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IN THE SUPREME COURT OF FLORIDA

JOSE PASTOR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,879

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, JOSE PASTOR, was the defendant, and Respondent was the prosecution, in the criminal trial proceedings held in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Said parties were "Appellant" and "Appellee", respectively, before the Fourth District Court of Appeal.

The symbol "R" refers to the Record on Appeal before the Fourth District, and "e.a." means emphasis added. "SR" refers to the supplemental Record on Appeal before the Fourth District.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement, to its limited extent, but makes the following additions, clarifications and corrections:

At the suppression hearing held on May 30, 1985, the undisputed testimony of Police Officers O'Connor and Zeno established, inter alia, that on January 8, 1985, as part of their regular duties, they approached Petitioner, in a public place, and asked if he would mind speaking to them. (R, 12, 16-17, 60, 61, 68). The officers were casually dressed (R, 13), and had no weapons drawn or visible. (R, 29,73). There was nothing threatening or coercive about the officers' physical appearance. (R, 71-74). Petitioner clearly and unequivically indicated he would speak to the officers, (R, 16-19, 22), even though the officers clearly advised him that he was not obligated to do so. (R, 16-19, 22, 71).

At this point, O'Connor explained the drug problem in South Florida, to Petitioner, and asked to see his boarding pass. (R, 16, 17). Petitioner freely complied with this request, and the boarding pass and any identification he then submitted, were quickly returned to him. (R, 17, 18, 32, 33). Petitioner was then asked if he would mind cooperating with the officers, by allowing them to search his bag. (R, 18-19, 22). Petitioner unequivocally indicated his consent, and did not in any way, or at any time, limit or deprive the officers of access or permission to search the bag or its contents. (R, 16-19, 35, 36, 71).

Petitioner was consistently advised that he was not required to consent to a search. (R, 19, 22, 71). There was no evidence that Petitioner did not comprehend or understand any of the officers' requests or statements, and the entire pre-arrest encounter occurred in English. (R, 17, 22, 23). The search revealed packages, wrapped in brown paper and masking tape, which O'Connor believed contained cocaine, based on his knowledge and experience. (R, 20). Petitioner was then arrested, and advised of his rights in English and Spanish. (R, 22,23,71).

The train Petitioner was to board, was not in the station, until O'Connor initially located the packages of cocaine in Petitioner's carry-on bag. (R, 18-20). It remained in the station throughout the encounter, and did not leave until approximately 3-5 minutes after O'Connor found the drugs. (R, 20, 21). Further, Petitioner was not physically limited in getting on the train, and could have done so at any time during the encounter (R, 74).

There was no evidence that Petitioner was aware of being observed or "surveilled" by O'Connor and Zeno, prior to their approach, or more significantly, that he was aware that the two were plain-clothed police officers. (R, 13). In addition to wanting to insure that Petitioner actually boarded the train, the officers observed other individuals in the station, at the time. (R, 38, 67). Before any advisement could be given to him, as to his alternatives to permitting a search of his bag, Petitioner gave his consent to search. (R, 33-34).

The State consistently argued that the encounter involved, did not constitute a Fourth Amendment stop, requiring prior founded suspicion, and did not invoke Fourth Amendment protections. (R, 38-58). The State further maintained that Petitioner's consent, to search his bag, was freely and voluntarily given. (R, 39). The trial court denied the suppression motion, specifically noting that Petitioner freely and voluntarily consented to the search. (R, 83-84).

The Public Defender's Office originally represented Petitioner, through Pam Burdick, for about one month. and demanded and received discovery from the State, on February 19, 1985. (R, 234, 433). The case was continued, at Petitioner's request, so as to allow retained counsel Ed Malavenda, to represent Petitioner, as substituted counsel. (R, 90, 234). Petitioner obtained another continuance, on June 3, 1985, after arguments were heard on his suppression motion, because of Malvenda's need for "additional time", and "for the matters we discussed", the nature of which is not revealed on the Record. (R, 79). Petitioner received a third continuance, while represented by Malavenda, because of Malavenda's withdrawal from the case, on the day of the trial. (R, 89-103). On this date, July 15, 1985, the Public Defender was re-appointed as counsel, as attorney of record, and the trial court expressly stated that no further continuance would be granted. (R, 100-103). Further, the trial court judge (Fleet) indicated there would be no more change of attorneys, and the new attorney should be ready to

go to trial in August, on the next trial date set. (R, 103). It was further established that all depositions of all witnesses had been taken, and all reports read, by Malavenda, who had also filed and argued the suppression motion. (R, 97, 98).

Petitioner moved for yet another continuance on August 21, 1985, the date trial was set, for the fourth time. (R, 222-223, 235). Robert Duboff, Esquire, indicated he was not ready to go to trial, even though he had never been appointed or acknowledged by the court as substitute or co-counsel to the Public Defender's Office. (R, 222-223). It was established that the Public Defender's Office, once reappointed on July 15, 1985, had done nothing on the case, or at the very least, had proceeded with little if any diligence on Petitioner's file, until the date of the status conference, approximately five days before trial. (R, 227-231, 235). The Assistant Public Defender generally stated he was unprepared. (R, 222-223, 232,233). While protesting that the office relied on another private counsel's alleged intention to take over the case, he conceded that the Public Defender's Office, was attorney of record. (R, 227-230). As is clear even from Petitioner's Statement Judge Futch, the successor judge in the case, checked with Judge Fleet, as to the original judge's knowledge and rendition of the circumstances leading up to Petitioner's continuance motion on August 21, before ruling. (R, 230-231, 233). In denying the continuance, Judge Futch noted that Judge Fleet agreed with his conclusion that the time had come "to fish or

cut bait"; that Petitioner could not continue to change attorneys, every time his case came up as set for trial; and that Petitioner had had prior attorneys, who had withdrawn. (R, 233-234). The State, in arguing against continuance, recited the procedural history of the case, including the fact that August 21 was the fourth time the case was set for trial, and that there had been prior continuances, and that Petitioner's pattern was to fire his attorneys whenever the case came up for trial. (R, 233-235).

At trial, the State presented testimony which demonstrated, inter alia, that Petitioner identified the carry-on bag he possessed on January 8, 1985, at the Hollywood Amtrak Station, as his own. (R, 263, 399). After being advised of his rights, upon arrest, Petitioner admitted flying into Miami, the night before, from New York, as a "middleman" in a drug deal, to buy 6 kilos of cocaine. (R, 269, 288, 347-348, 350, 354, 355). He was supposed to deliver the cocaine to his brother, and a Colombian female, and was to get paid $3,000, at $1,000 per kilo. (R, 285-288, 299, 345-348, 350, 354, 355). Petitioner further admitted he knew that the packages he was carrying in the carry-on bag contained cocaine. (R, 288). He also admitted using a different name, to come down to Miami, than his own, and admitted he used the name on his plane ticket (Edward Ortez, matching the name on his driver's license), as retrieved from his bag, as that name. (R, 270, 271, 274, 276, 348). Petitioner further stated he was only able to procure 3 kilos, instead of 6. (R, 347, 355). There was further testimony that

based on his training and experience, the packages he found in Petitioner's bag was cocaine (R, 265); that the contents were field-tested, coming up "positive" for cocaine (R, 270) and that the chemist had tested 2 out of the 6 packages found in Petitioner's bag, for a total weight of 1337.4 grams of cocaine. (R, 314). The "street" value of a kilogram of cocaine was estimated to be $30-32,000 in South Florida, and $60-65,000 in New York. (R, 361-362).

After the guilty verdict was announced in open court, Petitioner and his counsel each, in open court, waived a pre-sentence investigation report (PSI), even though the trial court advised him it could be of benefit to Petitioner. (R, 422-423). The trial court accepted this waiver, and proceeded to sentencing later that day. (R, 424).

In closing argument, the prosecutor stated that the jury had heard uncontradicted testimony from the police officers. (R, 393-393). The trial court denied Petitioner's motion for mistrial, offering to give a curative instruction. (R, 393). The court relied on a prior decision, White v. State, [377 So.2d 1149 (Fla. 1979)], in denying mistrial. (R, 394). The court instructed the jury to disregard the statement, and indicated it was again telling the jury that Petitioner had no burden to prove anything, and was presumed innocent, unless proven guilty beyond a reasonable doubt. (R, 394-395) Subsequently, defense counsel's objections to the prosecutor's attempt to vouch for its witnesses' credibility, were consis-

tently sustained by the trial court, which denied mistrial as to one of those comments. (R, 395-397).

At sentencing, Petitioner was asked if he had any legal cause not to be sentenced, to which Petitioner responded he wanted to "get it over with", and reiterated his prior waiver of a PSI report. (R, 426). The State sought a departure sentence, based on Petitioner's involvement in trafficking in an amount of drugs (3 kilos) well beyond the statutory amount required for conviction. (R, 426-427). The trial court noted he had afforded Petitioner a chance to be heard, and would impose a departure sentence. (R, 428). When defense counsel then indicated that he wanted to provide the court with "historical information" on Petitioner, the trial court reiterated that Petitioner had been given such an opportunity. (R, 428). Petitioner's counsel did not thereafter specify or proffer any such information. The trial court stated that the amount of drugs involved, "in and of itself", was cause for a departure sentence. (R, 428-429). The court additionally relied on Petitioner's use of two names, during his trafficking journey from New York to Miami and back, and his "middleman" role in the transaction. (R, 429; SR, 1).

POINTS INVOLVED

POINT I

WHETHER SINCE THE QUANTITY OF DRUGS IS APPROPRIATE CIRCUMSTANCE OF CONVICTED OFFENSE, AND DOES NOT VIOLATE STATED PROSCRIPTIONS OF THIS COURT OR GUIDELINES AGAINST DEPARTURE ON SUCH BASIS, IT CAN BE USED AS BASIS FOR DEPARTURE; CERTIFIED QUESTION SHOULD BE ANSWERED IN AFFIRMATIVE?

POINT II

WHETHER TRIAL COURT APPROPRIATELY DENIED PETITIONER'MOTION TO SUPPRESS EVIDENCE?

POINT III

WHETHER TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR FOURTH CONTINUANCE, ON DAY OF TRIAL?

POINT IV

WHETHER PROSECUTORIAL COMMENTS WERE CORRECTLY INTERPRETED AS PROPER REFERENCE TO LACK OF DEFENSE TESTIMONY, AND DID NOT AMOUNT TO DENIAL OF FUNDAMENTAL FAIRNESS?

SUMMARY OF THE ARGUMENT

The quantity of drugs possessed by Petitioner, which was more than three times the amount required for conviction of the subject cocaine trafficking offense, is a vaild and appropriate basis for a guidelines departure sentence. Such a factor is entirely consistent with the stated purpose of the guidelines to tailor punishment, commensurate with the severity of the crime, and allow departures based on particular circumstances of the convicted offense. Such a conclusion is in accord with virtually all Florida appellate decisions, which have examined the quantity of drugs, as a basis for departure sentencing. This conclusion is further supported by analogous decisions of this Court, permitting departure based on excessive force, and extensive psychological trauma

Since the guidelines themselves do not provide for any aggravation in amount of drugs, beyond the mere "floor" and "ceiling" parameters of the drug trafficking statute, the quantity of drugs can not be said to be improper to consider, as an "inherent component" of the offense. Moreover, the maximum term of 30 years, provided by the drug trafficking law for punishment of cocaine trafficking, beyond the respective mandatory minimum terms, based on amount, encourages individualized treatment of defendants, beyond the statutory minimum term. This circumstance is in no way inconsistent with, or contrary to, the sentencing guidelines.

Petitioner's challenge to the excessiveness of his sentence, can no longer be reviewed by this Court, based on procedural changes in the law, that removed jurisdiction of Florida appellate courts to review the extent of a departure sentence. Petitioner's claims in mitigation need not be addressed, because the Fourth District has provided for consideration of such factors on re-sentencing. Finally, Petitioner's desire for a re-sentencing before a different judge, is based on conjectural and speculative allegations of vindictiveness, which have no basis in the Record, and which constitute pure "forum-shopping".

The Fourth District's affirmance of trial court's denial of Petitioner's suppression motion, as to tangible evidence, was proper, since the testimony of the police officers established that under the circumstances, the encounter between Petitioner and the officers was merely voluntary, and did not rise to the level of a stop requiring Fourth Amendment protections. The evidence further demonstrated, substantially and competently, the correctness of the Fourth District and trial court ruling that Petitioner's consent to the search of his bag was freely and voluntarily given.

The trial court's denial of a defense continuance, under the circumstances, was an appropriate exercise of discretion, and correctly interpreted as such by the Fourth District, given the history of prior defense continuances, the lack of diligence by appointed counsel, and the pattern of Petitioner's replacement of attorneys, at the last minute before trial.

The prosecutor's reference to the uncontradicted and undisputed testimony of state witnesses, in closing argument, was a permissible comment on the evidence as it existed. Furthermore, the trial court's curative instruction demonstrated a lack of prejudice to Petitioner. Finally, the overwhelming evidence of Petitioner's guilt made such comment, if any error, harmless.

ARGUMENT

POINT I

SINCE QUANTITY OF DRUGS IS APPROPRIATE CIRCUMSTANCE OF CONVICTED OFFENSE, AND DOES NOT VIOLATE STATED PROSCRIPTIONS OF THIS COURT OR GUIDELINES AGAINST DEPATURE ON SUCH BASIS, IT CAN BE USED AS BASIS FOR DEPARTURE; CERTIFIED QUESTION SHOULD BE ANSWERED IN AFFIRMATIVE.

Petitioner has challenged reliance on the quantity of drugs possessed by a defendant, as a basis for a guidelines departure sentence, on the asserted basis that the Florida drug trafficking statute, and its mandatory minimum terms, have already accounted for and/or encompassed considerations of quantity. However, because of Petitioner's misconception of such an effect of the trafficking statute's mandatory minimum sentencing, and his attempt to base prohibition of considerations of drug quantities in sentencing departures in a way not contemplated under the guidelines, or trafficking statutes, this Court should approve the quantity of drugs as a basis for departure.

It is axiomatic that one of the most significant purposes of sentencing guidelines, is to provide punishment that is commensurate with the severity of the offense. Rule 3.701(b)(3), F.R.Crim.Pro. (1985). Prior to the introduction of guidelines sentencing in Florida, the amount of drugs in a defendant's possession was a significant factor in sentencing, and remains so as a factor "relating to the instant offense". Rule 3.701(d)(11), F.R.Crim.Pro. (1985); Mitchell v. State, 458 So.2d 10, 11

(Fla. 1st DCA 1984). Petitioner's trafficking conviction was for the crime of knowing sale, manufacture, delivery and/or possessing more than 400 grams of cocaine. §893.135(1)(b)(3), Fla. Stat. (1983). It totally ignores common sense, to suggest that the actual amount of drugs Petitioner had, would not be a relevant factor to the crime of trafficking. Rule 3.701(d)(11), supra; §893.135(1)(b), Fla. Stat. (1983).

Under these circumstances, it is highly significant that while Florida district appellate courts have distinguished the quantity of drugs as a sentencing departure factor, based on the degree of excess beyond that required for conviction of the drug offense, all such decisions have recognized that reliance on the amount of drugs involved is valid, as an appropriate factor relating to the convicted drug offense e.g. Colvin v. State, 12 F.L.W. 334 (Fla. 2nd DCA, January 21, 1987); Birchfield v. State, 497 So.2d 944 (Fla. 1st DCA 1986); Pedraza v. State, 493 So.2d 1122 (Fla. 3d DCA 1986); Coleman v. State, 491 So.2d 1292 (Fla. 2nd DCA 1986); Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986); Cortez v. State, 488 So.2d 163 (Fla. 1st DCA 1986); Jiminez v. State, 486 So.2d 36 (Fla. 2nd DCA 1986); Guerrero v. State, 484 So.2d 59 (Fla. 2nd DCA 1986); Mullen v. State, 483 So.2d 954 (Fla. 5th DCA 1986); Mitchell, supra. Such decisions are not limited to permitting reliance on large quantities of drugs as a basis for aggravated departure, but allow reliance on smaller quantities, and/or small value of property taken in theft prosecutions, as a basis for downward departure

sentences. State v. Pina, 487 So.2d 351 (Fla. 4th DCA 1986); State v. Villalovo, 481 So.2d 1303 (Fla. 3rd DCA 1986). These district courts seem to have had little trouble in determining that excessive amounts of drugs, that calculate to the outermost ranges of parameters needed for conviction, or that go way beyond the minimum amount of drugs required for conviction, are appropriate considerations for sentencing departures. Colvin, supra; Pedraza, supra; Coleman, supra; Jiminez, supra; Newton, supra; Guerrero, supra; Pursell v. State, 483 So.2d 94 (Fla. 2nd DCA 1986); Mitchell, supra. Even assuming arguendo the Fourth District's reliance on the amount of drugs Petitioner possessed, as 1337.4[1] grams (when over 400 grams were required for conviction), Pastor v. State, slip op, at 5, such an amount correlates to similar amounts of drugs that have been relied upon by appellate courts, to be a sufficient excess amount to support a departure sentence on that basis. Coleman (over 400 grams required for conviction; actual amount, 1000 grams); Guerrero (over 400 grams; 965.4 grams); Pursell, supra (over 400 grams; 1952.5 grams); Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985) (sale of LSD, 2,000 "hits" involved); Mitchell (over 20 grams, marijuana; actual amount, "entire bale" of marijuana); compare Jiminez (over 28 grams required for conviction, actual amount 28.35 grams; invalid as

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[1]Respondent maintains that the Fourth District was incorrect, in concluding that the evidence only supported proof of an amount of 1337.4 grams, since the evidence at trial, including Petitioner's own statements, supported the trial courts's conclusion that an amount of 3,000 grams was proved. Respondent's Statement of the Facts, supra. However, for purposes of analysis

(continued on next page)

basis for departure); Pedraza (over 400, 468 grams, invalid as basis for departure); Gallo v. State, 483 So.2d 876 (Fla. 2nd DCA 1986) (between 28 and 200 grams; amount, 43.5 grams, invalid as basis for departure); Colvin, supra (between 20 and 200 grams; amount, 56 grams, invalid as basis for departure). These decisions clearly and consistently appear to support the trial court's departure in this case.[2]

The reliance by various appellate courts, on excessive amounts of drugs possessed as an appropriate basis for departure, is consistent with this Court's recent recognition and approval of excessive brutality in violent crimes, as supporting a departure sentence. In Vanover v. State, 498 So.2d 899, 902 (Fla. 1986), this Court recognized that, while these were elements of force and brutality in every violent crime, the nature of the highly excessive brutality therein would constitute an appropriate basis for sentencing departure. Furthermore, in Casteel v. State, 498 So.2d 1249 (Fla. 1986), this Court additionally concluded that the emotional trauma caused to a sexual battery victim's child, while witnessing the attack, was a circumstance of the crime that would support departure, despite the existence of

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of the issue in this Court, Respondent will refer to the Fourth District;s lower figure, since Respondent's viewpoints and arguments, if viewed as correct by this Court on the lower amount, would necessarily and certainly apply to the higher amount relied on by the trial court.

[2]Despite the Fourth District's doubts to the contrary, Pastor v. State, slip op, at 5, it appears from the Record that the trial court would appear to have clearly departed from the guidelines, as it did, even with the lesser amount affirmed by the Fourth District. (R, 429).

some level of trauma in every sexual battery case previously acknowledged in Lerma v. State, 497 So.2d 736, 739 (Fla. 1986). It is particularly significant that the Vanover decision permitted departure, in a case involving the imposition of a mandatory minimum sentence, as an enhancement for weapon use therein. Vanover, supra, at 901, 902. Thus, the recognition by this Court of excessive force, and particularly excessive psychological trauma, as providing support for a departure sentence despite the presence of such force or trauma in all like cases, should be consistently applied to include cases involving particularly excessive amounts of drugs. In light of Vanover and Casteel, this Court could so affirm Respondent's position, even if it were to conclude, as Petitioner argues, that the amount of drugs possessed is a consideration in every drug possession prosecution.

The structure of the drug trafficking statute, substantiates this conclusion that consideration of large quantities of drugs should be an appropriate basis for departure. Those defendants who commit a cocaine trafficking offense, are guilty of a first-degree felony, punishable by up to 30 years imprisonments, regardless of the amount of drugs involved. §893.135(1)(b), supra; §775.082(4)(b), Fla. Stat. (1983). Within this offense, there are statutory parameters, setting a "floor" and "ceiling" amount of between 28 to 200, and 200 to 400 grams, which support increased terms of mandatory minimum period of imprisonment. §893.135(1)(b)1;(1)(b)(2). Finally, in Petitioner's case, there

is a higher category, setting only a "floor" limitation, and punishing all those defendants who traffick in over 400 grams of cocaine, to a greater mandatory minimum term of imprisonment. §893.135(1)(b)3. Thus, for mandatory minimum purposes, a defendant who possess 200.0001 grams, for example, is punished in the same way, as an individual who had 399 grams. §893.135(1)(b)2, supra. More significantly, under the category of offense applied to Petitioner, a person with 401 grams, is punished the same way (for mandatory minimum purposes), as a person with 401,000 grams. §893.135(1)(b)(3), supra. The guidelines do not specifically account for any "aggravation" of amount, beyond the 400 gram "floor". Atwaters v. State, 495 So.2d 1219, 1220-1221 (Fla. 1st DCA 1986). Moreover, the guidelines do not distinguish in any way, between a defendant with 401 grams, and someone like Petitioner, with 1337.4 grams. Mitchell, supra, at 11. Thus, the "broad range" of §893.135(1)(b)3, in particular, with no distinction as to amounts within the category, does not duplicate or factor-in the kind of distinction made by the trial court herein. Atwaters,supra at 1221; Mitchell. In fact, the existence of broad categories itself, in §893.135(1)(b), demonstrates a legislative intent, in terms of mandatory minimums, to punish commensurate with the crime, that is consistent with the punishment goals of guidelines sentencing. Rule 3.701(b)3; (d)(11), supra.

Petitioner's argument that mandatory minimum trafficking sentences, necessarily encompass aggravation of sentences, based on drug quantities involved, appears to

misconstrue the impact of mandatory minimum sentences in §893.135(1)(b). As already noted, all cocaine traffickers can be punished, as first-degree offenders, for up to 30 years in prison. §893.135(1)(b), supra. It is axiomatic, since this 30 years sentence is not a mandatory or automatic penalty, that cocaine traffickers are and can be punished in an individualized manner, beyond the mandatory minimum term, and up to the maximum term (30 years) provided by law. (Compare §921.141; §782.04, Fla. Stat. (1985), the homocide statutes, which provide for two alternate and automatic penalties, in every first-degree murder case). Furthermore, the drug trafficking statute, provides for the reduction of even mandatory minimum sentences, based on individualized considerations of "substantial assistance". §893.135(3), Fla. Stat. (1983). The mandatory minimum provisions are merely a "floor" amount, which necessarily leaves room for individualized sentences, to the extent available between the applicable mandatory minimum (in a case like that of Petitioner, 15 years), and the maximum of 30 years. Therefore, on its own terms, the drug trafficking statute differentiates between defendants within the same category as Petitioner, and does not limit all such defendants to the same sentence within the maximum provided by law. To the extent possible, between the mandatory minimum sentence, and maximum provided by law, there is nothing about the trafficking statute that would account for, or be inconsistent with, guidelines departures based on the quantity of drugs possessed.

It is clear that the guidelines do not make any distinctions, as to amounts of drugs, in factoring-in a first-degree felony conviction under §893.135(1)(b), and at most, would only reflect the broad parameters of §893.135(1)(b)(3) ("over 400 grams" of cocaine), in taking a mandatory minimum sentence into account, for purposes of Rule 3.701(d)(9), Fla.R.Crim.Pro. (1985) (if mandatory minimum longer that guidelines state, mandatory minimum takes precedence). As stated in Mitchell and Atwaters, the specified amount, within the category of "over 400 grams", is not distinguished from any other amount by the guidelines. Atwaters, at 1221; Mitchell, at 11.

Petitioner's argument that any quantity of drugs is an "inherent component" of any drug trafficking offense, is also misplaced. The specific amounts involved in a given case, clearly vary from case to case. As noted in Atwaters, a given aggravated amount of drugs present in a given case, is not reflected at all, let alone in every given case. Atwaters, at 1211. It is contrary to the entire structure and purpose of the drug trafficking statute, and sentencing guidelines, to suggest that the amount of drugs present, be they astronomical or miniscule, is a "common ingredient" that should necessarily result in the same or similar treatment in every single case.

Petitioner has further suggested that to permit departure, based on the quantity of drugs, will necessarily result in geographic disparities that will defeat the guidelines' purpose. Initially, this appears to be the same kind of "Chicken

Little" or "Pandora's Box" fear, argued under other circumstances, that departure sentences would generally run rampant, if any judicial discretion in sentencing remained. The statistics known to undersigned counsel, demonstrates an approximately 20% level of departures in guidelines sentences statewide, that was directly anticipated when the guidelines first went into effect, and there is no reason to think that trial courts will suddenly depart in all drug trafficking cases. Weems v. State, 451 So.2d 1027, 1028; 1028-1029, n.4 (Fla. 1st DCA 1984), approved, 469 So.2d 128 (Fla. 1985). Furthermore, the drug trafficking statute itself does not limit the possible sentence a cocaine trafficking defendant can or will get, between the mandatory minimums (3, 5 or 15 years under §893.135(1)(b)) and the thirty year maximum. This legislative intent, when combined with the retention of discretion and desire to punish commensurate with an offense, is enhanced by the guidelines, not frustrated. Rule 3.701(b)(2); (b)(3); (b)(6), Fla.R.Crim.Pro. (1985).

Further, contrary to Petitioner's apprehensions, the appellate courts have seemed entirely capable of employing and applying a "de minimus/far in excess" litmus test, on a case by case basis, to both invalidate and validate "quantity of drugs" sentencing departures. Pedraza; Newton; Villalova; Guerrero; Pursell; Mitchell; Seastrand; Gallo. Petitioner's alternative -- the reduction of sentencing to formulaic or mechanistic applications of numbers, where trial courts do no more than "fill in the blanks" --- would clearly frustrate the

purpose of the guidelines, regarding punishment and judicial discretion to depart where warranted by the "circumstances of the offense". Rule 3.701(b), et seq;(d)(1), supra.

Petitioner has further sought to challenge the extent of the departure sentence imposed on him by the trial court, based on various allegedly mitigating aspects of his involvment and prior criminal background. In view of the procedural statutory provision, that the extent of a departure sentence is not subject to appellate review, Petitioner's claim is one over which this Court no longer has jurisdiction. §921.001(5), Fla. Stat. (1986); Laws of Florida, Chapter 86-273, s.1 (1986); Powell v. State, 495 So.2d 828, 830 (Fla. 1st DCA 1986); Jackson v. State, 478 So.2d 1054, 1050 (Fla. 1985); see also Christopher v. State, 489 So.2d 22, 25 (Fla. 1986). Petitioner's claims that certain mitigation factors should be considered, has already been favorably provided for, by the Fourth District's conclusion that Petitioner was prevented from such presentation, and should have such an opportunity at re-sentencing. Pastor, supra, slip op, at 5-6. Thus, his argument on this point is both moot by virtue of this ruling, and premature, until and unless his opportunities for allocution are denied on re-sentencing.

Petitioner further maintains that re-sentencing in this case must be conducted before a different trial court, based on an alleged "tendency" of the present trial court "to impose a pre-determined sentence upon Pastor for reasons not apparent

in the record". Petitioner's Brief, at 21-22 (e.a.). This position is absolutely without any foundation in fact, and Petitioner's reliance on unspoken, non-Record support for his conclusory allegations of vindictive re-sentencing tendencies is the rankest form of speculation. Brice v. State, 419 So.2d 749 (Fla. 2nd DCA 1982); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). On the Record, the trial court indicated that the amount of drugs involved, in and of itself, was a basis for departure sentence, (R, 429), and this certainly was not based on any tangible or Record indication of non-Record bias, prejudice or other factors. In fact, Petitioner's own citation to the Record, Petitioner's Brief, at 24, reflects Petitioner's personal waiver, and waiver through counsel, of the preparation of a PSI report, even though the trial court urged that such a report would be helpful. (R, 422-424, 426, 428). Petitioner's further comment that he merely wanted to "get it over with" (sentencing) (R, 426), and failure to offer any evidence in mitigation, other than the possibility of presenting historical information (R, 428-430), leads to the clear conclusion that the trial court did anything but find "convenient" reasons for departure.

It is clear that Petitioner's authorities on this point are inapplicable. In Berry v. State, 458 So.2d 1155, 1156 (Fla. 1st DCA 1984), the trial court had considered his own opinion, of the defendant's guilt, at prior trials of the defendant where not guilty verdicts were returned, as a basis for sentencing.

In Galucci v. State, 371 So.2d 148 (Fla. 4th DCA 1979) there existed implied statements from the trial court, of vindictiveness towards the defendant in sentencing, for pursuing a jury trial. Galucci, supra, at 150. As noted, none of these circumstances appear in this Record, in part because by Petitioner's own admission, his argument is based on allegedly existing "non-Record tendencies". This Court should summarily reject Petitioner's attempt to "forum shop" for a trial court to his liking.

Both common sense and public policy, dictate that this Court answer the certified question in the affirmative. As noted by Petitioner himself, the goals of punishment and deterrence evident in the drug trafficking statute, State v. Benitez, 395 So.2d 514, 517 (Fla. 1981), are entirely consistent with such goals of the guidelines. Rule 3.701(b) et seq, supra. It is completely foreign, to the concept of criminal punishment, that those defendants, such as Petitioner, who possess more than 3 times the statutory minimum amount required for conviction, can not be punished to a greater degree than those who possess the bare minimum. An acceptance of Petitioner's argument would substantially diminish the punitive and deterrent effects of punishment of drug traffickers in general, and will encourage trafficking in higher quantities of drugs, if the punishment is not permitted to be tailored to the crime. Reduction of the amount of drugs possessed in a given case, to irrelevance in sentencing, will further defeat the intent of the trafficking statute, to individualize punishment when appro-

priate. If departure sentencing is not permitted, or left to a trial court's discretion, on such a legitimate basis as an excessive degree, and/or higher level of violations of the law, there remains little point to permitting departure sentences at all.

POINT II

TRIAL COURT APPROPRIATELY DENIED PETITIONER'S MOTION TO SUPPRESS EVIDENCE[3]

Petitioner has challenged the Fourth District's affirmance of the trial court's order denying suppression in this case. He has maintained that the Fourth District was in error, in assessing the circumstances of the Record, as constituting a voluntary encounter and consensual search by police, of Petitioner's carry-on bag. Pastor, slip op, supra, at 1-3. Because Petitioner's characterization of the Record continues to be as selective and self-serving as it was before the Fourth District, and since the Record supports the Fourth District's ruling, this Court should affirm the Fourth District's conclusions on this issue.

Despite paying apprent "lip service" to the appropriate standards governing the invoking of Fourth Amendment protections as a result of a police-citizen encounter, Petitioner has selectively ignored the "totallity of circumstances" on this Record. The undisputed testimony of officers O'Connor and

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[3]It is apparent that this Court took jurisdiction of this case, based solely on the sentencing issue presented in Point I. Point II, III and IV of Petitioner's brief, while presented before the Fourth District, all challenged the validity of Petitioner's judgment of conviction. This Court's resolution of the issue, upon which jurisdiction is based will have no effect of the judgment. The last three issues will have no effect on the outcome of the issue in Point I. Therefore, to

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Zeno[4], establishes that the two officers, as part of their regular duties at the Hollywood Amtrak Station, approached Petitioner in a public place, and asked if he would mind talking to them. (R, 12, 16-17, 60, 61, 68). Petitioner was repeatedly and consistently told he did not have to talk to the officers, if he did not want to. (R, 17, 19, 22). Although the officers asked for and received his boarding pass, and possibly, his identification, Petitioner's pass, and any identification he may have provided to the officers was swiftly returned to him. (R, 17, 18, 32, 33). The undisputed testimony of both officers demonstrates that the requests of the officers to speak with him, obtain and return his boarding pass, and to search his bag, was in no way coercive, or threatening in any manner. (R, 29, 71-74). Zeno's testimony clearly shows that Petitioner could have gone towards the train, at any time during the encounter, and was not so limited in any way. (R, 74). Petitioner gave voluntary answers and permission to the officer's questions and requests to talk to him, and search his bag, and did not seek to limit such access or discussions, even though

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re-affirm the function of the Fourth District, as a court of last resort, this Court should decline to review Points II, III or IV. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982).

[4]While the trial court made reference, in its suppression ruling, to the fact of Petitioner's possible testimony at the suppression hearing, such testimony is not a part of the transcribed testimony, and thus cannot be considered by this Court, in determining the presence of error, e.g. Brice v. State, 419 So.2d 749 (Fla. 2nd DCA 1982); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

advised he was not required to talk to the officers, or allow them to search his bag. (R, 16, 17, 18, 19, 22, 33-34, 35, 71); Pastor, slip op, at 2. Additionally, the train Petitioner was to board, remained in the station during the encounter, and did not leave until approximately 3-5 minutes after O'Connor found the drugs in Petitioner's bag. Pastor, supra, slip op, at 2. (R, 20, 21). In fact, the train had not yet quite arrived and stopped at the Hollywood station, at the time the officers requested permission to search Appellant's bag, which he identified as his own, when asked. (R, 18, 19). The encounter was conducted in English, and Petitioner was advised of his rights, in both English and Spanish, upon his arrest. (R, 17, 22, 23).

The Fourth District thus clearly and correctly was able to rely upon such substantial competent evidence, to determine that these circumstances constituted a "consensual encounter". Pastor, slip op, at 3. Petitioner has not demonstrated any circumstances, other than his own version of the facts, that should alter the Fourth District's judgment. Petitioners characterization of these circumstances as a "stop", involving Fourth Amendment protections of the requirements of "founded suspicion", is not at all borne out by the Record, and seeks to rely upon facts that are legally insignificant. The circumstances clearly demonstrate that, under the current state of law, the entire episode was a voluntary "encounter", and/or consensual stop, as correctly interpreted by the Fourth District,

that did not involve application of Fourth Amendment protections, and was a legitimate exercise of law enforcement functions. Pastor, supra; United States v. Mendenhall, 466 U.S. 544, 554 (1980)(Stewart, J., concurring opinion); Florida v. Rodriguez, 461 U.S. 940 (1983); Florida v. Royer, 460 U.S. 491, at 502-503 (1983)(plurality opinion); United States v. Armstrong, 772 F.2d 681, 684, 685 (11th Cir. 1984); Graham v. State, 495 So.2d 852 (Fla. 4th DCA 1986); State v. Smith, 477 So.2d 658 (Fla. 5th DCA 1985); Jacobsen v. State, 476 So.2d 1982 (Fla. 1985); Palmer v. State, 467 So.2d 1063 (Fla. 3rd DCA 1985). In Palmer, supra[5], which is almost "on all four corners" with the circumstances herein, the defendant was approached at an Amtrak station, voluntarily agreed to speak to police officer who asked to do so, permitted them on request to search his bag, and ultimately lied when the officers asked about the identity of the contents within. Palmer, at 1063, 1064. Since the Third District viewed this "stop" as a "mere contact", thus not requiring prior founded suspicion to exist, the circumstances herein should be appropriately characterized in the same manner. Palmer, at 1064. These circumstances simply do not present any "indicia of control" over Petitioner's person,

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[5]Palmer has been relied upon by the Fourth District for authority in State v. Jurisa, 475 So.2d 973 (Fla. 4th DCA 1985), as being nearly identical to the factual circumstances presented in Palmer.

threatening presence of officers, physical touching, or other evidence of coercion that went beyond an "encounter", for Fourth Amendment purposes. Jacobsen, supra, at 1285-1286; Graham, supra, at 853-854; Mendenhall, supra; Royer, supra; Armstrong, supra, at 684; United States v. Waksal, 709 F.2d 653, 658-659 (11th Cir. 1983).

Petitioner heavily relied upon the nature of the officer's prior "surveillance" of him, prior to approaching him, as lending credence to his view of the encounter, as a Fourth Amendment stop. The officers factually explained that they did not approach Petitioner sooner than they did, because of observation of other individuals then in the station, and because the officers wanted to insure that Petitioner would actually board the train. (R, 38, 67). Legally, this prior observation, before contact, has no legal significance or relevance, to the question of whether a reasonable person, in Petitioner's position, during the encounter, would have believed he was free to leave the area. Mendenhall, supra, at 554; Armstrong, at 684, 685; Berry, supra, at 603; Graham, at 853-854. The Record belies any contention that Petitioner was aware he was being observed by anyone, much less any awareness that the two plain-clothes officers, were in fact police officers. (R, 13). Although there was evidence that Petitioner's eyes "followed" the officers, prior to the encounter, such evidence does not suggest that Petitioner had already determined or discovered that he was under police observation from the two officers.

Petitioner has further argued that the officers' "bold" and "pressing" apprach, and inherent authority, coupled with Petitioner's knowledge of the situation and circumstances, made the encounter a stop, requiring "founded suspicion". The Record belies any other classification of the officers' conduct, besides one of non-coercion. The presence of the officers, the nature of their inquiry, the voluntary and comprehending nature of Petitioner's clear and unequivoval responses, and the absence of any retention, other than brief, temporary observation, of Petitioner's boarding pass and possible identification, all contributed to rebut Petitioner's reliance on the "inherent" circumstances present. Furthermore, proper analysis of the totality of factors present, does not include mere inherent authority of a police officer, as automatically, per se necessitating a finding of a Fourth Amendment stop, as opposed to an encounter. Mendenhall; Armstrong; Jacobsen; Palmer.

The cases cited by Petitioner, consistently refer to circumstances involving retention of a defendant's means of access to public transit, and/or actual physical restraint of a defendant or removal to a less-public, restrictive area. Royer, supra (ticket and identification kept by officers; defendant taken to small room, for luggage search); United States v. Elsoffer, 671 F.2d 1297 (11th Cir. 1982)(retention of defendant's ticket and identification); United States v. Santora, 619 F.2d 1052 (5th Cir. 1980) (defendant removed to a smaller area, from a public coffee shop, by police); United States v. Berry, 670 F.2d 583, 588-589, 604 (5th Cir. "B" 1982)(physical touching of defendant, command that defendant accompany police

to another location, misrepresentation by defendant to police officers; State v. Frost, 374 So.2d 593 (Fla. 3rd DCA 1979) (retention by officers of defendant's identification, airline ticket). Similarly, in Horvitz v. State, 433 So.2d 545, 547 (Fla. 4th DCA 1983), the Fourth District was faced not merely with the presence of three officers, but with circumstances where the officers retained the defendant's ticket, refused him permission to consult an attorney, prior to his consent to search, and told him he could leave only if he allowed the officers to search his luggage. It is clear that the circumstances in these cases are directly and significantly distinguishable from those presented herein, which do not even approach the "seizure" and/or "arrest"-like features of Petitioner's cited authorities. Armstrong, at 685; INS v. Delgado, ___ U.S. ___, 106 S.Ct ___, 80 L.Ed.2d 247, 254-255 (1984); Royer, at 498, 502; Jacobsen, at 543; State v. Arnold, 475 So.2d 301, 306 (Fla. 2nd DCA 1985); State v. Walden, 464 So.2d 691 (Fla. 5th DCA 1985); State v. Jones, 454 So.2d 774, 776-777 (Fla. 3rd DCA 1984); Lightbourne v. State, 438 So.2d 380, 387-388 (Fla. 1983), cert. denied, 74 L.Ed.2d 725 (1984).

Petitioner has also maintained that his consent to search his bag, as obtained by the officers, was tainted by the allegedly coercive features of the encounter, already rejected by argument herein. However, it is clear that there was substantial competent evidence, to support the Fourth District's affirmance of the trial court's finding (R, 83-84), that Petitioner's consent to the search was freely and voluntarily given. Pastor v. State, slip op, at 2-3; Scheckloth v. Bustamonte, 412 U.S. 218

(1973); Martin v. State, 411 So.2d 169 (Fla. 1982); Denehy v. State, 400 So.2d 1216 (Fla. 1980). The evidence demonstrates that the officer inditified himself as such, asked to look in the bag, and was told unequivically by Petitioner that he could look in the bag. (R, 16-19, 35, 36, 71). Petitioner was consistently advised that he need not give such consent. (R, 19, 22, 71). There is no evidence that Petitioner did not understand the nature of the officers' questions, or the language asked in, as suggested by Petitioner. Furthermore, there is no evidence of any form of resistance by Petitioner, or of any coercive acts or statements by the police officers. In view of such substantial evidence, supporting the trial court's ruling, this Court should reject Petitioner's attempt to "second-guess" both the Fourth District and the trial court.[6] Kunkel v. State, 473 So.2d 2, 3 (Fla. 4th DCA 1985); Myers v. State, 462 So.2d 57 (Fla. 4th DCA 1984); Harris v. State, 11 F.L.W. 440, 441 (Fla. 2nd DCA, February 14, 1986).

Petitioner's cited authorities on this issue are markedly distinguishable, in that the defendants therein either did not respond to requests for permission to search, Major v. State, 389 So.2d 1203 (Fla. 3rd DCA 1980), rev. denied, 408

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[6]While taking note of the holding in Miller v. Fenton, 474 U.S. ___, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985), regarding voluntariness of a confession, in urging that this Court issue an independent evaluation of voluntariness that differs from the Fourth District's view, Petitioner virtually ignores the additional language of Miller, supra, that issues such as the subsidiary circumstances surrounding the encounter, which "often require

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So.2d 1095 (Fla. 1981); did not unequivocally respond by consenting to the search, Raffield v. State, 362 So.2d 138 (Fla. 1st DCA 1978); or actually objected to the search, Robinson v. State, 388 So.2d 286 (Fla. 1st DCA 1980). These factual circumstances are not even close to those presented herein, and di-fer from the facts herein in the most legally significant way possible. The trial court's finding of consent should thus be affirmed.

Any suggestion, by inference, that Petitioner's consent was in some way limited or restricted to the bag itself, and did not extend to the wrapped packages inside, must be rejected by the Record circumstances. Initially, it should be noted that Petitioner did not restrict the officers' access, or his consent, merely to the bag, and not its contents. (R, 19, 22, 35, 71). Assuming arguendo that his consent could be construed, as not going towards the packages containing contraband, it is clear that Officer O'Co-nor, on the belief that the packages contained contraband, based on his experience and expertise gathered in the course of over 100 cocaine arrests, had probable cause to search the package. (R, 10-11, 20); Burke v. State, 465 So.2d 1337 (Fla. 5th DCA 1985); PLR v. State, 455 So.2d 363 (Fla. 1984); Palmer, supra.

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the resolution of conflicting testimony of police and defendant", are entitled to conclusive effect, if "fairly supported" by the Record. Miller v. Fenton, 88 L.Ed.2d, supra, at 415. Such application herein, even further substantiates the trial court and Fourth District's consent voluntariness rulings.

Because the initial encounter between Petitioner and the police did not trigger any Fourth Amendment protection, and because the search of his bag was independently valid, based on Petitioner's valid consent, thus leading to a proper arrest, Petitioner's "fruit of the poisoness tree" argument lacks any merit, and was appropriately rejected by the Fourth District. Bailey v. State, 319 So.2d 22 (Fla. 1975); Wong Sun v. United States, 371 U.S. 471 (1963).

POINT III

TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR FOURTH CONTIUANCE, ON DAY OF TRIAL.

Petitioner continues to maintain that the denial of a continuance of trial by the court, which had been granted at least twice previously, was a vindictive, unsupported action, which deprived him of an adequate defense. However, as the Fourth District correctly found, Pastor, slip op, at 3, it is clear from the Record that Petitioner's selective and self-serving characterizations, do not fully demonstrate those factors supporting the trial court's ruling.

The circumstances reveal that the subject motion was made on August 21, 1985, the date the case was set for trial, for the fourth time. (R, 222-223, 235). Judge Fleet's recollection, related at the time by the successor judge, and the Record, reveal that Petitioner had been originally represented by the Public Defender's Office, specifically Pam Burdick, for about one month, during which time she demanded and received discovery from the State, on February 9, 1985. (R, 234). The case was continued at Petitioner's request, so as to provide for retained counsel, Ed Malavenda, to represent Petitioner, and for Burdick to withdraw. (R, 90, 234). While represented by Malavenda, Petitioner received two more continuances, (R, 79, 102, 103), the second of which was sought on the day of trial,

as set for the third time, due to Malavenda's withdrawal. (R, 89-103). At said time, July 15, 1985, the trial court re-appointed the Public Defender's Office, as attorney of record, and expressly stated that there would be no further continuances, and no new attorneys, unless said new attorney would be ready for trial by the established trial date of August 21, 1985. (R, 100-103). The trial court further indicated that no further discovery would be permitted, without court approval, (R, 102, 103), in light of the State's eliciting of testimony by Petitioner himself, noting that Malavenda had deposed all witnesses in the case, read all reports, and made and argued a suppression motion. (R, 97, 98). Furthermore, in light of these circumstances, Judge Fleet denied Petitioner's continuance motion, made at the status conference on the Friday before the new trial date. (R, 231, 235).

When Petitioner made his renewed request for continuance, just prior to and after the jury was sworn on August 21, 1985, it was established that the Public Defender's Office, although sole counsel of record, did nothing in the case, or, at the very least, did not proceed with any degree of diligence in representing Petitioner, after being re-appointed, until the date of the status conference. (R, 227-231, 235). The Record further makes clear that Petitioner had obained at least three prior continuances, at least two of which were sought at the "eleventh hour", on the date trial was set. Petitioner had dismissed or agreed to the withdrawal of both retained and

appointed counsel, at least twice at the last minute. Petitioner was further assured on July 15, 1985, that the trial court would not entertain, tolerate or grant any further continuances, except for the most extraordinary of reasons. (R, 100-104, 235). Petitioner's newest retained counsel, Robert Duboff, although he did not seek appointment as substitute or additional defense counsel, even on the day of trial (R, 235), nevertheless sought continuance, on the very general basis that he was somehow unprepared. (R, 222-223, 232, 233). The public defender maintained a similarly general stance, and virtually conceded the Public Defender's Office's status as attorney of record for the past month, and his general inactivity on the file, in purported reliance on another private counsel's alleged intention to take over the case. (R, 227, 228, 229, 230). Furthermore, contrary to Petitioner's representations, the successor judge checked with Judge Fleer, as to his knowledge of the circumstances of Petitioner's last-minute continuance and change-of-counsel requests, before ruling on the subject motion. (R, 230-233).

Since it is clear that the motion was denied, expressly due to the particularized circumstances of the case, and was appropriately based on those circumstances which evinced a pattern of endless delays by Petitioner, and lack of diligence by appointed counsel, the ruling should be affirmed. Lusk, supra; Perczynski, supra; Echols v. State, 484 So.2d 568 (Fla. 1986) Goree v. State, 411 So.2d 1352(Fla.3rd DCA 1982); Gause v. State,

270 So.2d 383 (Fla. 3rd DCA 1972); Robinson v. State, 256 So.2d 29 (Fla. 3rd DCA 1971). Petitioner was not entitled, under the guise of his right to counsel of his choice, to attempt to manipulate the system by rejecting appointed and retained counsel at time of trial, nor was his appointed counsel entitled to benefit from its basic "stand pat" stance, in the expectation that someone else might possibly undertake Petitioner's representation. Morgano v. State, 439 So.2d 924 (Fla. 2nd DCA 1983); Mansfield v. State, 430 So.2d 586 (Fla. 4th DCA 1983); Gandy v. State of Alabama, 569 F.2d 1318 (5th Cir. 1978); Goree, supra; Holman v. State, 347 So.2d 832 (Fla. 3rd DCA 1977). Since Petitioner's characterizations of the circumstances is completely contradicted by the Record, he has fallen far short of demonstrating that the trial court's ruling was a palpable abuse of discretion, thus mandating affirmance on this point. Echols; Lusk; Perczynski; Jent.

The Fourth District's ruling, based on the circumstances presented herein, is supported by those circumstances similarly rejected by this Court in Echols, supra, and Woods v. State, 490 So.2d 24 (Fla. 1986). In Woods, supra, this Court upheld the denial of a continuance, where one had already been granted nine weeks before trial, and counsel's basis for seeking the continuance (to verify possible coercion of the defendant's involvment in the crime), was conjectural. Woods, supra, at 26. In Echols, two earlier continuances had been granted, and the Court further noted that the "eleventh-hour" timing of the motion

at issue "suggests an effort to further delay the thrice-delayed trial". Echols, at 572. Furthermore, both decisions approved continuance denials, which were based on specified aspects of possible prejudice to the defense. Woods, at 26; Echols, at 572. These cases provide ample authority to support denial of a continuance, based on mere generalized allegations of prejudice. (R, 222-235).

The Fourth District's ruling is even more directly supported, by the First District's decision in McKay v. State, 11 F.L.W. 2512 (Fla. 1st DCA, December 3, 1986). As in McKay, supra, Petitioner's case was not complex; discovery had been completed by prior counsel, (R, 97, 98); and Petitioner had delayed the trial, three previous times, by obtaining a change from the Public Defender, to different retained counsel, then back to the Public Defender, before finally settling again on private counsel, on the day of trial, as reset. McKay, supra, at 2512; United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976). As in McKay, there was no particularized showing of Robert Duboff's particularized expertise in drug possession cases, Id, and Petitioner had been unequivocally advised, just one month previously, that new counsel would not be appointed, or continuances entertained, unless the trial date in August, 1985, could be maintained, unless "extraordinary reasons" existed. Petitioner's acquiesence and agreement to change of counsel, at least twice at the last minute, under the circumstances of repeated delays as outlined herein, is absolutely and completely distinguishable, from those

contrary factors present in Holley v. State, 484 So.2d 634, (Fla. 1st DCA 1986).

Thus the Fourth District's approval of the trial court's action, in denying Petitioner's request for a fourth continuance, was appropriate, under this Court's prevailing precedents. Echols; Woods; Lusk; Jent.

POINT IV

PROSECUTORIAL COMMENTS WERE CORRECTLY INTERPRETED AS PROPER REFERENCE TO LACK OF DEFENSE TESTIMONY, AND DID NOT AMOUNT TO DENIAL OF FUNDAMENTAL FAIRNESS.

Petition's attempt to characterize the challenged comment, as a comment on his failure to testify, must fail, in light of the Fourth District's approval of the comment, as almost verbatim of those comments approved by this Court as appropriate, in prior rulings.

It is clear that the prosecutor is entitled to wide latitude in closing argument, in arguing the state of evidence, and all logical inferences from such evidence. Breedlove v. State, 413 So.2d 1 (Fla. 1982). To this end, it has been consistently held that the State may comment, and is in fact obligated to refer to the absence of defense evidence or testimony, as part of the evidence as it exists before the jury. State v. Sheperd, 479 So.2d 106 (Fla. 1985); Carrion-Viscay v. State, 478 So.2d 1192 (Fla. 3rd DCA 1985); Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984), quashed on other grounds, 476 So.2d 191 (Fla. 1985); Smith v. State, 378 So.2d 313 (Fla. 5th DCA 1980); White v. State, 377 So.2d 1149 (Fla. 1979). It is clear from the transcript that the State was not specifically or otherwise referring to the absence of Petitioner's testimony, but rather to the lack of defense testimony (R, 392-393). In fact, the comment complained of here, is almost exactly verbatim the comment in White, supra, at 1150 ("You haven't heard one word of testimony, to contradict what [the State's only eyewit-

ness] said, other than the lawyer's argument"), Pastor, slip op, at 3, which was held to be a proper reference to the uncontradicted nature of the testimony, and the absence of evidence on a particular issue. (R, 394); White, at 1150. It is additionally clear that the prosecutor's comment herein, was a direct reference to the "uncontradicted" evidence, as it existed, and as such, was additionally proper. Sheperd, supra, at 107; Reynolds v. State, 452 So.2d 1018, 1020 (Fla. 3rd DCA 1984); Smiley v. State, 395 So.2d 235, 237 (Fla. 1st DCA 1981); Elam v. State, 389 So.2d 221, 222 (Fla. 5th DCA 1980); White.

It is additionally evident that, assuming arguendo the comment was improper, the trial court granted Petitioner's request for a curative instruction, informing the jury of the State's burden of proof, and Petitioner's presumption of innocence, and absence of any obligation to prove anything. (R, 394-395). Under such circumstances, Petitioner is hardly in a position to credibly claim prejudicial error, from the trial court's decision not to grant the last-resort device of mistrial. Ferguson v. State, 417 So.2d 639 (Fla. 1982); also, see James v. State, 429 So.2d 1362, 1363 (Fla. 1st DCA 1983); Johnson v. State, 393 So.2d 1069, 1071 (Fla. 1980); Stanton v. State, 349 So.2d 761 (Fla. 3rd DCA 1977). The comment challenged herein, does not approach, in and of itself, a denial of Petitioner's rights to a fair trial, or to fundamental fairness. Bush v. State, 461 So.2d 936 (Fla. 1984); Tefeteller v. State, 439 So.2d 840

(Fla. 1983); Ferguson, supra; Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059 (1981); Cobb v. State, 376 So.2d 230 (Fla. 1979).

Assuming arguendo any of the comments complained of, were erroneous, the State's overwhelming evidence of guilt, see Statement of Facts, supra, rendered them harmless, at best. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Marshall, 476 So.2d 150 (Fla. 1985); State v. Murray, 443 So.2d 955 (Fla. 1984); United States v. Hasting, 461 U.S. 499 (1983).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Respondent respectfully requests that this Honorable Court answer the certified question in the affirmative and in all other respects AFFIRM the judgment and sentence of the trial court, as approved by the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been sent through the U.S. Mail to BENEDICT P. KUEHNE, ESQUIRE, of Bierman, Sonnett, Shohat & Sale, P.A., 200 Southeast First Street, #500, Miami, Florida this 6th day of March, 1987.

Richard G. Bartmon

Of Counsel