IN THE SUPREME COURT OF FLORIDA

**CASE NO. 95,451**

**STATE OF FLORIDA,**

Petitioner,

-vs-

**LEVON SHILLINGFORD,**

Respondent.

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**ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

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# BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellant in the District Court of Appeal of Florida, Fourth District. Respondent, LEVON SHILLINGFORD, was the Defendant in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand before this Court, or by Defendant and the State. As of this date, Petitioner has not received the index to the record on appeal and thus will include an Appendix which will contain references to the original record on appeal and the transcript of the trial court proceedings.

## CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Petitioner, the State of Florida, hereby certifies this brief is printed in 12 point Courier New font as required by this Court's administrative order of July 13, 1998.

## STATEMENT OF THE CASE AND FACTS

On July 10, 1997, in lower case number 97-12250 CF 10A Defendant was charged by Information with delivery of cocaine in violation of sections 893.13(2)(a)4 and 893.13(1)(a)1, Florida

Statutes (1997). The offense date was June 20, 1997. (Ex. A).

A hearing was held before the Honorable Peter M. Weinstein on July 28, 1998. (Ex. B). Defense counsel informed the court Defendant had two prior felonies and asked if the court would consider a sentence of six months in the Broward County Jail. The trial judge responded, "[M]y understanding is your plea will be adjudication, six months Broward County Jail. (Ex. B:4).

A plea colloquy followed. Defendant was advised of his rights and waived his rights. (Ex. B:5-6). The court then asked the State to summarize the facts upon which the charge was predicated. The prosecutor said if the case were to proceed to trial the State was prepared to prove that on June 20, 1997, an undercover detective from the Hollywood Police Department made contact with Defendant. As the detective was walking by, Defendant asked him what was up and what did he want. The detective responded he had a twenty. Defendant delivered a twenty dollar crack cocaine rock to the detective and the detective gave Defendant a marked twenty dollar bill. The detective did a Valtox test that was positive, and the lab analysis revealed the item tested positive for cocaine. (Ex. B:6-7).

After the State's recitation of the facts, the State objected based on the separation of powers doctrine, to the court extending

a plea and argued that the judiciary did not have a responsibility to make a plea offer. The prosecutor said the State would appeal; the court overruled the objection. (Ex. B:7).

Defense counsel did not take any exception to the facts as summarized and Defendant entered a plea of no contest. The court accepted the plea, adjudicated Defendant guilty as charged, and sentenced him to six months in the Broward County Jail with credit for 15 days time served. (Ex. B:8-9; Ex. C). The transcript reflects there was no discussion regarding where Defendant scored on the sentencing guidelines scoresheet.

Delivery of cocaine is a felony of the second degree which carries a sentence of imprisonment for a term not exceeding fifteen years. Secs. 893.13(1)(a)1. and 775.082(3)(c), Fla. Stat. (1997). Defendant's guidelines scoresheet showed a total of 40.48 points, for a sentence of 12.48 state prison months. (Ex. D). Hence, Defendant's sentence of six months county jail time was far less than the legal statutory sentence and less than the guideline sentence.

Based upon the decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), Petitioner filed an appeal in the Fourth District Court of Appeal, DCA Case No. 98-2874 challenging the trial court's authority to strike a plea bargain

with Defendant over the prosecutor's objection. (Ex. E). Defendant moved to dismiss the appeal, arguing that because Defendant's guideline scoresheet points were greater than 40 but less than 52, the sentencing court had the discretion to impose a nonstate prison sanction, and Defendant's sentence of six (6) months county jail time was lawful. (Ex. F).

In its response, the State argued, *inter alia*, that at the very least the trial court became a party in interest when it accepted Defendant's plea over the State's objection. That is, under contract law the court is to remain an impartial arbiter but here, rather than remain an impartial arbiter, the trial court became a party in interest when it accepted Defendant's plea offer over total rejection by the representative of the State. (Ex. G). The State further argued the sentence was "illegal" because the trial court contemplated Defendant's offer, even going so far as to determine the voluntariness of the plea, prior to taking any evidence. That is, under Gitto, *supra*, and Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den., 356 U.S. 953 (1958), the procedure employed by the trial court rendered the sentence "illegal".

When the Fourth District granted Defendant's motion to dismiss (Ex. H), the State filed a Motion For Reconsideration/Clarification

And Motion For Rehearing En Banc (Ex. I). Defendant filed a response. (Ex. J).

The Fourth District denied the State's motion for rehearing en banc, but granted the motion for reconsideration/clarification, and wrote to explain the reason for dismissal. (Ex. K). The court noted the State took issue with the procedure the trial court employed in accepting the plea, i.e., with the trial court's telling the Defendant what sentence it intended to impose prior to the actual entry of the plea and prior to hearing the State's factual basis for the plea, but commented that "[n]o matter how ill-advised such a practice may be in any particular case," the sentence was not rendered illegal, and dismissed the State's appeal.

This petition for discretionary review followed.

## QUESTION PRESENTED

**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.**

## SUMMARY OF THE ARGUMENT

The rule announced by this Court in Tilghman v. Culver and followed in State v. Gitto is that a trial court cannot independently bind itself to a sentencing agreement with a defendant, especially where there is no factual basis for the plea and when it is over the prosecutor's objection. Those cases state that expediency has no place in formulating the judge's act and the court's involvement in plea negotiations taints the sentencing process. Accordingly, the trial court erred when it accepted Defendant's plea offer over the State's objection and without a factual basis for the plea, and that error was compounded when the Fourth District Court of Appeal dismissed Petitioner's appeal.

## ARGUMENT

**THE FOURTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN TILGHMAN V. CULVER, 99 SO. 2D 953 (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.**

Petitioner respectfully asks this Honorable Court to address the issue of whether a trial court can negotiate and accept a plea without a factual basis and over the State's objection.

The Fifth District decided Gitto on constitutional grounds, opining that entry of departure sentences also concerns the power of the trial court to enter into a plea agreement with the defendant, as the sentences there were reached by plea negotiations between the trial judge and the defendant. Accordingly, the Fifth District held the downward departure sentences were a subissue: The decision turned on constitutional grounds.

> 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.

State v. Gitto, *supra* (emphasis added). The Gitto decision

expressly states that a trial court cannot bind itself to a sentencing agreement with a defendant.

> Courts cannot bind themselves to agreements such as that shown by this record. To countenance such would require too high a price for administrative efficiency. The judge is an instrument of the law charged with meting out just punishment to convicted men. Just punishment is that which fits the circumstances of the crime and the particular criminal; therefore, expediency has no place in formulating the judge's act.

Id. citing Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den., 356 U.S. 953 (1958). Further,

> . . .the trial court's acceptance of a plea over the prosecutor's objection is clear error which requires outright reversal of any sentence entered in reliance on such a plea. ...It is immaterial whether the trial court articulated valid reasons for departure in imposing sentence on these defendants, since the court's involvement in plea negotiations has tainted the entire sentencing process.

Id. (citations omitted).

In holding as it did, the Fourth District overlooked the very real and highly significant issue raised by the Fifth District in Gitto: by engaging in a sentencing discussion based on nothing more than the "title" of a crime, a trial court injects itself into the bargaining process without the special knowledge which at that point is only the prosecutor's. The defendant is "entitled" to a guideline sentence, but the State is also entitled, based on facts

which only the State may know, to argue for an upward departure. In the words of Chief Justice Cardozo, "[J]ustice, though due to the accused, is due to the accuser also. ...We are bound to keep the balance true." (Quoted in Bell v. State, 262 So. 2d 244, 245 [Fla. 4th DCA 1972]).

In this case, the trial court and the Defendant negotiated a plea over the State's objection and without a factual basis for the plea, such was in express conflict with this Court's opinion in Tilghman v. Culver and the Fifth District's opinion in State v. Gitto. That error was compounded when the Fourth District dismissed Petitioner's appeal.

The doctrine of separation of powers is incorporated in Article II, section 3 of the Florida Constitution, and provides

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

In the criminal context, the power of the executive branch, which enforces or executes the laws, is wielded through the office of the prosecutor. The prosecutor has control over the decision when and whether to bring criminal charges, and which charges will be brought. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) (en banc), citing Young v. United States ex.rel.

Vuitton et Fils S.A., 481 U.S. 787 (1987). As an extension of the power to control the charges brought against a defendant, the prosecutor has the exclusive authority to enter into a plea bargain with the defendant. Id.

> Reposing this authority in the hands of the prosecutor is grounded on practical, as well as constitutional considerations. Since the prosecutor is the person most aware of the strengths and weaknesses of his case, and the facts upon which the prosecution is based, it is the prosecutor, and not the court, who should determine whether and when to enter into a plea bargain.

State v. Gitto, *supra*. For the trial court to agree in advance to a sentence, without the knowledge of the case possessed by the prosecutor or without the benefit of having heard evidence at trial is error as it undermines the sentencing process, which contemplates independent sentencing by the trial court once plea negotiations are concluded. Id. See Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den., 356 U.S. 953 (1958), wherein this Court noted that in the record before it the trial judge admitted that he bargained with the petitioner and reached an agreement whereby the petitioner was to plead guilty to the breaking and entering charge in exchange for a particular sentence by the judge. This Court held trial courts cannot bind themselves to such agreements as expediency has no place in formulating a judge's act.

99 So. 2d at 286.

Plea bargains are encouraged by the Florida Rules of Criminal Procedure. Bell v. State, 453 So. 2d 478 (Fla. 2d DCA 1984). However, plea bargaining or negotiation does not include the situation in which a defendant, for his own reasons, makes a unilateral offer to enter a particular plea which is neither initiated, approved nor responded to in any way but rejection by the representative of the State. Stell v. State, 366 So. 2d 825 (Fla. 4th DCA 1979). See Owen v. State, 551 So. 2d 557 (Fla. 2d DCA 1989). Here, immediately after Defendant made his plea offer the trial court inquired as to the voluntariness of Defendant's plea. The prosecutor voiced his disapproval and rejection of the plea offer. Nevertheless, the trial court accepted Defendant's plea and imposed sentence as requested by Defendant.

A plea bargain is a contract between society and the accused, entered into on the basis of a perceived mutuality of advantage, therefore, in order for plea bargaining to take place, both the defendant and the State must actually be involved. See Lopez v. State, 536 So. 2d 226 (Fla. 1988); Pate v. State, 547 So. 2d 316 (Fla. 4th DCA 1989); and Offord v. State, 544 So. 2d 308 (Fla. 4th DCA 1989).

The plea here was an illusory contract because it was

unenforceable and ineffective as to at least one party, the State. At the very least, the trial court became a party in interest when it accepted Defendant's plea over the State's objection. The rules of contract law are applicable to plea agreements, State v. Frazier, 697 So. 2d 944 (Fla. 3d DCA 1997); Gonzalez v. State, 714 So. 2d 1125 (Fla. 3d DCA 1998), and under contract law the court is to remain an impartial arbiter, State v. Frazier, *supra*. Here, the trial court, rather than remain an impartial arbiter, accepted Defendant's plea offer over total rejection by the representative of the State.

Although a trial judge is not prohibited from participating in plea discussions, active negotiations on the part of the trial court should not be heavyhanded. Stephney v. State, 564 So. 2d 1246 (Fla. 3d DCA 1990); Johnson v. State, 501 So. 2d 158 (Fla. 3d DCA 1987). Here, the trial judge's participation in the plea negotiation with Defendant was not heavyhanded in so far as Defendant was concerned as Defendant received the sentence he requested, but it was heavyhanded in so far as the State was concerned as it was over the State's disapproval and total rejection of the plea offer.

The purpose of the sentencing guidelines set forth in the Florida Rules of Criminal Procedure is to establish a uniform set

of standards to guide the sentencing judge in the sentence decision making process. Fla. R. Crim. P. 3.701(b). The guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity involved in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decisions. Id. In effect, the sentencing guidelines provide the trial judge with a basic minimum of information necessary to indicate the "usual" penalty which has been imposed in similar cases, and therefore represent historic sentencing practices throughout the state. Id.

The sentencing guidelines embody principles of current sentencing theory, such as the principles that sentencing should be neutral with respect to race, gender, and social and economic status, that the penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense, and that the severity of the sanction should increase with the length and nature of the offender's criminal history. Fla. R. Crim. P. 3.701(b).

When a defendant has been found guilty or has entered a plea of nolo contendere or guilty, and the court has discretion as to what sentence may be imposed, the circuit court may refer the case

to the Department of Corrections for investigation and recommendation. Fla. R. Crim. P. 3.710. Whenever the defendant has a recommended sentence under the sentencing guidelines of any nonstate prison sanction, the circuit court may also refer the case to the department for investigation or recommendation and a presentence investigation report. Sec. 948.015, Fla. Stat. (1997).

In the case at bar, the transcript reflects there was no discussion regarding where Defendant scored on the sentencing guidelines scoresheet. (See Ex. B). Defendant's guideline scoresheet showed a total of 40.48 points, for a sentence of 12.48 state prison months. (See Ex. D). However, because Defendant's scoresheet points were greater than 40 but less than 52, the sentencing court had the discretion to impose a nonstate prison sanction.

As previously pointed out, a defendant is "entitled" to a guideline sentence, but the State is also entitled, based on facts which only the State may know, to argue for an upward departure. Justice, though due to the accused, is due to the accuser also. Bell v. State, 262 So. 2d at 245 quoting Chief Justice Cardozo. By agreeing to the sentence Defendant requested, over the rejection and objection of the State, the trial court precluded the State from seeking either a guideline sentence or an upward departure

from the guidelines. Since Defendant's prior record had two felonies, a presentence investigation report, if ordered, may have showed that a guideline sentence of 12.48 state prison months or an upward departure sentence, was the sentence Defendant should have received.

The trial court and the Defendant negotiated a plea over the State's objection and without a factual basis for the plea. Said procedure prevented the State from seeking a guideline or upward departure sentence, a sentence which it was entitled to seek. Such judicial expediency was in express conflict with this Court's opinion in Tilghman v. Culver and the Fifth District Court of Appeal's opinion in State v. Gitto.

## CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be reversed with directions that this matter be remanded to the trial court for further proceedings before a new judge.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to Marcy K. Allen, Esquire, Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this _____ day of August 1999.

**BARBARA A. ZAPPI**
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**ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

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# APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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