

**IN THE
SUPREME COURT OF FLORIDA**

STATE OF FLORIDA,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 95,451
)	
LEVON SHILLINGFORD,)	
)	
Respondent.)	
_____)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

MARCY K. ALLEN
Assistant Public Defender

Attorney for Levon Shillingford

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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 "Ex." will refer to the exhibits contained in Petitioner's appendix. The symbol "RA" will refer to documents set forth in Respondent's appendix.

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 accepts Petitioner's statement of the case and facts submitted by Petitioner in its initial brief on the merits with the following addition:

1. During the plea colloquy, the prosecutor did not suggest that there were grounds to support a departure sentence or request that the court delay imposition of sentence to permit the prosecution to present evidence in support of a departure sentence.

Ex. B

SUMMARY OF THE ARGUMENT

After the trial court made a pre-plea pronouncement of the sentence it intended to impose upon a plea, respondent pled no contest to delivery of cocaine 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 do so 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

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN TILGHMAN V. CULVER, 99 SO. 2D 282 (FLA. 1957), CERT. DEN., 356 U.S. 953 (1958), AND OF THE FIFTH DISTRICT COURT OF APPEAL IN STATE V. GITTO, 23 FLA. L. WEEKLY D1550 (FLA. 5TH DCA JUNE 26, 1998) ON THE SAME QUESTION OF LAW.

Respondent, whose guideline scoresheet permitted imposition of any non-state prison sanction, pled no contest to delivery of cocaine after the trial court announced it was willing to sentence Respondent to six months in the county jail. The announced sentence was subsequently imposed over Petitioner's separation of powers objection. Petitioner sought review of the sentence in the Fourth District Court of Appeal, but the cause was dismissed for want of jurisdiction. State v. Shillingford, 731 So. 2d 57 (Fla. 4th DCA 1999). In this Court, Petitioner concentrates upon its argument that the pre-plea sentencing pronouncement violated the separation of powers clause¹ and only perfunctorily considers the propriety of the district court's decision to dismiss the appeal.²

Although intertwined, this Court must first determine whether

¹ Article II, § 3, Florida Constitution.

² Petitioner acknowledges that the sentence is not a downward departure from the guidelines, appealable under section 924.07(1)(i), Florida Statutes (1997).

the state has the right to appeal Respondent's sentence³. As the sentence comports with the sentencing guidelines scheme, the state is only entitled to appellate review if the sentence is illegal. See Fla. R. App. P. 9.140(c)(1)(j)-(k).

Petitioner contends that the sentence is illegal because it violates the separation of powers clause set forth in Article II, section 3 of the Florida Constitution. As an ancillary argument, Petitioner suggests that any agreement between the court and a defendant which does not include the state's approval is contrary to its contract theory of plea bargains and thus, illegal.

Respondent acknowledges that the state has the right to appeal a sentence which is illegal. This Court has announced that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'" State v. Mancino, 714 So. 2d 429,433 (Fla. 1998). Respondent contends however, that his sentence is neither illegal nor unlawful as it was imposed in conformity with the Florida Constitution, state statutes and Rules of Criminal Procedure.

³This issue has been extensively briefed in State v. Figueroa, 728 So.2d 787 (Fla. 4th DCA 1999), review granted, Case No. 95,087 (Fla. May 6, 1999). Respondent incorporates the argument as set forth in the Figueroa Respondent's Answer Brief on the Merits and has appended the Figueroa Answer Brief on the Merits to this brief. (Respondent's Appendix - 24)

The question of whether Respondent's sentence is unlawful because the court told him, prior to entering his plea, the sentence the court intended to impose if he choose to plea guilty or no contest is currently pending before this Court in State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998), review granted Case No. 94,842 (Fla. May 4, 1999). Oral argument is scheduled for October 5, 1999. Respondent incorporates the argument of the Respondent in Warner as set forth in the Corrected Respondent's Answer Brief on the Merits and has appended a copy of the Answer Brief (A-).

CONCLUSION

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

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

MARCY K. ALLEN
Assistant Public Defender
Florida Bar No. 332161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to BARBARA A. ZAPPI, Assistant Attorney General, 110 SE 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, by mail this _____ day of SEPTEMBER, 1999.

MARCY K. ALLEN
Assistant Public Defender