

IN THE SUPREME COURT OF FLORIDA

**FILED**  
DEBBIE CAUSSEAU

✓ JUN 08 1999

CLERK, SUPREME COURT  
By \_\_\_\_\_

ANTHONY P. GITTO, )  
ALLEN SILAS, ALFRED )  
PERKINS, JUSTIN P. )  
HARBIN, and COREY )  
HARPIN, )  
 )  
 )  
Petitioner/Appellee, )  
 )  
vs. )  
 )  
STATE OF FLORIDA, )  
 )  
 )  
Respondent/Appellant. )  
\_\_\_\_\_ )

DCA Case No. 97-1376

Supreme Court Case No. 95754

**PETITIONER'S BRIEF ON JURISDICTION**

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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## TABLE OF CITATIONS

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### OTHER AUTHORITIES CITED:

Florida Rule of Appellate Procedure 9.030(a)(2)(iv)

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**STATEMENT OF THE CASE AND FACTS**

Petitioner entered a plea of no contest to resisting an officer with violence and battery on a law enforcement officer in case number 96-2889-CFA.

Petitioner also admitted to violating his probation in case numbers 94-3149-CFA and 94-3150-CFA. (R 21-22, 50, 52, 61, 67, 74)

The trial court over the State's objection downwardly departed and sentenced Petitioner to concurrent terms of five years drug offender probation, with the special condition that he complete the Daytop residential treatment program. (R 54, 64, 71, 86, 88-90) Respondent appealed to the Fifth District

Court of Appeal. On appeal to the Fifth District Court of Appeal, Respondent argued that the trial court erred in downwardly departing because there was insufficient record support. On June 26, 1998, the Fifth District issued its en banc opinion reversing Petitioner's sentence. See State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998). (Appendix A) Petitioner filed a motion for rehearing on July 10, 1998. The Fifth District issued its decision denying Petitioner's motion for rehearing on April 30, 1999 along with a corrected opinion. (Appendix B and C) In rejecting Petitioner's argument that the trial court could impose a downward departure over the State's objection, the District Court cited to the Fourth District Court of Appeal's case of State v Warner, 721 So. 2d 767 (Fla. 4th DCA)(Appendix D). In Warner, the Fourth District Court of Appeal expressly disagreed with the Fifth District Court of Appeal's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998) and is currently pending review in the Supreme Court of Florida in Case Number 94,842.

A timely notice to invoke this Court's discretionary jurisdiction was filed on May 28, 1999.

## **SUMMARY OF ARGUMENT**

The decision of the Fifth District Court of Appeal below is in direct and express conflict with the decision of the Fourth District Court of Appeal in State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998) on the same question of law. This Court has accepted Jurisdiction in Warner and is currently pending review with this Court in Case Number 94,842. Thus, this Court has discretionary jurisdiction to accept the instant case for review and resolve the conflict.

## ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL BELOW IS IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN STATE V. WARNER, 721 SO.2D 767 (FLA. 4TH DCA 1998).

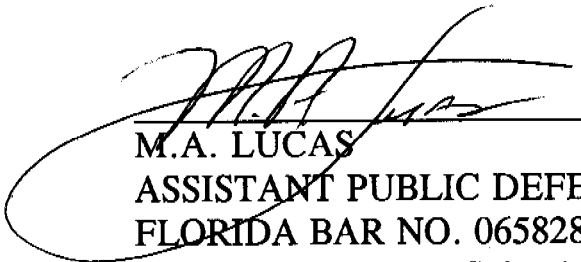
Petitioner, Appellee below argued that it was proper for the trial court to downwardly depart despite the State's objection. The Fifth District rejected this argument and cited to the Fourth District Court of Appeal's decision of State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998) which is in direct conflict. The Fourth District in Warner disagreed with the holding in Gitto. This Court has accepted jurisdiction in Warner in Case Number 94,842. Therefore, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(iv) and Jollie v. State, 405 So.2d 418 (Fla. 1981) this Court has discretionary jurisdiction to accept the instant case for review for the purpose of resolving the express and direct conflict between the District Courts of Appeal on this question of law.

**CONCLUSION**

Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT



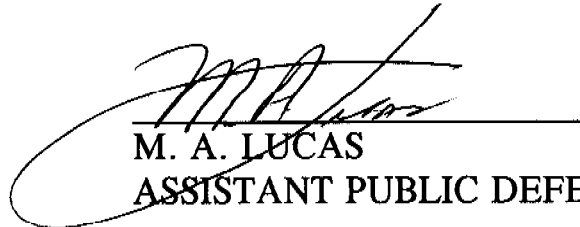
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, on this 7<sup>th</sup> day of June, 1999.

  
M. A. LUCAS  
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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**APPENDICES**

**Appendix A** -- State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)

**Appendix B** -- State v. Gitto, 24 Fla. L. Weekly D1054 (Fla. 5<sup>th</sup> DCA April 30, 1999) (Opinion on Motion for Rehearing)

**Appendix C** -- State v. Gitto, (Corrected Opinion)

**Appendix D - State v. Warner, 721 So. 2d 767 (Fla. 4<sup>th</sup> DCA)**

Respectfully Submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT



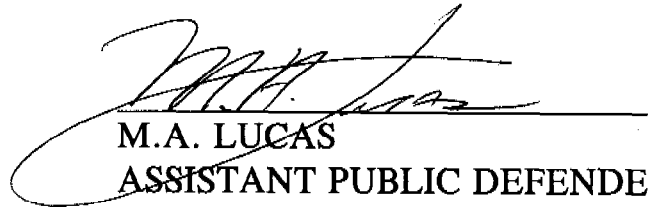
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**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14 pt.

  
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ASSISTANT PUBLIC DEFENDER