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IN THE
SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 5 1999
CLERK, SUPREME COURT
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STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 ESTEVAN FIGUEROA,)
)
 Respondent.)
 _____)

CASE NO. 95,087

RESPONDENT'S BRIEF ON JURISDICTION

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ARGUMENT

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN <u>STATE v. FIGUEROA</u> DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN <u>STATE v. GITTO</u>	5
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PRELIMINARY STATEMENT

Respondent was the appellee in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the appellant and prosecution in the lower courts. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "P" will denote petitioner's amended jurisdictional brief.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 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 was advised by the trial court that it was willing to withhold adjudication of guilt and place him on probation if he pled to the crimes he was charged with committing. State v. Figueroa, 24 Fla. L. Weekly D540 (Fla. 4th DCA Feb. 24, 1999). After accepting respondent's plea, and over petitioner's objection, the trial court imposed the previously announced legal sentence. Id. at D540. Petitioner appealed the final sentencing order, "argu[ing] that under the Fifth District Court of Appeal's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), the doctrine of separation of powers precludes the trial court from entering into a plea agreement with the defendant." Id. Respondent's motion to dismiss the appeal, predicated upon the ground that petitioner had no right to appeal a final sentencing order imposing a legal sentence that did not deviate downward from the guidelines, was granted. Id. In granting respondent's motion, the district court responded to petitioner's argument stating:

Gitto is inapposite here because it does not discuss the issue of jurisdiction and a close reading of the opinion reveals that the district court had jurisdiction in that case because each of the consolidated cases involved the imposition of a downward departure sentence. The state was permitted to appeal under Florida Statute section 924.07(1)(i), (1995).

Id.

Although the district court noted that in a previous case, State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998), it partially disagreed with the substantive holding of Gitto, it did not address the merits of petitioner's appeal, instead deciding the case solely upon jurisdictional grounds.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in State v. Figueroa, 24 Fla. L. Weekly D540 (Fla. 4th DCA Feb. 24, 1999), relied upon by petitioner to invoke the conflict jurisdiction of this Court, is not in 'express and direct' conflict with the decision of the Fifth District Court of Appeal in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998). Without addressing its jurisdiction to entertain the state's appeal, the Gitto court vacated the defendant's downward departure sentence on the ground that the trial court violated the separation of powers doctrine when it advised him of the sentence he would receive before his plea was entered. In Figueroa, where the court advised the defendant of the sentence he would receive before he entered his plea and thereafter imposed a lawful sentence within the guidelines, the district court dismissed petitioner's appeal for lack of jurisdiction, without addressing the merits of its separation of powers doctrine argument. Figueroa and Gitto involved dissimilar controlling facts and decided different points of law. Accordingly, no conflict exists leaving this Court without jurisdiction to review the district court's decision.

ARGUMENT

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN STATE v. FIGUEROA DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN STATE v. GITTO.

"Conflict" jurisdiction may be invoked when the decision of a district court announces a rule of law in conflict with one previously announced by this Court or another district court or the district court applies a settled rule of law to produce a different result in a case that involves facts substantially the same as those found in a decision of this Court or another district court. See Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). The test for accepting review under this provision is "not whether we [the Supreme Court] would necessarily have arrived at a conclusion different from that reached by the District Court. The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents." Kincaid v. World Insurance Co., 157 So. 2d 517, 518 (Fla. 1963). The conflict must be of such magnitude "that if the later decision and the earlier decision were rendered by the same court the former would have the

effect of overruling the latter." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[i]f the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, than no conflict can arise." Id. at 887.

The controlling facts giving rise to the appeals in State v. Figueroa and State v. Gitto are similar in some respects, but dissimilar in others, and the points of law settled by the two cases are not the same. Although all of the defendants were advised by the trial court of the sentence they were to receive before entering their pleas, those imposed in Gitto constituted downward departures from the sentencing guidelines, while respondent's sentence fell within the range recommended by the guidelines. Relying upon the separation of powers doctrine, the Gitto court reached the merits of the state's appeal and vacated the sentences stating, "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." Nowhere in its opinion did the Gitto court address the question of whether it had jurisdiction to entertain the

state's appeal.¹ Figueroa, on the other hand, failed to address the merits of petitioner's argument that the sentences were imposed in violation of the separation of powers doctrine because the court determined that it was without jurisdiction to do so.² Instead, the Figueroa court decided the case upon jurisdictional grounds.

Figueroa did not announce a rule of law in conflict with one previously announced in Gitto, nor did it apply a settled rule of

¹ Since the state is authorized to appeal the imposition of sentences that depart downward from the sentencing guidelines, § 924.07(1)(i), Fla. Stat. (1997), jurisdiction should not have been at issue. In its jurisdictional brief, petitioner confuses arguments that may provide a basis for relief with grounds providing a basis for jurisdiction. An alleged violation of the separation of powers doctrine is an argument that may provide a district court, whose jurisdiction has been properly invoked, a basis to vacate a sentence, but it is not a ground providing the court with a basis for jurisdiction to entertain the state's appeal of a questioned sentence any more than the violation of a defendant's Fourth Amendment right to be secure against unreasonable searches and seizures provides a jurisdictional basis for a district court to entertain his appeal absent imposition of a final judgment of conviction or order granting probation. See § 924.06, Fla. Stat. (1997). Sections 924.07 and 924.071, Florida Statutes (1997), set forth the grounds which provide a jurisdictional basis for a state appeal. 'Separation of powers' is not enumerated therein.

² Although acknowledging that it previously disagreed with Gitto, in State v. Warner, the court did not revisit the merits of the issue. Petitioner's suggestion at pages five and seven of its amended brief that Figueroa disagreed with Gitto clearly, and most likely inadvertently, takes the district court's words out of context. If conflict exists it is between Gitto and Warner, not Gitto and Figueroa.

law to facts substantially similar to those found in Gitto to produce a different result. Gitto reached the merits of the state's argument without addressing whether it had jurisdiction to do so, while Figueroa determined that it lacked jurisdiction to entertain petitioner's appeal without reaching the merits of its argument. Because the controlling factual elements and the points of law settled by the two cases are not the same, there is no conflict.

CONCLUSION

Because there is no express and direct conflict, this Court should deny the petition for discretionary review.

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 31st day of MARCH, 1999.



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