroa.* Because the sentences in *Gitto* departed downward from the guidelines, jurisdiction was not an issue.

> shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

This constitutional provision "divides government into three separate and distinct branches.... [K]nown as the 'separation of powers' clause, [it] embodies one of the fundamental principles of our federal and state constitutions and prohibits the unlawful encroachment by one branch upon the powers of another branch." *Simms v. State, Dept. of Health & Rehab., 641 So. 2d 957, 960 (Fla. 1994) rev. denied, 649 So. 2d 870 (Fla. 1994).* Two prohibitions are found in the clause: "no branch may encroach upon the powers of another.... [And] ... no branch may delegate to another branch its constitutionally assigned power." *Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991).* The encroachment prohibited by Article II, section 3, is the exercise by one branch of government of a power exclusively granted to another. *Simms, 641 So. 2d at 960.* "If a power is not exclusive to one branch, the exercise of that non-exclusive power [by another branch] is not unconstitutional." *Id.* The exclusive powers each branch possesses are generally not delineated in the Constitution or statutes, but are determined "by considering the language and intent of the Constitution as well as the history, nature, powers, limitations and purposes of our form of government." *Id. at 960-961.*

Enacting statutes that define criminal offenses and establish penalties for those offenses is the responsibility of the legislative branch. *B.H. v. State, 645 So. 2d 987, 992 (Fla. 1994) cert. denied, 515 U.S. 1132, 115 S.Ct. 2559, 132 L.Ed. 2d 812 (1995); Dorminey v. State, 314 So. 2d 134, 136 (Fla. 1975).* "[T]he decision to charge and prosecute is an executive responsibility, and the state attorney has discretion in deciding whether and how to prosecute." *State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986); accord Cleveland v. State, 417 So. 2d 653, 654 (Fla. 1982).* Sentencing is a matter left for the judiciary, "judges hav[ing] traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." *Smith v. State, 537 So. 2d 982, 985-986 (Fla. 1989); accord Grimes v. States, 616 So. 2d 997 (Fla. 1st DCA 1993) rev. dism'd, 617 So. 2d 319 (Fla. 1993).* While the decision to prosecute, and what charges to file, rests with the executive branch, immune from judicial interference, *see State v. Jogan, 388 So. 2d 322, 323-324 (Fla. 3rd DCA 1980)*, the judicial branch, subject to the executive's decision to prosecute under an enhanced or mandatory sentencing statute and the sentencing parameters fixed by the legislature, is solely responsible for determining the appropriate sentence to impose. *See Id. at 323-324; Woods v. State, 24 Fla. L. Weekly D657, 658 (Fla.*

4th DCA Mar. 26, 1999). The state attorney can seek imposition of a specific sentence, *State v. Wise, 24 Fla. L. Weekly D657, 658 (Fla. 4th DCA Mar. 10, 1999)*, but it cannot, even by agreeing with the defendant to recommend a certain sentence in exchange for a guilty plea, control the court's sentencing decision, *Rigabar v. State, 658 So. 2d 1038, 1042 (Fla. 4th DCA 1995) rev. denied, 664 So. 2d 248 (Fla. 1995).*

The trial court told respondent the sentence it intended to impose if he pled guilty to the crimes petitioner charged him with committing. Petitioner's constitutional powers to charge and prosecute were not encroached upon by the court's announcement. *State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998) rev. granted, No. 94,842; People v. Cobbs, 505 N.W. 2d 208, 212 (Mich. 1993); See also Brown v. State, 245 So. 2d 41, 44 (Fla. 1971)(authorizing trial judges to announce sentence before plea entered); But see Gitto, 731 So. 2d 686.*[7] "[S]eparation of powers does not mean that every governmental activity is classified as belonging exclusively to a single branch of government." *Simms, 641 So. 2d at 960.*

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[7] The trial court would have encroached upon the powers of the executive branch if it offered to reduce the severity of the offenses pled to or agreed to dismiss other charges in exchange for the plea. *See Fla. R. Crim. P. 3.170(h); Cox v. State, 412 So. 2d 354 (Fla. 1982); State v. Vesquez, 24 Fla. L. Weekly D1519 (Fla. 4th DCA June 30, 1999).*

Although the state attorney can negotiate a settlement with the defendant,[8] which may include both charge and sentencing concessions, it cannot impose sentence, only the court can. *Rigabar, 658 So. 2d at 1952.* The Florida Constitution neither requires trial courts to remain silent on the issue of sentencing until after the defendant enters a plea nor grants the executive branch sole authority to engage in pre-plea sentencing discussions. Accordingly, the trial court did not violate the separation of powers clause of the Florida Constitution.[9]

B

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[8] *Gitto*, cited *Young v. United States ex rel. Vuitton et Fits S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed. 2d 740 (1987)*, for the proposition that the exclusive authority to enter plea bargains with the defendant rests with the prosecutor. Young, which condemned the practice of appointing the recipient of a favorable court order as a private attorney general to prosecute its violation, merely acknowledged that prosecutors have considerable discretion in deciding what charges to file and whether to enter into, and the terms of, plea bargains. *481 U.S. at 807*, *107 S.Ct. At 2137.* The Supreme Court was not addressing the separation of powers argument raised herein when it listed the powers of the prosecutor and it did not hold that the Constitution prohibits courts from making pre-plea sentencing pronouncements.

[9] *Warner*, correctly concluded that the out-of-state cases relied upon in *Gitto* to support the proposition that a violation of the separation of powers doctrine occurs when a trial court accepts a plea over the prosecutor's objection are inapposite. *721 So. 2d at 768 and n. 1.* The comments in those cases were made in reference to actions taken by the trial court that encroached upon the powers of the executive branch to determine the appropriate charges to bring and how to proceed with the prosecution, not to pleas that were entered to the crimes as charged with the understanding that a lawful sentence would be imposed.

A VIOLATION OF THE SEPARATION OF POWERS CLAUSE IN IMPOSING AN OTHERWISE LEGAL SENTENCE DOES NOT RENDER THE SENTENCE ILLEGAL

Even if this Court were to hold that pre-plea sentencing pronouncements violate the separation of powers doctrine, respondent's sentence would not be rendered illegal.[10] In *Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995)*, this Court rejected the argument that an upward departure from the guidelines without accompanying written reasons constituted an illegal sentence stating, "an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." *Id. at 1196.* Respondent acknowledges that *Mancino*, subsequently said, "we have rejected the contention that our holding in *Davis* mandates that only those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal," *714 So. 2d at 429*, and "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" *714 So. 2d at 433.*

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[10] Florida Rule of Appellate Procedure 9.140(c)(1)(J) permits the state to appeal from an unlawful sentence, in addition to one that is illegal or outside the guidelines. If unlawful means something other than illegal or a guidelines departure it enlarges the appellate rights granted to the state by the legislature in violation of our constitution. *Cf. State v. Gaines*, *731 So. 2d 7, 8 (Fla. 4th DCA 1999)(legislative attempt to allow state to appeal non-final order in criminal case is unconstitutional).*

However, in those cases where this Court has applied a more expansive definition of the term 'illegal', the trial court's failure to comport with a statutory or constitutional limitation resulted in a sentence that was longer than it would have been had the court complied with the limitation. *See Mancino, 714 So. 2d 429; See also Hopping v. State, 708 So. 2d 263 (Fla. 1998)(sentence that resulted from increasing lawfully imposed sentence in violation of double jeopardy clause illegal).* This Court, and others, have not previously found illegal sentences that were authorized by law and were no longer than they would have been if the trial court complied with the violated statutory or constitutional limitation when it imposed the sentence. *Davis, 661 So. 2d 1193; See also State v. Evans, 693 So. 2d 553 (Fla. 1997)(sentence not illegal despite trial court's failure to enter written findings supporting decision to sentence juvenile as an adult); State v. F.G., 630 So. 2d 581 (Fla. 3rd DCA 1993)(disposition not illegal despite court's failure to obtain predisposition report) approved, 638 So. 2d 515 (Fla. 1994); Gartrell v. State, 626 So. 2d 1364 (Fla. 1993)(downward departure sentence without accompanying written reasons is not an illegal sentence); State v. Riley, 648 So. 2d 825 (Fla. 3rd DCA 1995)(trial court's failure to make mandatory habitual offender findings upon*

request by state did not render subsequently imposed guideline sentence illegal); Valencia v. State, 645 So. 2d 1985 (Fla. 3rd DCA 1994)(claim of vindictive sentencing, where sentence fell within legal limits, is a claim of error leading up to imposition of the sentence that does not render the sentence illegal). The definition of 'illegal' championed by petitioner requires any error that occurs during the imposition of an otherwise legal sentence to result in a determination that the sentence is illegal, allowing it to be challenged at anytime. Surely, that is not what this Court meant to do in *Mancino.*

Even if the pre-plea sentencing pronouncement was made in violation of the separation of powers clause it did not cause the sentence to be longer than it would have been but for the violation. If error, the pronouncement amounted to nothing more than the utilization of an improper procedure leading up to the imposition of an otherwise legal sentence. Accordingly, respondent's sentence was not illegal.

II

CERTIORARI JURISDICTION

Certiorari jurisdiction is available to review certain non-final orders of lower tribunals and final orders of circuit courts acting in their review capacity. *Art. V, § 4(b)(3), Fla. Const;*

Fla. R. App. P. 9.030(b)(2)(A) & (B). The instant order is a final order, rather than a non-final order, that was not the result of the circuit court acting in its appellate capacity. "[T]he state may not use the petition for a writ of common law certiorari to obtain appellate review of an order that is only reviewable, if at all, by direct appeal. If there is no statutory right to appeal, then certiorari cannot be used to supply that right." *State v. Pettis, 520 So. 2d 250, 251-252 (Fla. 1988)(quoting State v. Wilson, 483 So. 2d 23 (Fla. 2d DCA 1985) affm'd, 520 So. 2d 566 (Fla. 1988)).* Because it was final and not the result of the circuit court acting in its appellate capacity, the order withholding adjudication of guilt and placing appellee on probation is reviewable, if at all, by appeal. *See Art. V, § 4(b)(1), Fla. Const.* The legislature chose not to allow the state to seek appellate review of final orders of circuit courts imposing legal sentences that fall within the sentencing guidelines. Certiorari cannot be relied upon to supply that right. *Pettis, 520 So. 2d at 251-252.* Accordingly, the order withholding jurisdiction and placing appellant on probation is not reviewable by way of certiorari.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, appellee respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOSEPH A. TRINGALI, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this __________ day of JULY, 1999.

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