IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALLEN SILAS, et al.,,

Petitioner,

v. Case No. 95,754

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

Robert A. Butterworth
Attorney General

Belle B. Schumann
Assistant Attorney General
FL Bar # 397024
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

Counsel for Respondent

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STATEMENT OF THE CASE AND FACTS

This consolidated case reaches this Court by a circuitous path. In fact, this is not the first time this case has been here.

On September 9, 1997, Respondent moved to have five cases travel together in the District Court: State v. Gitto, Case No. 97-1239; State v. Harbin, Case No. 97-1860; State v. Silas, Case No. 97-1376; State v. Harpin, Case No. 97-1934 and State v. Perkins, Case No. 97-1377. This Motion was granted on September 22, 1997.

On September 26, 1998, the District Court of Appeal, Fifth District, issued an *en banc* decision in which the five cases were consolidated.

Only Appellee Silas filed a motion for rehearing on July 10, 1998. None of the other Appellees joined this motion. Petitioners Perkins and Harpin both filed Notices to Invoke the Discretionary jurisdiction of this Court on July 27, 1998.

By order entered December 2, 1998, this Honorable Court declined to accept jurisdiction. **All five case numbers** were listed on the order. (See, Order, attached to the Motion to Dismiss as Exhibit A)[1] As is customary, this Court ordered that no motion for rehearing would be entertained by the Court.

On remand to the Fifth District, the Court issued a corrected en banc opinion on April 30, 1999. (Exhibits B, C, Motion to

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[1]The decisions below were appended to the motion to dismiss, and so Respondent has not included them again in an appendix to this brief.

Dismiss) The sole correction is the deletion of a single sentence in the decision: the third sentence from the end.[2] Also, footnote six was included in the body of the decision. The holding of the case was unchanged.

Petitioner Silas only filed a notice to invoke the jurisdiction of this Court on May 28, 1999. However, once again, all five cases are listed in the caption. Respondent moved to dismiss this action as this Court has already reviewed this case and declined to accept jurisdiction. That motion is still pending, and Respondent incorporates in herein. By order entered July 14, 1999, this Court ordered this brief to be filed.

The facts of the Silas case as contained in the District Court decision are as follows:

> Silas was on probation for burglary and theft. He was charged with resisting an officer with violence and battery on a law enforcement officer, as well as with violating his probation. He pled guilty to the new offenses, based on an understanding with the trial court that he would receive five years drug offender probation, with the special condition that he receive specified drug treatment. The trial court (orally) justified the

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[2]"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." This sentence was deleted, softened somewhat, and incorporated as an introductory clause to the sentence immediately preceding it: "Because the plea on which the sentence was predicated was improperly obtained, we should not have done so."

> departure on the grounds that Silas suffered from a drug addiction and was amenable to treatment. The prosecutor objected to entry of a downward departure sentence because of a lack of evidence to support the reason given by the trial court.

See State v Gitto, et al, Corrected en banc decision, Case nos. 97-1239, 97-1376, 97-1377, 97-1860, 97-1934, p. 3 (Fla. 5th DCA Apr. 30, 1999)(unpublished decision)

CERTIFICATE OF FONT

The undersigned hereby certifies that this brief is submitted in Courier New, 12 point font, a proportionally spaced font.

SUMMARY OF ARGUMENT

This Court has already rejected jurisdiction to review this case. That ruling is law of the case.

The decision in this case does cite or refer to any case pending before this Court and so this Court should not exercise jurisdiction in this case on the basis of Jollie, infra.

ARGUMENT

THE DECISION BELOW DOES NOT CITE TO ANY CASE CURRENTLY PENDING BEFORE THIS COURT SO THIS COURT SHOULD NOT EXERCISE JURISDICTION

Petitioner seeks review of this consolidated case on the ground that the en banc decision below relies upon a case currently pending before this Honorable Court, and so this Court has jurisdiction pursuant to Jollie v. State, 403 So. 2d 418 (Fla. 1981). This position is incorrect for several reasons.

First of all, as argued more fully in the Respondent's Motion to Dismiss, which is currently pending and carried with this case, this Court has already considered and declined to accept jurisdiction in this case. As all five case numbers were on this Court's prior order, and since this case was consolidated in the district court, Respondent contends that this order constitutes law of the case to all Petitioners.

If this Court disagrees that its prior order did not bind all five defendants, and decides that the inclusion of all case numbers was an error, it certainly is law of the case as to parties who expressly sought this Court's review in 1998. As to Petitioners Perkins and Harpin, the decision to decline to accept jurisdiction is law of the case. As to Petitioners Gitto and Harbin, they are barred from review because they did nothing to seek further review when the decision was originally issued. Their cases became final thirty days after the first en banc decision issued. With Gitto

and Harbin, they are either included in the prior case and now barred as law of the case, or else barred because they did not file notices to invoke in a timely manner.

It is only Petitioner Silas who is arguably before this Court properly because he is the only party who filed a motion for rehearing in the district court. The State recognizes the potential argument that the Silas case did not become final until the district court considered and denied his motion for rehearing on April 30, 1999, despite the fact that the decision was en banc in a consolidated case. Respondents maintain its position that any motion for rehearing was abandoned with the filing of the notice to invoke. Fla. R. App. P. 9.020(h)(3)

Regardless, this Court should not take review in Silas' case either. The en banc corrected decision does not refer to State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998), the case currently pending before this Court. As such, Jollie is inapplicable. No where in the en banc decision or the corrected en banc decision is there a "...a citation PCA where the cited case is either pending review in this Court or has previously been reversed by this Court." Jollie v. State, 403 So.2d at 419(Fla. 1981). Although Warner is discussed in the Order on the motion denying rehearing, this is not the decision in this case. The same day, the district court issued its corrected en banc decision, which does not refer to Warner at all. Therefore, the sole basis for invoking this

Court's jurisdiction is not well founded. The decision in this case does not rely on any case currently pending before this Court, and so jurisdiction based on Jollie does not lie. No other basis for review is suggested by Silas, and hence this Court must decline to accept jurisdiction in this case.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to decline to accept jurisdiction in this case.

Respectfully submitted,

Robert A. Butterworth
Attorney General

Belle B. Schumann

Belle B. Schumann
Assistant Attorney General
FL Bar # 397024
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing motion has been furnished by delivery to Assistant Public Defender M.A. Lucas, at 112A Orange Avenue, Daytona Beach, FL 32114, via the basket at the Fifth District Court of Appeal, this 22d day of July, 1999.

Belle B. Schumann
Belle B. Schumann
Assistant Attorney General