IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,451

STATE OF FLORIDA,

Petitioner,

-vs-

LEVON SHILLINGFORD,

Respondent.

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

REPLY BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437

BARBARA A. ZAPPI
Assistant Attorney General
Florida Bar No. 0782602
Office of the Attorney General
Department of Legal Affairs
The 110 Tower - S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4832 Fax: 712-4761

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INTRODUCTION

Petitioner relies on the Introduction as stated in Petitioner's Brief on the Merits.

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

Petitioner relies on the Statement of the Case and Facts as stated in Petitioner's Brief on the Merits.

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 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.

SUMMARY OF THE ARGUMENT

Petitioner relies on the Summary of the Argument as stated in Petitioner's Brief on the Merits.

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 reiterates its argument in its brief on the merits and further adopts the similar arguments in the State/Petitioners' briefs on the merits in State v. Figueroa, Case No. 95,087 and State v. Warner, Case No. 94,842. (See the conformed E-mail copies of the State's official briefs filed in those cases and appended hereto as Exhibits L and M.)

Respondent, by way of answer, incorporated the arguments of the Respondents in the above-cited cases.

Respondent incorporated the argument in State v. Figueroa with regard to whether the State has the right to appeal a sentence that is within the sentencing guidelines scheme. As Petitioner previously argued, and as the State argued in Figueroa, a defendant is presumptively "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 keeping the balance true, the prejudice may be, as here, in not giving the State the opportunity to exercise its role in the judicial process. Rigabar v. Broome, 658 So. 2d 1038, 1041 (Fla. 4th DCA 1995), rev. den., 664 So. 2d 248. The Fourth District said in Rigabar:

> Discretion unrestrained by principle, by methodology and by standards is contrary to our rule of law. It would substitute rule by the whim of judges. Discretion exercised without guiding principles or standards is without rudder or anchor and is subject to prevailing tides and winds and little else. Judicial discretion exists not for its own sake but merely because it is impossible to set down a single rule to govern all procedural questions that arise in judicial proceedings.

Petitioner submits the principle at stake in the case at bar is the corollary of that in Rigabar: If a defendant has a right to plead guilty without judicial interference, the State must have an equal and identical right to prosecute, free from the ability of a trial judge to short-circuit the process on little more than a whim.

Respondent incorporated the argument in State v. Warner with regard to whether his sentence was unlawful because the trial court and the Respondent negotiated a plea over the State's objection and without a factual basis for the plea. As Petitioner previously

argued, and as the State argued in Warner, the plea agreement entered into by the trial court and the Respondent was an illusory contract because it was unenforceable and ineffective as to one party, the State. At the least the trial court became a party in interest when it offered the plea before hearing the State's evidence and determining if there was a factual basis for the plea. 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.

Florida Rule of Criminal Procedure 3.171(d) governs plea discussions and agreements and delineates the responsibilities of the prosecutor, defense counsel and the trial judge.

> **After an agreement on a plea has been reached,** the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.

(Emphasis added.)

The above language specifically states the agreement is

reached between the prosecutor and the defense attorney prior to the judge being informed of the terms of the agreement. Under that rule a trial judge's role is limited. Once a plea agreement is reached between the State and the defendant, both parties may tell the judge the reasons for the plea agreement, prior to accepting the plea. The trial judge must then tell both parties whether or not the plea is acceptable; if not, the judge must give his or her reasons for not accepting the plea.

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,

ROBERT A BUTTERWORTH
Attorney General

_____

MICHAEL J. NEIMAND
AssistanAttorneyyt General
Florida Bar No. 0239437

_____

BARBARA A. ZAPPI
Assistant Attorney General
Florida Bar No. 0782602
Office of the Attorney General
Department of Legal Affairs
The 110 Tower - S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4832 Fax: 712-4716

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF of Respondent ON THE MERITS** was furnished by mail to Marcy K. Allen, Esquire, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Fifteenth Judicial Circuit Court, Criminal Justice Building, 421 Third Street, West Palm Beach, Florida 33401 on this ____ day of October 1999.

BARBARA A. ZAPPI
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,451

THE STATE OF FLORIDA,

Pititioner,

-vs-

LEVON SHILLINGFORD,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPENDIX TO REPLY BRIEF OF PETTIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

BARBARA A. ZAPPI
Assistant Attorney General
Florida Bar No. 0782602
Office of the Attorney General
Department of Legal Affairs
The 110 Tower - S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4832 Fax: 712-4761

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Ex. M	State v. Warner, Fla. S. Ct. Case No. 94, 842, Petitioner's Brief on the Merits

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO REPLY BRIEF OF Respondent ON THE MERITS** was furnished by mail to Marcy K. Allen, Esquire, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Fifteenth Judicial Circuit Court, 421 Third Street, West Palm Beach, Florida 33401 on this ____ day of October 1999.

_____

BARBARA A. ZAPPI
Assistant Attorney General

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,451

THE STATE OF FLORIDA,

Pititioner,

-vs-

LEVON SHILLINGFORD,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPENDIX TO REPLY BRIEF OF PETTIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

BARBARA A. ZAPPI
Assistant Attorney General
Florida Bar No. 0782602
Office of the Attorney General
Department of Legal Affairs
The 110 Tower - S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4832 Fax: 712-4761

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EXHIBIT L

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner/Appellant

v.

ESTEVAN FIGUEROA,

Respondent/Appellee.

Case No. 95,087

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

INITIAL BRIEF OF PETITIONER/APPELLANT ON THE MERITS

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
Bureau Chief

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 0134924
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(561) 688-7759
Counsel for

Petitioner/Appellant

Case No. 95,087
State of Florida v. Estevan Figueroa

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner/Appellant certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable Ilona M. Holmes
   Circuit Court Judge, Seventeenth Judicial Circuit of Florida
   (trial judge)

2. Joseph A. Tringali, Esq., Assistant Attorney General
   Office of the Attorney General, State of Florida
   Robert Butterworth, Attorney General
   (appellate counsel for State, Petitioner/Appellant)

3. Paul Renner, Esq., and Ken Gillespie, Esq., Assistant State Attorney(s),
   Office of the State attorney, Seventeenth Judicial Circuit
   Michael J. Satz, State Attorney
   (trial counsel for State, Petitioner/Appellant)

4. Estevan Figueroa
   (Respondent/Appellee)

5. Browning-Ferris Industries, Inc.
   (Complainant/Victim)

6. Louis Pironti, Esq., Assistant Public Defender(s)
   Office of the Public defender, Seventeenth Judicial Circuit
   Alan R. Schreiber, Public Defender
   (trial counsel for Respondent/Appellee)

7. Margaret Good-Earnest, Esq., Assistant Public Defender
   Office of the Public Defender, Fifteenth Judicial Circuit
   Richard Jorandby, Public Defender
   (appellate counsel for Respondent/Appellee)

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Petitioner/Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

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PRELIMINARY STATEMENT

Petitioner/Appellant was the appellant in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of Seventeenth Judicial Circuit of Florida.

Respondent/Appellee was the appellee in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner/Appellant may also be referred to as the "prosecution" or the "State."

The following symbols will be used:

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

Respondent, Estevan Figueroa was charged in the Circuit Court of the Seventeenth Judicial Circuit of Florida with three counts of burglary of a structure, three counts of grand theft, and one count of possession of burglary tools (R 4-6). He appeared in the Circuit Court, Hon. Ilona M. Holmes presiding, on August 11, 1998, at which time the following discussion took place among the trial judge, the prosecutor and the defense attorney:

> THE COURT: Well, what does he score, Mr. Gillespie or Mr. Renner?
>
> MR. RENNER (the prosecutor): He scores up to a year in state prison, Judge, discretionary. It's 35.2 points.
>
> THE COURT: 35.2 points. And what are his priors?
>
> MR. GILLESPIE (the prosecutor): No prior record, Judge.
>
> THE COURT: No prior record?
>
> MR. GILLESPIE: No.
>
> THE COURT: *I'm willing to withhold and put him on probation.*
>
> MR. PIRONTI (defense counsel): Judge, I think he would be amenable to that.
>
> MR. RENNER: I would object to that.
>
> THE COURT: Objection based on what?
>
> MR. RENNER: Based upon separation of powers, Judge.

(T 4).

Following a plea colloquy in which Respondent was advised of his rights, he plead no contest to the court (T 12). The trial judge withheld adjudication and sentenced Appellee within the guidelines (R 13-16) to 18 months probation over the objection of the State (T 13; 15).

Following the entry of the plea and sentencing by the court, the trial judge entered a written order entitled "Order Overruling State's Objection to Court Plea" (R 10-11) and the State timely appealed to the Florida Fourth District Court of Appeal (R 17-18).

Respondent, through the Office of the Public Defender, moved to dismiss Petitioner's appeal in the Fourth District, contending that because the sentence which was imposed on Respondent was not an 'illegal sentence' within the meaning of §924.07(1)(I), (1995), and, therefore, the State could not appeal. The Fourth District agreed, and dismissed the appeal by the State. The State then filed a notice to invoke the discretionary jurisdiction of this Court.

This Court accepted jurisdiction on May 6, 1999 and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. This brief follows.

SUMMARY OF THE ARGUMENT

A trial court may not 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. While a defendant is presumptively 'entitled' to a guideline sentence, the state is also entitled -- based on facts which only the state may know -- to argue for an upward departure. A sentence which is imposed as the result of an constitutional violation is itself illegal.

Judicial discretion, unrestrained by principle, by methodology and by standards is contrary to our rule of law. It would substitute rule by the whim of judges.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THE STATE'S APPEAL OF THE TRIAL COURT SHOULD BE DISMISSED. THE TRIAL COURT ERRED BY ENGAGING IN PLEA NEGOTIATIONS WITH THE APPELLEE OVER THE OBJECTION OF THE STATE, AND THE RESULT SENTENCE, EVEN THOUGH IT WAS WITHIN THE GUIDELINES WAS 'ILLEGAL.'

Petitioner, the State of Florida, respectfully submits the Florida Fourth District Court of Appeal erred when it held the State did not have the right to appeal the action of the trial judge who, citing the holding of *State v. Gitto, et al,* 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), discussed her intended sentence with a defendant prior to his entry of a no-contest plea, and then accepted that plea over the objection of the State.

In so doing, the trial judge distinguished the case at bar from *Gitto* saying "in that all five cases consolidated for appeal [in *Gitto*] were downward departures . . ." and "[t]he portion of *Gitto* which discusses plea negotiations by the court is mere dicta." The Fourth District agreed with the trial court and added the observation that *Gitto* did not discuss the issue of jurisdiction.

Petitioner respectfully submits that both the Fourth District and the trial court missed the essential holding of *Gitto.* In fact, in *Gitto* the Fifth District Court of Appeal wrote a well-reasoned, *en banc* opinion in which it thoroughly explored the reason for the constitutional separation of powers between the executive branch, represented by the office of the prosecutor, and the judicial branch, represented by the trial judge. Going far beyond "mere dicta" the Fifth District noted that the "role of the judiciary in the plea

bargaining process is limited . . ." and that "[w]hile the judiciary has the power to accept or reject a plea, (citation omitted), the court's role is a secondary one, designed as a safeguard against excess on either side." Thus, said the Fifth District, "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." (emphasis added).

Petitioner conceded in the Fourth District, and concedes here, that the facts of the case at bar are different in the one respect mentioned by the trial judge -- that is, the case at bar does not involve a downward departure. And, clearly, there are district court opinions which hold that a sentence within the guidelines is not subject to appellate review. *Preston v. State,* 641 So.2d 169, 171 (Fla. 3d DCA 1994). And in *State v. Warner,* 721 So.2d 767 (Fla. 4th DCA 1998), the Fourth District specifically said, "[w]e . . . respectfully disagree with *Gitto* to the extend that it hold that a trial 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."

However, the reasoning of the trial court, and, respectfully, the Fourth District Court, overlooks the very real issue raised by the Fifth District in *Gitto:* that by engaging in a sentencing discussion based on nothing more than the 'title' of a crime, the trial court injects itself into the bargaining process without the special knowledge which at that point is in the hands only of the prosecutor. Certainly, the defendant is presumptively '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, "But justice, 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 the recent case *State v. Mancino,* 714 So.2d 429, 433 (Fla. 1998) this Court once again explained the distinction between an 'illegal sentence' and an 'unlawful' or 'erroneous' sentence. The Court could not have made it clearer when it said, "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." And in *Avatar Development Corp. v. State,* 723 So.2d 199 (Fla. 1998) the Court reiterated that "Article II, section 3 declares a strict separation of the three branches of government and that: 'No person belonging to one branch shall exercise any powers appertaining to either of the other two branches....'" Simply stated, Petitioner submits the sentence imposed in the case at bar was 'illegal' because it was arrived at in violation of the most basic precepts of the Florida Constitution: the precept dealing with separation of powers. And, like the sentence in *Mancino,* the illegality is apparent in the record and easily correctable by the appellate court.

Respondent may very well ask, of course, "Where is the prejudice?," arguing that he pled 'no contest' and was sentenced as provided by law, period. To that argument Petitioner responds, "The prejudice is in not giving the state the opportunity to exercise its role in the judicial process. In *Rigabar v. Broome,* 658 So.2d 1038, 1041 (Fla. 4th DCA 1995) Fourth District Court of Appeal said:

> Discretion unrestrained by principle, by methodology and by standards is contrary to our rule of law. It would substitute rule by the whim of judges. Discretion exercised without guiding principles or standards is without rudder or anchor and is subject to prevailing tides and winds and little else. Judicial

> discretion exists not for its own sake but merely because it is impossible to set down a single rule to govern all procedural questions that arise in judicial proceedings.

Petitioner respectfully submits the principle at stake in the case at bar is the corollary of that in *Rigabar*: if the defendant has a right to plead guilty without judicial interference, the state must have an equal and identical right to prosecute, free from the ability of a trial judge to 'short-circuit' the process on little more than a whim. Petitioner respectfully contends that in the case at bar the trial court overstepped its bounds by announcing a sentence and inviting the defendant to plead guilty. The trial court erred, and, respectfully, the Fourth District compounded that error by interpreting the definition of 'illegal sentence' too narrowly. Petitioner's appeal should not have been dismissed in the Fourth District, and the trial court's order should have been reversed and the case remanded for further proceedings in accordance with the law.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Petitioner/Appellant prays for an order of this Court to reversing the Fourth District Court of Appeal's decision, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Bureau Chief
Florida Bar No. 656879

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 0134924
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
Telephone (561) 688-7759
FAX (561) 688-7759

Counsel for Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Initial Brief of Petitioner/Appellant on the Merits" has been furnished by courier to MARGARET GOOD-EARNEST, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on July 6, 1999.

_____

JOSEPH A. TRINGALI
Assistant Attorney General
Counsel for

Petitioner/Appellant

EXHIBIT M

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN WARNER,

Respondent.

Case No. 94,842
DCA Case No. 97-2862

****

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
Bureau Chief
Florida Bar No. 0656879
MYRA J. FRIED
Assistant Attorney General
Florida Bar No.: 0879487
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(561) 688-7759

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Court, except that the Petitioner may also be referred to as "State" or "Prosecution".

STATEMENT OF THE CASE

An Information was entered against Respondent in the Seventeenth Judicial Circuit on October 21, 1996 (R 28-29). The charges were one count of Driving Under The Influence/Serious Bodily Injury/Unlawful Blood Alcohol Level; and two counts of Driving Under The Influence (a misdemeanor) (R 28-29).

Respondent entered a plea of guilty to all three counts (R 30, 31). Respondent's scoresheet totalled 114.4 points, which came out to a minimum of 65 months in prison and a maximum of 108 months in prison (R 37-39). The trial court imposed a downward departure over the objection of the State (T 23-24). Respondent was adjudicated on all three counts (R 33), and was sentenced to two years of community control, followed by three years of Drug Offender Probation on count one, and six months probation on counts two and three (concurrent to count one) (R 30, 33-36). Respondent was also given 364 days in the Broward County Jail with one day credit for time served, random drug urinalysis testing, DUI School, one year suspension of his driver's license, and fifty hours of community service (R 30-34). The trial court also reserved the right to impose restitution (R 30).

On the written scoresheet, the trial court's written reasons for the downward departure was that this was an isolated incident, and Respondent was 37 years old and had never been arrested prior to this incident (R 38). The court also checked off the following reasons for departure on the form attached to the scoresheet: "[t]he capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired;" "[d]efendant requires specialized treatment for addiction, mental disorder, or physical disability and the defendant is amenable to treatment;" and "[t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse" (R 40).

The State filed a timely notice of appeal on August 11, 1997 (R 43-44). On appeal, Petitioner alleged that the trial court had erred in imposing a downward departure sentence over the objection of the State. Respondent alleged that the trial court's decision for a downward departure was valid. The Fourth District Court of Appeal issued an opinion on November 18, 1998, State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998) reversing the sentence imposed by the trial court. In that opinion, the Fourth DCA addressed the Fifth District's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), disagreeing 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" (footnote omitted). State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998).

On December 3, 1998, Petitioner moved for rehearing, certification of conflict, and for a question of great public importance with the Fourth DCA for the **limited** purpose of the Fourth DCA's holding as it refers to conflict with State v. Gitto.
On January 5, 1998, the Fourth District denied Petitioner's motion. Mandate issued on January 22, 1998. Petitioner filed a Notice To Invoke Discretionary Jurisdiction with the Fourth District Court of Appeal on February 2, 1999, as well as a Motion to Stay Mandate And/Or Recall Mandate. This Court accepted jurisdiction of the above-styled cause and set a briefing schedule, to be followed by oral argument on October 5, 1999.

STATEMENT OF THE FACTS

According to the police report, on June 11, 1996 at 4:50 A.M., Respondent was driving a vehicle northbound on State Road 5 in Fort Lauderdale when he struck the rear of a 1991 GMC van at the corner of State Road 5 and State Road 84. This collision caused the GMC van to travel forward and hit the rear of a Chevrolet Caprice. The Caprice and GMC van were stopped at an intersection waiting for a red traffic signal to turn green. The occupant of the Caprice sustained injuries, was treated, and then released. The passenger of the GMC van sustained a broken leg. The driver of the GMC van sustained serious bodily injuries, including a fractured skull and a leg wound which developed a severe infection and required plastic surgery. Two blood samples were taken from Respondent shortly after the collision. The results indicated a blood alcohol level of .15 and .13 g% (R 26-27).

SUMMARY OF ARGUMENT

The trial court violated the separation of powers clause, Article II, section 3 of the Florida Constitution, by negotiating with the defendant for a downward departure sentence over the objection of the prosecutor. The trial court's role in plea negotiations should be limited to the role of an objective arbiter. Therefore, this Honorable Court should rule that a trial court may not negotiate a plea over the objection of the State. This Court should adopt the Fifth District Court of Appeal's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)(en banc), rehearing granted 1999 WL 252130 (Fla. 5th DCA April 30, 1999), as it applies to the case at bar, and should reject the Fourth District Court of Appeal's reasoning that allows a trial court to negotiate a plea agreement over the State's objections. This case should be reversed on this issue only.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY DETERMINED THAT THE TRIAL COURT COULD OFFER THE RESPONDENT A DOWNWARD DEPARTURE SENTENCE OVER THE OBJECTION OF THE PROSECUTOR.

The trial court's involvement in negotiating a plea bargain over the objection of the prosecutor culminated in a violation of the separation of powers clause, Article II, section 3, of the Florida Constitution. This constitutional violation requires reversal as to this issue only.

In State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)(en banc), rehearing granted, 1999 WL 252130 (Fla. 5th DCA April 30, 1999)(en banc), the Fifth District Court of Appeal concluded that a 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." (Footnote omitted.) The Fifth DCA applied the doctrine of separation of powers, Article II, section 3, of the Florida Constitution:

> 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.

State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998). The Florida Constitution "specifically prohibits a person belonging to one of such branches from exercising any powers 'appertaining to either of the other branches unless expressly provided herein.'" State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998)(quoting Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973).

In the criminal context, the power of the executive branch, which enforces or executes the law, is wielded through the office of the prosecutor. It is up to the prosecutor to determine when 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 (citation omitted).

State v. Gitto, supra. A trial court's role in the plea bargaining process is limited. The trial judge's main role is to act as an impartial arbiter between the prosecutor and the defendant, so that the trial court may determine that the plea is entered into by the defendant voluntarily, and is supported by a factual basis. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998); Rule 3.172(a), Fla. R.Crim.P.; Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining," 76 Colum. L. Rev. 1059 (1976). Although the trial judge has the discretion to either accept or reject a plea, the trial court's acceptance of a plea over the objection of a prosecutor violates the doctrine of separation of powers. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998).

It is error for the trial court to agree in advance to a sentence, either without the knowledge of the case possessed by the prosecutor or without the benefit of having heard evidence at trial, 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 that Court stated:

> According to the record before us the trial judge admits 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.
>
> 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.

99 So. 2d at 286. Here, the trial judge in the case *sub judice* exceeded her authority in entering into a plea bargain with Respondent without the prosecutor's consent.

On Motion For Rehearing And/Or Request For Certification En Banc, the Fifth District Court of Appeal in State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999), discussed its original opinion as well as the Fourth District Court of Appeal's application of State v. Gitto to the above-styled cause. The Fifth District considered the reasons for keeping the trial judge out of plea negotiations:

> "There are a number of valid reasons for keeping the trial judge out of plea discussions, including the following: (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent." (citation omitted, footnote omitted).

State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999), quoting State v. Buckalew, 561 P. 2d 289, 291 (Alaska 1977).

Along with the above delineated concerns for keeping the trial judge out of plea negotiations, the Gitto court also considered its concern for victims' legislatively created rights. State v. Gitto, supra. Section 921.143, Florida Statutes, requires that the victim be given an opportunity to speak before the trial court imposes sentence upon the defendant. On rehearing, the Gitto court reasoned that "[s]ince the victim has the statutory right to be heard at sentencing, due process requires that he or she not only be given notice of the sentencing hearing but also that such victim will be heard at a

'meaningful' time." State v. Gitto, supra. "It is not a meaningful time to hear the victim after the court has pre-determined the sentence in order to get a plea agreement. The victim should not be required to change the court's mind. A pre-disposed judge does not give the appearance of impartiality." Gitto, supra.

In State v. Clark, 724 So. 2d 653, 654 (Fla. 5th DCA Jan. 15, 1999), the Fifth District Court of Appeal disagreed with the Fourth District Court of Appeals' conclusion in State v. Warner that because the trial court's commitment is not binding, it is therefore appropriate. The Clark court stated that both the State and the victim are entitled to present their argument "as to an appropriate sentence to an uncommitted judge." State v. Clark, 724 So. 2d 653, 654, n.2 (Fla. 5th DCA Jan. 15, 1999).

According to the court in Clark:

> ...They should not have the burden of having to convince a judge that he or she should renege on his or her previous commitment. It is unseemly for a judge, the personification of the lady with the blindfold and set of scales, to make an independent compact with an admitted felon to sentence him to less than the law prescribes.

State v. Clark, 724 So. 2d 653, 654, n. 2 (Fla. 5th DCA Jan. 15, 1999).

In its *en banc* opinion issued upon rehearing in State v. Gitto, the Fifth District Court of Appeal also disagreed with the Fourth District's claim in State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998)1, that a trial judge's plea bargain between a defendant and the trial court was not actually a binding contractual agreement between the two parties involved.

> ...The Warner court, citing the supreme court's decision in Davis v. State, 308 So. 2d 27, 29 (Fla. 1975), urges that such 'plea agreements' are not objectionable because they are not truly 'agreements.' Because the court cannot be bound to impose the sentence that the court either 'suggested' or 'agreed to,' the Warner court finds there really is no 'plea bargain' that the state can complain about. The court can simply change its mind at any point and impose whatever sentence it pleases. If this occurs, however, the defendant is entitled to withdraw his plea. What the Warner court approved appears to be in the nature of a criminal equivalent of 'quasi-contract.' Because the judge knew a defendant expected to receive the sentence stated by the judge, and because the defendant did rely upon it in offering the plea, if the court fails to sentence in

> accordance with its representation, the defendant can rescind. If, on the other hand, the court acts in a manner consistent with its representation, there is no basis for the state to complain. This seems to us the worse of all worlds: one that permits judicial 'representations,' 'agreements,' or 'suggestions' that are, in effect, plea bargains but which give the court free rein to renege on them.

State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999).

The plea agreement entered into by the trial court and the Respondent was an illusory contract, because it was unenforceable and ineffective as to one party of the case: the State. At the very least, the trial court became a party in interest when it offered the plea before hearing the State's evidence and determining if there was a factual basis for the plea. The rules of contract law are applicable to plea agreements, State v. Frazier, 697 So. 2d 944 (Fla. 3d DCA 1997), and under contract law the court is to remain an impartial arbiter. Further, 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 a representative of the State. Stell v. State, 366 So. 2d 825 (Fla. 4th DCA 1979). Here, the trial court, rather than remain an impartial arbiter, made the plea offer to the Respondent over the objections of the State's representative, the prosecutor.

In reaching its conclusion below, the Warner court relied on Davis v. State, 308 So. 2d 27, 29 (Fla. 1975), where this Court refrained from condemning a trial court from becoming involved in plea negotiations. This Court determined that trial judges could be trusted to take all necessary precautions to protect defendants' rights. Davis v. State, 308 So. 2d 27, 29 (Fla. 1975).

However, Davis v. State is distinguishable from the case at bar. In Davis, although there is a reference to an agreement between the defendant and the trial court, it cannot be determined whether a true negotiated plea agreement actually existed. Nor is there any indication whether the State objected to the trial court's concession. Further, in Davis, the issue was whether the trial court's agreement could

be enforced. If the plea agreement in Davis had occurred because all three parties (the State, the defendant, and the trial court) concurred as to the plea agreement, then such a plea would be appropriate as proposed by Standard 14-3.3(c), the American Bar Association's Standards for Criminal Justice. Standard 14-3.3(c) allows for the prosecutor and the defendant to bring in the trial judge if the State and the defense are unable to reach an agreement first. However, the judge, at that point, shall serve only as a moderator, and may make suggestions as to what might be acceptable. It is then up to the State and the defense to either accept or reject the proposed plea of the court.

This goes beyond what is allowed under Florida law, as seen in Rule 3.171(d), Florida Rules of Criminal Procedure. Rule 3.171 governs plea discussions and agreements, and delineates the responsibilities of the prosecutor, the defense counsel and the trial judge. The responsibilities of the trial judge, Rule 3.171(d), Florida Rules of Criminal Procedure, provides:

> **After an agreement on a plea has been reached**, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.

(Emphasis added.) The above language specifically states that the agreement is reached between the prosecutor and the defense attorney prior to the judge being informed of the terms of the agreement. Under that rule, a trial judge's role is limited. Once a plea agreement is reached between the State and the defendant, both parties may tell the trial judge the reasons for the plea agreement, prior to accepting the plea. Then the trial judge must tell both parties whether or not the plea is acceptable; if not, the judge must give his or her reasons for not accepting the plea.

Also, to allow the trial court to become involved in plea negotiations in order to expedite a judge's court docket would create the additional problem that appellate courts might be called upon to consider the issue as to whether such pleas should be

set aside because they are coercive. State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999). See United States v. Werker, 535 F.2d 198 (2d Cir. 1976).

One should also consider the possibility that allowing the trial judge to negotiate a plea over the objections of the State could create potential constitutional violations of the Fifth and Sixth Amendments. For example, there is the potential problem that a trial judge may overreach his or her legal boundaries, since a trial judge has different interests than those of a defense attorney or even of a prosecutor. A defendant already has his own attorney to represent his best interests. It is for this reason that a trial judge should be a neutral arbiter. If a trial judge tells a defendant he will give him a lesser sentence if he pleads guilty instead of going to trial, there is the implication that the defendant will be treated differently if he does go to trial. State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999)(concurring opinion). See Gallucci v. State, 371 So. 2d 148, 149 (Fla. 4th DCA 1979).

This Court recognized the potential consequences of such a problem in City of Daytona Beach v. Del Percio, 476 So. 2d 197, 205 (Fla. 1985)(quoting United States v. Jackson, 390 U.S. 570 (1968)):

> The law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.

The Florida Rules of Criminal Procedure have not yet adopted the American Bar Association's position allowing limited judicial participation in plea negotiations. The judge's role in plea negotiations should be limited to approving the plea negotiations between the prosecutor and the defendant. By limiting the trial judge's role in this respect, there would be little danger of a violation of a defendant being coerced into accepting a plea and thus giving up his constitutional right to trial. If the plea negotiations are kept between the State and the defendant, then there will be little chance that a defendant could allege that the trial court treated defendants who plead guilty differently from those who go to trial.

It is the Petitioner's position that the trial court erred by accepting a plea agreement which the State opposed and by downwardly departing based on reasons which were unsupported by the record. In State v. Herrick, 691 So. 2d 540 (Fla. 5th DCA 1997), the court held that it was error to accept a plea agreement opposed by the State and to impose a downward departure sentence based on a reason unsupported by evidence. In Herrick, as in the case at bar, the defendant entered into a plea agreement with the court and not with the State. The Herrick court noted that "[W]e are unaware of any authority for this highly unusual contractual arrangement." State v. Herrick, at n. 1.

In the instant case, the State did not enter into the agreement with Respondent as it was signed by all parties involved except the State. The State clearly opposed the sentence contained in the agreement. The trial court erred in accepting the plea agreement which was entered into with the court and not with the State. Therefore, this Court should hold that the trial court erred in entering a plea agreement over the State's objections.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Petitioner respectfully requests this Honorable Court to reverse the the Fourth District Court of Appeal's ruling **only** as to the validity of the trial court's entrance into a plea bargain with the defendant over the objection of the State. The Fourth DCA's ruling as to the impropriety of Respondent's downward departure sentence for other reasons should be affirmed.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
Bureau Chief
Florida Bar No. 0656879

MYRA J. FRIED
Assistant Attorney General
Florida Bar No.: 0879487
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(561) 688-7759
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

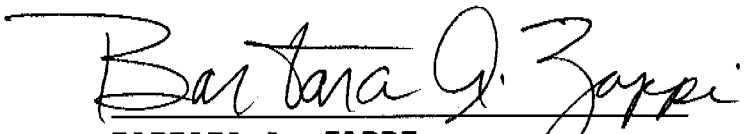
I HEREBY CERTIFY that a copy hereof has been furnished to David McPherrin, Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on June ____, 1999.

CELIA A. TERENZIO
Counsel for Petitioner

MYRA J. FRIED
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO REPLY BRIEF OF Respondent ON THE MERITS** was furnished by mail to Marcy K. Allen, Esquire, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Fifteenth Judicial Circuit Court, 421 Third Street, West Palm Beach, Florida 33401 on this 15th day of October 1999.



BARBARA A. ZAPPI
Assistant Attorney General