3-14

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,879

JOSE PASTOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

INITIAL BRIEF OF PETITIONER JOSE PASTOR

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

Cases

Constitutional Provisions and Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings and Disposition Below.

The State Attorney for the Seventeenth Judicial Circuit charged Jose Pastor with trafficking in excess of four hundred grams of cocaine (R 432).[1/] At arraignment, the Public Defender's Office received an appointment to represent Pastor (R 234-235); retained counsel substituted soon thereafter (R 433). Pastor has remained incarcerated since his arrest.

Pastor moved to suppress evidence and statements obtained from him by police (R 434-444). Circuit Judge Fleet, then presiding over the case, held an evidentiary hearing on that motion (R 3). The hearing reconvened the following week (R 77), at which time defense counsel advised the judge that Pastor was not going to testify (R 78). The court reserved ruling on the motion until the June 21 status conference, when the judge announced that, although he was "really troubled" by the case, he was denying the motion to suppress even after considering the testimony of the "accused" (R 83-85, 445). The court then suggested that Pastor consider a no contest plea (R 84-85). This prompted the prosecutor to announce that in order "to maintain some type of an appearance of consistent credibility," Pastor could only plead "open to the Court" (R 85).

On July 15, defense counsel moved to withdraw, citing personal and financial disputes with Pastor and his family (R 88-

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[1/] The Record on Appeal in the lower tribunal contained four volumes, each numbered sequentially. The symbol "R" followed by a page number indicates a reference to the record. The symbol "SR" refers to the Supplemental Record on Appeal. Throughout this brief, the parties are referred to as they appear in the trial court and by their proper names.

92). Pastor did not seek this withdrawal, but acceded to the request, stating that "[i]f we can't both of us agree, it is better that he withdraws" (R 96). Judge Fleet granted the withdrawal (R 101) and, after cautioning Pastor that the case was trial ready and would not be continued (R 101-103), appointed the Public Defender's Office and set the case for August 19, with a status conference on August 16 (R 103-104).

At the time of the Friday status report, the Assistant Public Defender assigned to the case -- Bernard I. Bober -- told Judge Fleet that he had just received the case file that day and was not prepared for trial. Judge Fleet denied the requested continuance without prejudice to see whether counsel could be ready after the weekend (R 227-230). On the day scheduled for trial, August 19, retained counsel appeared to advise Circuit Judge Stone, who substituted for an ailing Judge Fleet, of his retention during the weekend and the need for a continuance (R 231-232). On the same day, Judge Fleet caused a memorandum to be placed in the court file relating the following (R 448):

> Defendant originally retained Ed Malavenda and the case progressed to one or two continuances. Then Malavenda asked for and received permission to withdraw because the defendant's family was threatening Malavenda. A P.D. was appointed. Mr. Sales notified the P.D. that his office was asked to come into the case and P.D. then did nothing on the case. Last week Mr. Sales told Mr. Bober, the P.D. that he was not going to come into the case and the file was given to Bober the P.D. Last Friday, Aug. 16th at the docket call, the whole history was told again and the S.A. opposed vigorously to any continuance and the continuance was denied.
>
> Over the weekend, money was given to Sales and now Sales says he is coming into the case.

Neither Pastor nor counsel were notified that the judge was entering this memorandum into the file and neither had an opportunity to challenge the facts asserted in the memorandum.

Judge Stone assigned the case for trial to Circuit Judge M. Daniel Futch and the case commenced on August 21 (R 106). Both retained counsel -- Robert M. Duboff -- and Assistant Public Defender Bober appeared for Pastor (R 109). After completion of jury selection, Judge Futch begrudgingly allowed counsel to discuss their trial unpreparedness (R 227) and to relate circumstances surrounding the case which required both lawyers to request a continuance (R 227-244). Judge Futch refused to continue the case,[2/] concluding that Pastor had the benefit of counsel and the "time has come to fish or cut bait." (R 233).

During trial, Pastor preserved his objection to the introduction of illegally seized evidence (R 236, 273-274). At the conclusion of the evidence, Pastor moved for a judgment of acquittal.

The jury found the Defendant guilty as charged (R 420, 456). Pastor waived preparation of a presentence report (R 422-423, 426). The State argued for a sentence in excess of the minimum mandatory fifteen years (R 426-428). The court departed from the guidelines, imposing the maximum 30-year sentence and a $250,000 fine (R 428-429, 457-458). The trial judge offered three reasons in support of his sentencing deviation (SR):

[2/] Judge Futch also advised Assistant Public Defender Bober that he intended to notify The Florida Bar and the Supreme Court that Bober did not prepare for trial notwithstanding the appointment of the Public Defender (R 229-230).

a. The defendant travelled under a false name before he was arrested.

b. The defendant admitted to the police that he was a middleman drug dealer.

c. The defendant possessed approximately 7 times more than the amount of cocaine required for a 15 year mandatory minimum sentence. Specifically, the defendant possessed over 3,000 grams of cocaine (3 kilograms). A 15 year mandatory minimum sentence requires at least 400 grams.

On appeal, Pastor raised four issues: (1) denial of the motion to suppress; (2) denial of the motion for continuance; (3) improper closing argument by the prosecutor which unfairly commented on the Defendant's failure to testify; and (4) improper sentencing departure. The Fourth District affirmed the convictions but reversed the departure sentence and remanded the case for resentencing. Pastor v. State, 498 So.2d 962 (Fla. 4th DCA 1986). The Fourth District certified the following question:

> May the quantity of drugs involved in a crime be a proper reason to support departure from the sentencing guidelines?

Pastor sought review in this court of the certified question and requests that this court exercise its discretion in reviewing several other issues involved in this appeal.[3/]

B. Factual Recitation.

1. The Motion To Suppress.

Undercover Detectives O'Connor and Zeno of the Hollywood Police Department were assigned to the Hollywood Amtrak Station on January 8, 1985 (R 8-12, 60-61). They arrived at the

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3/ Once the Supreme Court accepts jurisdiction to resolve a case, it may in its discretion consider other issues. Savoie v. State, 422 So.2d 308 (Fla. 1982).

station in their undercover vehicle at 5:30 p.m. (R 12, 60). They were to look for "suspicious" narcotics activity. The two officers anticipated the arrival of a train to New York, expected every afternoon between 6:13 and 6:15 p.m., with departure immediately thereafter (R 26, 61, 66).

As O'Connor and Zeno walked to the platform, they observed a casually dressed young man, later identified as Pastor, sitting alongside a concrete planter in the waiting area (R 13-14, 62). The police passed the Defendant on their way to the Amtrak office, where they obtained a copy of the passenger manifest (R 12-13, 61). Only one Hispanic sounding name, Jose Pastor, was on the list. This person was travelling to New York by sleeper car (R 12-13). According to the manifest, when Pastor made the reservation he did not leave a "call back" number (R 13). Less than a dozen names were on the manifest, and fewer people than that were in the station (R 13, 61-62).

O'Connor and Zeno scanned the waiting area; they settled their attention on the only Hispanic-looking person, Pastor (R 14, 63). No one else was surveilled with the same intensity as Pastor, who appeared nervous "for some reason," looking about the area and minding other people's business. The undercover officers believed that Pastor saw them: "[Pastor] was interested in myself and my partner, where we went, his eyes basically followed us" (R 14-15). According to Zeno, Pastor was the only one acting in an abnormal manner, because he was nervous and looking around (R 63-64).

The officers surveilled Pastor for at least thirty minutes, until the boarding position was announced (R 15, 65).

Pastor stood up, carrying his single bag, and walked toward the designated boarding position (R 15, 65). The police, who had focused their attention on the Defendant (R 27, 64), made a decision to ask Pastor about contraband (R 16).[4] By this time -- 6:10 p.m. (R 12, 26) -- the train was in sight and nearing the station (R 15-16).

As the Defendant moved toward his designated boarding area, O'Connor and Zeno approached him.[5] The Defendant was still walking when O'Connor identified himself as a policeman, causing the Defendant to stop dead in his tracks (R 29, 68). To move forward, Pastor would have had to manuever between the two men (R 74). Both officers displayed Hollywood Police Department identification, as O'Connor inquired whether Pastor would not mind talking (R 16). The Defendant responded "no." O'Connor interpreted this "no" as meaning "yes," that Pastor wanted to talk with him (R 16-17). O'Connor, without seeking clarification, requested that the Defendant produce his boarding pass (R 17).[6] The Defendant complied (R 17). The boarding pass was in Pastor's correct name (R 18). Pastor told O'Connor that he intended to board the train (R 17). O'Connor returned the boarding pass and admonished the Defendant about the local "narcotics problem" (R 17-18).

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[4] This timing was a tactical decision by the police (R 67). They wanted to make sure that Pastor would be boarding (R 28). This timing had a measurable impact on the Defendant.

[5] Both police officers presented a physically imposing presence (R 69-70).

[6] According to O'Connor, standard procedure required him to ask Pastor for additional identification, such as a driver's license (R 31-32). O'Connor could not recall if he followed standard procedure (R 32).

O'Connor then solicited Pastor's assistance in combatting the problem by permitting a search of his luggage (R 18). Even as the train neared the boarding station, in full sight and sound of the awaiting passengers, O'Connor blandly stated that the Defendant did not have to comply (R 19-20, 71). Neither officer told the Defendant of the consequences of noncompliance (R 33, 71), or that the Defendant was free to leave or board the train if he desired (R 33).[7/]

On response, the Defendant said that he "didn't mind" (R 19).[8/] O'Connor bent down to unzip the bag, which was situated on the floor. This took place as Pastor struggled, unsuccessfully, with his bodily functions to avoid having to go to the bathroom. O'Connor noticed at that time that Pastor was defecating in his pants (R 20). Without even the courtesy of permitting Pastor to take care of his hygiene problem, O'Connor commenced a search (R 20). The train by this time had arrived at the station and passengers were boarding (R 20-21). Underneath a pile of clothes in the bag were six oblong-shaped containers wrapped in brown paper (R 20-21). The police arrested Pastor (R 22-23, 71). According to O'Connor, if he had not found contraband in the luggage, the Defendant would have been able to board (R 21).

7/ O'Connor had decided to retain Pastor's bag even if Pastor would not consent (R 33-34). The alternatives available to the Defendant were consenting or leaving the bag with the police for a dog sniff (R 34).

8/ Neither officer remembered Pastor's precise words. At one point in his testimony, O'Connor stated that Pastor said "yes" when the police asked to look through the bag (R 36).

2. The Trial.

Detectives O'Connor and Zeno testified at trial to the facts related in the hearing on the motion to suppress. According to O'Connor, Pastor "stuck out like a sore thumb" while at the train station (R 258). During the discussion which led to an examination of the luggage, Pastor acknowledged ownership of the bag and contents (R 262-263, 341-342). Pastor said that he was a "middleman" who was to be paid $3,000 for carrying the contraband to New York (R 269, 287, 346, 354). In New York, Pastor was to give the "kilos" to his brother and a Colombian female (R 347-348, 269). Pastor was supposed to bring six kilos, but only carried what he thought were three (R 347).

Only after obtaining this statement did Zeno permit Pastor to go to the bathroom to clean himself (R 269). Pastor renewed his statement at the police station. He exhibited needle track marks on his arms and admitted that he was a heroin user (R 349). By then, the police had searched the bag thoroughly, finding a New York to Miami plane ticket in the name of Edward Ortez (R 270-271, 348) and a social security card and birth certificate bearing Pastor's name (R 271-272).

Chemist Randy Hilliard (R 307), testified that the seized packages contained cocaine. Its weight was 1,034 grams (R 314-316).[9/]

9/ A discrepancy in Hilliard's testimony occurred when he stated that he only weighed a portion of the seized evidence. His laboratory report showed analysis of the entire seizure, including the wrapping, which weighed a total of 1,337 grams (R 319-323, 333).

Pastor presented no evidence (R 366). During the prosecution's closing, the Defendant objected and moved for a mistrial based on the statement that "you haven't heard one word of testimony to contradict what the police officer told you." (R 392-393). The trial judge, believing that this was a "pretty close comment," sustained the defense objection, gave a curative instruction, but denied the requested mistrial (R 394).

SUMMARY OF THE ARGUMENT

I.

The lower tribunal had no justification for departing from the mandatory minimum sentence for trafficking in cocaine. The trial court greatly departed from the guideline sentence, which exceeded the mandatory minimum. The appellate court correctly ruled that several of the justifications offered for the departure sentence by the trial court were wrong. The appellate court, however, wrongly ruled that the quantity of drugs alone can be a valid consideration in aggravating a sentence above the mandatory minimum.

The trafficking statute sets forth a comprehensive sentencing scheme which incorporates the quantity of contraband into its assessment of mandatory minimum sentences. To base an aggravated sentence on a factor -- quantity of drugs -- which is an essential element of the charged offense is inconsistent with the law of sentencing. The quantity of drugs is nothing more than a shorthand way of evaluating other factors, such as the value of the contraband possessed or whether the accused is a major drug trafficker. These considerations are not valid departure factors. Standing alone, an increased quantity of drugs cannot support a departure sentence. Also, the quantity of drugs

in this case is not so excessive as to warrant imposition of the maximum term of incarceration.

Upon resentencing, the Defendant is entitled to be resentenced by an impartial jurist. Where neither the Defendant nor society can feel confident that the original sentencing judge will reconsider the sentence in an impartial manner, considerations of fundamental fairness require that a new judge preside over this case.

II.

An encounter occurred between two police officers and the Defendant at a train station. The meeting was no mere "contact." It was a preplanned confrontation between suspicious law enforcement agents and the target of a criminal investigation. The Defendant, outnumbered and intercepted in his movements, was blocked by officers whose verbal admonitions and imposing presence subjected him to conditions of undeniable confinement. As a detention, the meeting implicated the protections of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

This detention was not based on probable cause or even reasonable suspicion. Predicated solely on the "drug courier profile" and unsupported by any information or knowledge possessed by seizing officers, the stop does not pass constitutional muster. The appellate court's failure to perceive the stop as one which violated the Fourth Amendment erroneously led it to affirm the denial of the Defendant's motion to suppress.

The circumstances demonstrating the intimidating character of the detention apply equally to the consent to

search. The State failed to carry its burden to demonstrate the knowing and intelligent relinquishment of the Defendant's constitutional rights. The trial and appellate courts should have ordered suppression of the evidence.

III.

Neither retained nor appointed counsel were prepared for trial. The need for a continuance occurred solely because the Defendant had a right to be represented by prepared counsel. Notwithstanding counsel's commendable efforts during trial, the court's haste to rush to judgment deprived the Defendant of fundamental fairness.

IV.

The prosecutor commented on the Defendant's failure to testify and rebut the testimony offered by the police. Since the Defendant was the only person in a position to counter the prosecutor's accusations, the admonition carried great weight. The evidence was not so overwhelming as to render the comment harmless.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

(CERTIFIED QUESTION)

MAY THE QUANTITY OF DRUGS INVOLVED IN A CRIME BE A PROPER REASON TO SUPPORT A DEPARTURE FROM THE SENTENCING GUIDELINES?

II.

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE DEFENDANT'S RIGHTS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS?

III.

DID THE TRIAL COURT ERR IN DENYING THE REQUESTED CONTINUANCE, WHICH WAS NECESSARY SO THAT THE DEFENDANT COULD OBTAIN A FAIR TRIAL BY BEING REPRESENTED BY PREPARED COUNSEL?

IV.

WAS THE PROSECUTOR'S CLOSING ARGUMENT AN IMPERMISSIBLE COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY WHICH WARRANTS A NEW TRIAL?

ARGUMENT

POINT I

(CERTIFIED QUESTION)[10]

THE QUANTITY OF DRUGS INVOLVED IN A CRIME IS NOT A PROPER REASON TO DEPART FROM SENTENCING GUIDELINES WHERE THE QUANTITY IS NOT SO GREAT TO JUSTIFY DEVIATION FROM THE MANDATORY MINIMUM.

The trial court imposed the maximum sentence of thirty years incarceration and a $250,000 fine, upon the Defendant's conviction for trafficking in excess of 400 grams of cocaine (R 458). This was done notwithstanding that Pastor was a first time offender and the guidelines worksheet approved by the court set the guidelines sentence at the 15-year minimum mandatory (R 459).[11] The court's rationale for departing from the guidelines was threefold (SR):

> a. The defendant travelled under a false name before he was arrested.
>
> b. The defendant admitted to the police that he was a middleman drug dealer.
>
> c. The defendant possessed approximately 7 times more than the amount of cocaine required for a 15 year mandatory minimum

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[10] This question was also certified in Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986).

[11] The guideline scoresheet was imprecise. The actual guidelines for the offense were 3 1/2 to 4 1/2 years. Fla.R.Crim.P. 3.988(g). Since the mandatory minimum exceeds the guidelines, the 15-year mandatory minimum takes precedence. Rule 3.701(d)(9) of the Florida Rules of Criminal Procedure provides:

> Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

> sentence. Specifically, the defendant possessed over 3,000 grams of cocaine (3 kilograms). A 15 year mandatory minimum sentence requires at least 400 grams.

Prior to imposing sentence, Judge Futch refused to permit the defense to allocute or make a sentencing presentation, apparently because the judge had decided to impose the maximum punishment for reasons which suggest the exacting of a penalty for going to trial (R 428).[12/]

On appeal, the Fourth District ruled that the first two reasons offered by the judge did not support a departure from the minimum mandatory. The appellate court further ruled that the evidence proved only 1337 grams of cocaine and not the 3000 stated by the trial judge. The court further found that Pastor was entitled to resentencing because the sentencing judge deprived the Defendant of meaningful allocution. The appellate court did not, however, order that resentencing occur before another, impartial, judge.

The Fourth District certified the question of whether the quantity of drugs may be a proper reason to depart from the guidelines. The answer is no. In a drug trafficking case, where the mandatory minimum exceeds the guideline sentence, a departue cannot be based on the mere quantity of drugs. The Fourth District therefore erred in ruling that the sentencing judge could give consideration to the amount of cocaine.

12/ The Defendant's intelligent waiver of a presentence report (R 422-423, 426) did not waive the right to present evidence and submissions relevant to sentencing.

A. The Quantity Of Drugs Is Not A Clear And Convincing Reason To Warrant Departure From The Mandatory Minimum.

Departures from sentencing guidelines must be avoided unless **clear and convincing** reasons exist to aggravate or mitigate the sentence. Fla.R.Crim.P. 3.701(d)(11); State v. Mischler, 488 So.2d 524 (Fla. 1986). The guidelines require courts to use the recommended sentence unless sufficient reasons are shown to justify a departure. In this case, the only reason for departure from the guidelines potentially approved by the Fourth District -- the quantity of drugs -- does not warrant imposition of the maximum sentence. This court should conclude that as a matter of law the trial court committed a gross abuse of discretion. Albritton v. State, 476 So.2d 158 (Fla. 1985); State v. Twelves, 463 So.2d 493 (Fla. 2d DCA 1985)(function of appellate court is to canvass record to determine whether lower tribunal abused discretion in departing from guidelines).

1. The Quantity Of Cocaine Is Not A Valid Departure Factor.

Although the lower courts have approved the quantity of drugs involved in a charged offense as being a consideration in departing from a recommended sentence, Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985), rev. denied, 488 So.2d 830 (Fla. 1986); Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984)(possession of bale of marijuana supported five-year aggravated sentence); Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984), the quantity alone should not be a permissible aggravating factor. The trafficking statute's unique use of the mandatory minimum term expressly recognizes that quantities of contraband are encompassed within the minimum penalty, with **vastly excessive** amounts being the only

potential basis for aggravation, and then only if there is some other factor present which is not related to the quantity of drugs.

The proper answer to the certified question must be that the quantity of contraband alone is not a meaningful basis for imposing a sentence above the mandatory minimum in a trafficking case.[13] Indeed, in those cases where a departure was approved by an appellate court, some factor other than simple possession of a large quantity was found to exist. For example, in Guerrero v. State, 484 So.2d 59 (Fla. 2d DCA 1986), the Second District opined that a large amount of contraband in a "major narcotics trafficking transaction" could be a consideration in imposing a departure sentence.[14] In Pursell v. State, 483 So.2d 94 (Fla. 2d DCA 1986), that same court approved imposition of the maximum sentence where the quantity of drugs "far exceeded" the amount charged[15] and led to an implication that the accused was a major drug smuggler. Irwin v. State, 479 So.2d 153, 154 (Fla.

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[13] This rule is not intended to apply to non-trafficking convictions where mandatory minimum sentences do not apply. Perhaps quantity could be considered in the case of simple possession, although even in that instance the quantity factor is an extremely imprecise, and potentially unfair, mechanism to guage a departure sentence. Garcia v. State, __ So.2d __, 12 F.L.W. 125 (Fla. 3d DCA Dec. 23, 1986)(deviation from guidelines where defendant charged with trafficking but convicted of possession). E.g., Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984)(departure approved where evidence showed possession of entire bale of marijuana).

[14] Guerrero was remanded for further sentencing proceedings.

[15] The proof was that the defendant possessed 1,925 grams, nearly 500% above the amount needed to sustain a cocaine trafficking conviction. This is to be contrasted with the evidence that Pastor possessed a total of 1337 grams of cocaine and packaging material.

2d DCA 1985), rev. denied, 488 So.2d 830 (Fla. 1986), one of the early cases discussing this question, merely noted that the quantity of cocaine "is a proper circumstance to be considered in departing from a recommended sentence..." The Irwin court did not give any guidance with respect to the quantity involved or the extent of departure allowed in the case of a mandatory minimum sentence.

The use of mandatory minimum sentences, which often exceed the guidelines absent such factors as prior convictions or multiple offenses, denotes a legislative effort to establish a comprehensive sentencing scheme which automatically aggravates a sentence based on the quantity of contraband involved. The sentencing guideline cells for drug trafficking convictions call for sentences which exceed the mandatory minimums in many cases,[16] thus incorporating a recognition that the mandatory minimum may not be adequate punishment for all defendants in all cases. Thus, by possessing between 28 and 200 grams of cocaine, a defendant must serve three years, whether the amount is 28 grams or 199 grams. Similarly, possession of between 200 and 400 grams of cocaine subjects a defendant to a mandatory five years. Of course, a sentence greater than the mandatory minimum could be imposed, provided that either the guidelines exceed the minimum or aggravating factors exist which are independent of the mere quantity of the contraband. The amount of the drug, standing alone, simply is not a circumstance which should aggravate a

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[16] Category 7 of the sentencing guidelines concerns drugs. The applicable sentences range from any nonstate sanction to life imprisonment. Fla.R.Crim.P. 3.988(g).

mandatory minimum sentence. As such, quantity is not an available departure consideration.

The purpose of the sentencing guidelines "is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process." Fla.R.Crim.P. 3.701(b). Permitting the mere quantity of contraband to be a sentencing factor promotes the very sentencing disparity and unfairness which the guidelines were meant to eliminate. The quantity of drugs involved in a trafficking case is essentially another way of referring to other factors which may not be permissible sentencing considerations. For example, the greater quantity a defendant possesses, the greater its value, yet the monetary amount is not a basis for a departure sentence. Guerrero v. State, 484 So.2d 59 (Fla. 2d DCA 1986). The quantity of cocaine can also be another way of suggesting that the defendant is a "big-time drug dealer," a factor which was disapproved in Banzo v. State, 464 So.2d 620 (Fla. 2d DCA 1985). Since the quantity by itself is nothing more than a common ingredient inherent in every trafficking offense, it is not a permissible aggravating factor, any more than a lesser amount of cocaine could be a basis for imposing a sentence below the mandatory minimum. State v. Mischler; Baker v. State, 466 So.2d 1144 (Fla. 3d DCA 1985)(common ingredients of all attempted first degree murders not proper aggravation consideration); Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 1984)(court is not at liberty to aggravate sentence by use of elements of crime).

The approach approved by the Fourth District is inconsistent with the purpose of the drug trafficking statute, which

is to punish all drug traffickers, "from the importer-organizer down to the 'pusher' on the street." State v. Benitez, 395 So.2d 514, 517 (Fla. 1981). How can a trial judge, or even an appellate court, be expected to evaluate how much weight to give to a certain quantity of narcotics. If the test is that the amount must "far exceed" the quantity needed for a conviction, Colvin v. State, __ So.2d __, 12 F.L.W. 334 (Fla. 2d DCA 1987); Gallo v. State, 483 So.2d 876 (Fla. 2d DCA 1986), what formula is the court to employ? Should the standard be one of simple arithmetic or is a geometric equation more appropriate? As an example, §893.135(1)(b)(1) proscribes the trafficking in 28 to 200 grams of cocaine. This is a first degree felony punishable by a mandatory minimum five year term. Possession of 199 grams, although more than seven times the minimum classification amount, clearly is insufficient to justify a 21-year sentence. Indeed, that would be a greater sentence than the mandatory minimum for the next greater quantity of cocaine -- 200 grams. It would be sheer nonsense to suggest, as the court did below, that such figures can alter the delicate sentencing balance implicit in the trafficking statute and the sentencing guidelines.

Another question which readily flows from the decision of the district court is the extent to which geographic variations in public opinion as well as judicial attitudes will be used as excuses for departure sentences in drug cases. Suppose, for example, a defendant is charged with trafficking in the Eleventh Judicial Circuit (Miami), where large drug seizures are everyday occurrences. Is that defendant entitled to a lesser sentence because the judge does not believe the amount greatly

exceeds the minimum amount for a conviction. Or, is the defendant in the First Judicial Circuit (Santa Rosa County) to be penalized because public opinion labels 56 grams of cocaine a vastly excessive amount? Manifestly, the sentencing guidelines may just as well be eliminated in drug cases if this sort of unbridled discretion is condoned.

A court should not be permitted to depart from the mandatory minimum, where it exceeds the guidelines, because of rote reliance on the quantity of contraband, particularly where the purity of the contraband has not been established. To approve such a result emasculates the uniformity which is implicit in the guidelines. For these reasons, this court must answer the certified question in the negative.

2. The Quantity Of Cocaine Does Not Justify A Departure In This Case.

The Fourth District concluded that Pastor possessed 1337 grams of cocaine.[17/] That quantity, without the presence of other permissible aggravating factors, does not support imposition of any sentence in excess of the fifteen year mandatory minimum term.

Pastor possessed approximately 3 1/2 times the cocaine needed for a conviction under §893.135(1)(b)(3). He was nothing more than a "mule," carrying the cocaine to New York for someone else. He was neither a dealer nor a major cocaine operative. He had no prior convictions. Furthermore, he was cooperative with the police during their investigation.

17/ This was the gross weight of the cocaine and packaging. Only the net weight is to be included in trafficking charges. Cronin v. State, 470 So.2d 802 (Fla. 4th DCA 1985).

The amount of cocaine possessed by Pastor did not "far exceed" the minimum amount needed for the trafficking conviction. Gallo v. State; Colvin v. State (proof of double the amount of cocaine needed for conviction does not warrant sentencing above the mandatory minimum); Garcia v. State. Moreover, even if the amount is a factor which can be considered, it can only aggravate a sentence above the **guidelines.** In Pastor's case, that onnly permissible aggravation would be of the 3 1/2 - 4 1/2 guideline range, which certainly would not exceed the 15-year mandatory minimum.

Furthermore, any aggravating factor based on quantity should be offset by mitigating factors not considered by the sentencing judge. The Defendant's candid cooperation with the police at the time of his arrest should be considered in mitigation. Banzo v. State, 464 So.2d at 622. The Defendant's age and lack of a prior criminal history is a sufficient reason to mitigate the sentence. State v. Rice, 464 So.2d 684, 686 (Fla. 5th DCA 1985). Even the Defendant's status as a heroin abuser, a possible explanation for his involvement in this offense, can be a factor in mitigation. Cf., Boyett v. State, 452 So.2d 958 (Fla. 2d DCA 1984). On this record, the trial judge abused his discretion in imposing a sentence which exceeded the mandatory minimum. The appellate court should have remanded the case with directions to impose a sentence within the guidelines.

B. Resentencing Is To Take Place Before An Impartial Judge.

At the time of resentencing, Pastor is entitled to appear before a different, impartial jurist, instead of a judge who has shown a tendency to impose a predetermined sentence upon

Pastor for reasons not apparent in the record. The record does reflect, however, the substantial likelihood that the original sentencing judge may not resentence the defendant in a fair and impartial manner, but may instead continue to penalize Pastor for going to trial and further justify that penalty because Pastor successfully appealed the sentencing error.

The rule applied by the First District in Berry v. State, 458 So.2d 1155 (Fla. 1st DCA 1984), requires setting this case before another judge. There, the sentencing judge considered that the defendant was guilty of prior arrests which did not lead to convictions. In ordering a resentencing, the court stated, at 1156:

> In order to preclude any perception on Berry's part that the resentencing may not be conducted in a completely fair and impartial manner, we think it best that he be resentenced by another judge to be assigned by the Chief Judge of the Circuit. Gallucci v. State, 371 So.2d 148 (Fla. 4th DCA 1979).

The decision in Gallucci v. State, 371 So.2d 148 (Fla. 4th DCA 1979), which was cited in Berry, is remarkably similar to the relevant circumstances of this case. There, the Third District evaluated a claim that the defendant was penalized by the trial court for availing himself of the constitutional right to a jury trial. In vacating the sentence with directions that resentencing take place before another judge, the court reviewed the constitutional and practical reasons for this rule. The underlying rationale, according to the court, is one of fairness to the individual, who is entitled to the absence of any actual or perceived prejudgment on the part of the sentencing court. The Gallucci court explained at 150:

Sentencing is perhaps the most difficult of all of the trial court's duties. For many reasons, not the least of which is a recognition that a sentencing judge is in a unique position to decide what sentence is appropriate to a particular case, a sentence imposed within the bounds established by statute is not subject to appellate review. The sentence imposed herein is well within those bounds. However, a trial court may not impose a greater sentence on a defendant because such defendant avails himself of his constitutional right to a trial by jury. Hankerson v. State, 326 So.2d 400 (Fla. 4th DCA 1976) [footnote omitted]; Weatherington v. State, 262 So.2d 724 (Fla. 3d DCA 1972). It is true that in considering a sentencing for a defendant who has pleaded guilty a trial court may consider the plea itself as a step toward rehabilitation. However, while it may seem entirely logical, it is not so easy to simply turn the coin over and conclude that a request for a trial is an indication that a defendant cannot be rehabilitated. Our system presumes innocence and rightfully holds in high esteem an individual's right to trial by jury. And such right may be exercised freely by an individual, without fear that the choice to go to trial will be held against him.

We are quite certain that the remarks of the trial judge here were not meant to imply that probation was being withheld because the appellant chose to go to trial. Rather we think his remarks were in response to a rather vigorous claim by appellant who virtually demanded probation while at the same time continuing to staunchly defend his innocence. The trial court, no doubt, felt it was rather presumptuous of the appellant to be insisting on his innocence, in view of the jury's verdict, and in addition, demanding probation.

However, in an abundance of caution and because all we have are the printed words of the court, we cannot overlook the court's own statement that after a jury trial probation will be denied "unless it is very, very odd and weird circumstances." On its face the statement implies that those who demand a trial will be treated differently than those that do not. Such different treatment is not permitted. Hankerson, supra. For these reasons we think it best that the appellant's sentence be vacated and that the appellant be resentenced by another judge to be assigned by the chief judge of the circuit.

In Pastor's case, one need only examine the sentence imposed to come to the inevitable conclusion that the trial judge did not consider any factor other than his own intention to punish this first time offender by imposing the maximum term of incarceration. Even the State recognized in its answer brief on appeal that the trial judge was going to sentence Pastor to the maximum, notwithstanding the lack of any aggravating factors: "the trial court would have nevertheless imposed the same sentence ... " (Answer Brief at 30). The trial court's comments at sentencing can only be construed as suggesting that he was punishing Pastor for reasons other than his guilt:

> I gave you the opportunity, he's waived PSI, which I would normally get that. Normally I'm concerned when a Defendant doesn't want me to get a presentence investigation because it's been my experience over 16 years that they have something they don't want me to know at the time of sentencing. Nevertheless, I'm going outside the guidelines for the following reasons and you can put them together in formal writing.

(R. 428).

Whether the trial judge "conveniently" found reasons to depart from the sentencing guidelines and impose the maximum term of imprisonment, the fact remains that neither Pastor nor any objective observer can feel confident that the trial judge will impose a sentence based on permissible considerations. The opposite is, in fact, more likely, that the trial judge will rationalize the resentencing decision when reimposing the very same sentence, thus yielding the impression that the judge further penalized Pastor for invoking his constitutional right to pursue an appeal. While such a contention may be contested vigorously by the State or even by the trial judge himself, the

reason for the precedent which requires resentencing before an independent judge is to avoid reasonable perceptions of unfairness and partiality. That perception exists in this case.

POINT II

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE DEFENDANT'S RIGHTS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

This case presents a situation which has become increasingly familiar to the courts: the propriety of a police encounter with an interstate traveler and the validity of a seizure. The facts herein are largely undisputed, involving the dual constitutional areas of consent to search and detention without adequate cause. The record evinces a warrantless search of an individual in the absence of an emergency or probable cause. Because the initial stop was unreasonable, the fruits derived from the stop should have been suppressed. The Fourth District was obligated to order the trial judge to suppress the evidence.

A. The Detention Of The Defendant, Considering All Available Circumstances, Was A Seizure Implicating The Constitutional Guarantee Against Unreasonable Searches And Seizures.

An investigative "stop," amounting to a seizure, occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). The Supreme Court effectively adopted the Mendenhall formula as the standard for determining when police cross the boundary separating consensual encounters from forcible stops to investigate a suspected crime. United

States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983); Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1979)(en banc), aff'd, 460 U.S. 491, 103 S.Ct. 1319 (1983). A plurality of the Royer court resolved that a suspect

> may not be detained even momentarily without reasonable, objective grounds for doing so...

460 U.S. at 498, 103 S.Ct. at 1324 (citations omitted).

"[T]he Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime -- 'arrests' in traditional terminology[.]" Terry v. Ohio, 392 U.S. 1, 88 S.CT. 1868 (1968).

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

392 U.S. at 16, 88 S.Ct. at 1877. A seizure is established by either "physical force or a show of authority" indicating that the individual's liberty has been restrained. 392 U.S. at 19 n.16, 88 S.Ct. at 1879. The essential teaching of the Terry decision -- that a right to personal security and freedom must be respected even in encounters with the police that fall short of full arrest -- has been reaffirmed consistently. E.g., Davis v. Mississippi, 394 U.S. 721, 726-27, 89 S.Ct. 1394 (1969); Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979).

In determining whether a **contact** between law enforcement officers invokes the protections of the Florida or United States Constitutions, the reviewing court must consider the coercive nature of the circumstances surrounding the stop. As the en banc former Fifth Circuit observed in United States v. Berry, 670 F.2d 583 (5th Cir. Unit B 1982)(en banc):

> We conclude that, in looking to the totality of circumstances of an airport stop, a court should closely scrutinize whether those circumstances reveal the presence of any coercion. If such coercion was present, the court must hold that a reasonable person would believe that his freedom had been limited.

670 F.2d at 597 (emphasis added). The court in State v. Frost, 374 So.2d 593, 597 (Fla. 3d DCA 1979), discussed whether the suspect was "under the reasonable impression that he was not free to leave the officers' presence," and reiterated the rule earlier set forth in United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977):

> [T]he crucial consideration is ... whether the person was "under a reasonable impression that he [was] not free to leave the officer's presence." We would only add that in determining whether such a reasonable impression existed, the test must be "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes."

374 So.2d at 597 (citation omitted). See also Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1982)(profile courier characteristics inadequate to justify stop).

In applying this legal authority to the circumstances of this case, the Fourth District incorrectly applied the presumption of correctness rule. The presumption which ordinarily attaches to a trial court's suppression ruling is inapplicable, since a review and evaluation of the evidence adduced in the record, State v. Gonzalez, 447 So.2d 1015, 1016 (Fla. 3d DCA 1984), shows that the trial court was clearly erroneous in its conclusions.[18] Because the record does not support the trial

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[18] The trial judge made no findings of fact. The ruling was (fn.cont.)

court's findings, the presumption of correctness is an irrelevant legal standard. State v. Navarro, 464 So.2d 137, 140 (Fla. 3d DCA 1984)(en banc); State v. Riocabo, 372 So.2d 126, 127 (Fla. 3d DCA), cert. dismissed, 378 So.2d 348 (Fla. 1979)(appellate court not bound to trial court's determination of fact questions on a motion to suppress when that determination is "clearly shown to be without basis in the evidence or predicated upon an incorrect application of the law.").

In this case, Pastor confronted a cumulating series of circumstances which were sufficiently coercive to yield the conclusion that the Defendant was not, and could not have reasonably felt, free to leave the officers' presence. The Defendant found himself confronted by police officers who chose him out of all other travellers at the train station, watched him in an obvious manner for more than thirty minutes, and began questioning him. There was two officers, not just the one policeman needed if the intention was to ask questions. The officers stopped and questioned only the Defendant, after the Defendant knew that these heretofore strangers were after him. The criminal investigation had begun and had focused upon him (R 26). Howard v. State, 230

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based on an assessment of evidence which was never before him. The trial judge stated that he had

> evaluated the testimony of the two law enforcement officers and of the accused, and [found] all of them more or less believeable. However, the weight of the evidence is tilted in favor of the State and against the accused, even taking at face value the testimony of the accused. [R 84]

Pastor never testified and never put his credibility in issue.

So.2d 1 (Fla. 1969); Brown v. Beto, 468 F.2d 1284 (5th Cir. 1972); United States v. Phelps, 443 F.2d 246 (5th Cir. 1971).

This is not a case where a policeman walks up to an individual to engage in conversation. The police made it plain that they were detectives investigating narcotics. They boldly approached the Defendant as he followed boarding instructions toward the rapidly arriving train. The officers stopped the Defendant's progress and impeded his access to the boarding location. While Zeno was of the subjective belief that the Defendant could have continued on his way, the Defendant would have had to manuever his way between the two physically imposing officers in order to proceed to the boarding platform (R 74). "[B]locking an individual's path or otherwise intercepting him to prevent his progress in any way is a consideration of great, and probably decisive significance" in determining whether a police-citizen encounter constitutes a seizure requiring Fourth Amendment protections. United States v. Berry, 670 F.2d at 597. As the court held in Horvitz v. State, 433 So.2d 545, 547 (Fla. 4th DCA 1983), when a suspect is "surrounded by three police officers for questioning concerning illegal drugs" and is otherwise subjected to verbal coercion, it is impossible to maintain the view that the suspect would have believed he was free to leave.

Even closer to the facts of this case is United States v. Bowles, 625 F.2d 526 (5th Cir. 1980). A detective, intent on "contacting" the defendant, walked past him, held out his credentials and turned to face the defendant, blocking his path and stopping him from proceeding further. The court concluded at

532: "Clearly at this point Bowles' movement had been restrained. Bowles was seized." The same conclusion is compelled here. Consider that both officers announced that they were narcotics detectives. Their show of authority continued when the officers admonished the Defendant that, in their opinion, there was a serious drug problem in South Florida. In singling out this individual to the exclusion of all other passengers, the police suggested his cooperation in enforcing drug laws. "Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention." United States v. Berry, 670 F.2d at 597. See also United States v. Waksal, 709 F.2d 653, 656 (11th Cir. 1983); United States v. Robinson, 625 F.2d 1211, 1216-1217 (5th Cir. 1980).

The law enforcement officers' demand to see the Defendant's boarding pass and identification was suggestive of a stop and not a casual encounter. United States v. Elsoffer, 671 F.2d 1294, 1297 (11th Cir. 1982)(seizure occurred when DEA agents retained defendant's airplane ticket and asked for identification). The fact that the boarding pass was returned does not diminish this overt exhibition of authority. In Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979), the Supreme Court held that police cannot stop an individual and ask for identification unless they have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. In the present case, the trial judge should have found no justification for the initial investigation and police intrusion.19/

The recent case of Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 308 (1984), supports the conclusion that this encounter escalated to a Terry stop well before the police found the contraband. The court wrote, at 311:

> Assuming without deciding, that after respondent agreed to talk with police, moved over to where his cohorts and the other detective were standing, and ultimately granted permission to search his baggage, there was a "seizure" for purposes of the Fourth Amendment, we hold that any such seizure was justified by "articulable suspicion."

Rodriguez is distinguishable on this last point because, while the travellers in that case and Pastor here were stopped at public transportation centers, the Rodriguez suspects had exhibited sufficient suspicious behavior beyond profile characteristics when stopped. Pastor in this case presented **no** suspicious behavior other than profile factors.

The Defendant was not free to leave. The police

19/ In Florida v. Royer, 460 U.S. 491, 501-502, 103 S.Ct. 1318, 1326 (1983), the Court stated:

> Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that he was not free to leave.

This dictum in a plurality opinion does not negate the basic teaching of Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979) (individual right to personal freedom must be respected in police encounters falling short of arrest). In the present case there was **no** justification for **any** intrusion.

intended to make a forcible stop in order to have access to the Defendant's bag. Their conduct and intention corroborates the impression they must have conveyed to Pastor. The acted with urgency, as they knew the train was arriving and would pull out within minutes. This urgency was telegraphed to the Defendant, who knew that this interference might cause him to miss his train. He reasonably feared that he would not be on the train if he did not "agree" to cooperate in the investigation.[20/]

Viewing the totality of these circumstances, the Defendant was seized from the time the officers stopped him, identified themselves, and pressed for responses to their investigatory questioning. Jacobson v. State, 476 So.2d 1282 (Fla. 1985). The Defendant was entitled to the full protections of the Constitution.

B. The Officers Lacked Reasonable Suspicion To Effectuate The Stop.

To comply with the Fourth Amendment, the stop suffered here must be "supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, 448 U.S. 438, 440, 100 S.Ct. 2752, 2754 (1980)(citations omitted); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2284 (1979); Jacobson v. State, 476 So.2d at 1286; State v. Smith, 477 So.2d 658 (Fla. 5th DCA 1985); Palmer v. State, 467 So.2d 1063, 1064 (Fla. 3d DCA 1985).

20/ The Defendant's Hispanic background is also a consideration. Alzate v. State, 466 So.2d 331 (Fla. 3d DCA 1985); State v. Santamaria, 464 So.2d 197 (Fla. 3d DCA 1985); Restrepo v. State, 438 So.2d 6 (Fla. 3d DCA 1983).

In Moya v. United States, 745 F.2d 1044 (7th Cir. 1984), the court reviewed circumstances very much like those relied upon by the officers here. Moya was stopped while standing in a taxicab line outside an airport. "At that time, officers knew that Moya was arriving from Miami, had only carry-on luggage, scanned the crowd repeatedly, looked back over his shoulder, and 'sought the privacy of a washroom stall for some reason other than a desire to relieve himself.'" Id. at 1048. The court concluded that such information was "insufficient to establish even reasonable grounds for suspecting that Moya was carrying contraband." Id. at 1048.

To constitute "reasonable" suspicion, the suspicion must be more than an "inchoate and unparticularized suspicion or 'hunch.'" Terry v. Ohio, 392 U.S. at 27. "Mere" or "bare" suspicion does not support detention. Coleman v. State, 333 So.2d 503 (Fla. 4th DCA 1976). In enforcing this principle, courts must apply **objective** standards in determining whether, at the time of the seizure, the requisite degree of suspicion existed. Brown v. Texas, 443 U.S. at 52. While due deference may be given to police training and experience, "[s]till, any special meaning must be articulated to the courts and its reasonableness as a basis for seizure assessed independently of the police officers' subjective assertions, if the courts rather than the police are to be the ultimate enforcers of the principle." United States v. Gooding, 695 F.2d 78, 82 (4th Cir. 1982).

The police wholly lacked any objective basis for detaining Pastor. The officers acted on a hunch. The officers'

only basis for suspecting that the Defendant was carrying narcotics was from the Defendant's "abnormal behavior" in looking around and at the police while in the train station (R 64-65). In Martinez v. State, 414 So.2d 301 (Fla. 4th DCA 1982), the court reversed the trial court's denial of the defendant's motion to suppress a quantity of cocaine abandoned by him while fleeing the police after a "drug courier profile" detention, even though that defendant used a false name. Here, the Defendant's boarding pass was in his correct name. Even patently false responses to officers' questions do not implicate a defendant in criminal activity. As the court recognized in Moya v. United States, 745 F.2d at 1049:

> There are several innocent explanations for a lack of forthrightness with law enforcement officers. A person could simply be mistaken or have forgotten; this explanation appears particularly plausible if one considers the stress that someone might reasonably feel when subjected to police questioning. Alternatively, a person could be attempting to conceal information that is personal or embarrassing but not criminal, or supplying answers that she or he believes will expedite the questioning process.

Other factors, even those not identified by the officers, must be discounted. Because O'Connor noticed that the Defendant carried only one bag, he might have considered that suspicious. The luggage, however, is consistent with the Defendant's return to his home town. State v. Battleman, 374 So.2d 636 (Fla. 3d DCA 1979)(affirming suppression of evidence by trial judge where suspect was merely nervous, had arrived two days earlier from San Francisco with one of the same bags, and paid cash for tickets); United States v. Andrews, 600 F.2d 563, 566

(6th Cir. 1979)(nervousness deemed entirely consistent with behavior among innocent travelers and is entitled to no weight); United States v. Berry, 670 F.2d at 596 (nervousness may be generated simply from anxiety of travel); United States v. Ballard, 573 F.2d 913 (5th Cir. 1978) (fact that suspect appeared nervous and walked hurriedly through airport does not provide reasonable suspicion). The Defendant's nervousness "is slender evidence of specific lies, especially because being stopped and questioned by police officers could be alarming even to the innocent..." United States v. Brown, 731 F.2d 1491, 1494 (11th Cir. 1984).

Courts have rejected attempts by law enforcement officers to place a suspicious connotation on other aspects of an individual's behavior, such as watching other passengers and not minding one's own business (R 14-15). Courts have consistently discounted police testimony that an individual was suspect because of unusual movements or attentiveness to others. In Royer v. State, 398 So.2d 1007 (Fla. 3d DCA 1979), officers thought Royer was suspicious because he carried American Tourister luggage typical of marijuana smugglers and was "nervous in appearance, looking around at other persons as though he might be looking for possible police officers." Id. at 1016. The court expressly condemned such attempts at "amateur forensic psychiatry:"

> [Officer] Johnson stated that he was able to detect a difference in the manner or type of wariness exhibited by a narcotics courier as opposed to the "perceptively different type of nervousness" characteristic of "white knuckle type" flyers or others who were just plain

> nervous people. The effect of any such amateur forensic psychiatry must be completely disregarded. It is true that, in determining the existence of either founded suspicion or probable cause, an officer's expertise should be considered. But his special knowledge must be based upon some specific objective fact which the officer knows from experience is associated with criminality.... [I]t would be gravely dangerous to the very basis of our system to attach any legal credence to the subjective avowals of a policeman (or anyone else) that he can tell a criminal when he sees one or that he knows "from his experience" that the guilty look or act differently from the innocent.

389 So.2d at 1016 n.4 (emphasis added). See also United States v. Gooding, 695 F.2d at 79 (no reasonable suspicion despite fact that suspect appeared nervous "and looked up and down the corridors of the concourse"); United States v. Jefferson, 650 F.2d 854, 855-56 (6th Cir. 1981)(no reasonable suspicion even though agents received a tip suspect "examined the terminal area with unusual intensity and avoided carrying the luggage which contained heroin" and "appeared to be observing the people in the claim area").

The court, in Horvitz v. State, reviewed the justification of a stop on the basis of facts establishing: (1) the appellant appeared nervous; (2) he purchased a one-way ticket for cash; (3) his luggage consisted of a purse-sized shoulder bag and an attache case; (4) he noticed the police officers; and (5) he left the terminal building and apparently abandoned his plans to depart. 433 So.2d at 547. This court concluded that "[t]he facts as outlined above are not sufficient to justify the intial stop; therefore, the action of the police officers constituted an illegal seizure." Id. at 547.

In this case, there was no legitimate basis to stop Pastor as he walked to his departing train at the Hollywood Amtrak Station. The law enforcement officers who effected the detention had no reasonable or articulable suspicion. The fruits of that stop should have been suppressed. Although the trial judge announced that he was "really troubled" by the circumstances of this case, the court reached the wrong conclusion in failing to suppress the evidence. The appellate court was obligated to order a reversal of the suppression decision.

C. Once Detained, The Defendant Did Not Freely And Voluntarily Consent.

Once the question of Pastor's detention is resolved, this court must determine its impact on any consent. This issue must be viewed in the context of the State's burden to prove the existence of consent by clear and convincing evidence. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); Shapiro v. State, 390 So.2d 344 (Fla. 1980), cert. denied, 450 U.S. 982, 101 S.Ct. 1519 (1981). Since the Defendant was without counsel, the State has an even heavier burden to establish that any statement made by him was the product of a knowing and intelligent waiver of his constitutional rights. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977). The court in Schneckloth v. Bustamonte, 412 U.S. at 248-249, 93 S.Ct. 2041, stated:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances....

The burden of proving that consent was freely and voluntarily given cannot be discharged by showing acquiescence to authority. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968). Because a valid consent involves the waiver of constitutional rights, such cannot be inferred lightly.[21] As the court stated in Pekar v. United States, 315 F.2d 319, 324 (5th Cir. 1963),

> ...if this consent is obtained by the use of force or pressure, or where superior authority had any place in the obtaining of the consent, the consent is no consent at all, and the constitutional guarantees against unreasonable searches and seizures have been violated.

Under Florida law, that consent to search must be "voluntary" and not mere acquiescence. Talavera v. State, 186 So.2d 811 (Fla. 2d DCA 1966).

The court must determine from a "totality of the circumstances" whether the consent was in fact voluntarily given or "was the product of duress or coercion, express or implied." State v. Othen, 300 So.2d 732, 733 (Fla. 2d DCA 1974). As reasoned in Jordan v. State, 384 So.2d 277 (Fla. 4th DCA 1980), the court must distinguish between submission to the apparent authority of the officer and **unqualified** consent. In reviewing the totality of the circumstances, the conclusion is compelled that the Defendant gave no unqualified consent whatsoever to the

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[21] Although a reviewing court is to defer to a lower tribunal's ruling on a motion to suppress, Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329 (1984), a conclusion as to voluntariness is a question of law for resolution by the reviewing court. See generally Miller v. Fenton, _ U.S. _, 106 S.Ct. 445 (1985).

search of his personal effects. For the same reasons that the Defendant's initial detention was coercive, so was his purported consent involuntary.

In Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980), rev. denied, 408 So.2d 1095 (Fla. 1981), under facts similar to, but much less compelling than, those in the case at bar, the court reversed the defendant's conviction and remanded the case with directions to discharge the defendant. There, Major was asked if he "would mind" if the officers checked his tote bag and responded with the question, "Do you mind if I open it?" Without surrendering possession of the tote bag and without further conversation, an officer reached into the tote bag, searched it, and discovered contraband. Relying on the decision in Taylor v. State, 355 So.2d 180 (Fla. 3d DCA), cert. denied, 361 So.2d 835 (Fla. 1978), the court reasoned:

> A distinction is recognized in the law between submission to the apparent authority of a law enforcement officer and unqualified consent. Mere acquiescence in a search is not necessarily a waiver of a valid search warrant. Rather, for a person to waive his search and seizure rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search.

389 So.2d at 1204 (emphasis in original)(citations omitted). Thus, the Major court concluded that absent the clear and convincing showing required by Florida law, reversal was compelled. Precisely the same conclusion is compelled here.

Similarly, in Raffield v. State, 362 So.2d 138 (Fla. 1st DCA 1978), officers arriving at the suspect's property told him they were going to search the barn. The defendant replied,

"Well, it's in there," or "I'm guilty," or words to that effect. Again, the court reasoned, at 140:

> Acquiescence which is resignation -- a mere submission in an orderly way to the actions of arresting agents -- is not that consent which constitutes an unequivocal, free and intelligent waiver of a fundamental right.

The court reversed the defendant's conviction. E.g., Robinson v. State, 388 So.2d 286 (Fla. 1st DCA 1980)(defendant responded "yeah" to question "do you mind if I search?"). The alleged "consent" to look into the luggage did not confer consent to examine wrapped containers therein. See Goldberg v. State, 407 So.2d 352 (Fla. 4th DCA 1981).

D. The Statements Are The Fruits Of The Poisonous Tree.

The Defendant's post-arrest statements made at the train station and at police headquarters were obtained solely as a consequence of the initial Fourth Amendment violation. These incriminating statements must be suppressed as "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). There was no attenuation between the illegal seizure and the resulting interrogation, notwithstanding the giving of Miranda rights. See United States v. Parker, 722 F.2d 179 (5th Cir. 1983).

POINT III

THE TRIAL COURT ERRED IN DENYING THE REQUESTED CONTINUANCE, WHICH WAS NECESSARY SO THAT THE DEFENDANT COULD OBTAIN A FAIR TRIAL BY BEING REPRESENTED BY PREPARED COUNSEL.

Prior to trial, the Defendant's counsel sought a continuance because neither retained counsel nor court appointed counsel was prepared to present a defense (R 109, 222-223, 227-

235). The court, professing his view that the Defendant was engaged in a ruse to change counsel each time the case was scheduled for trial (R 233), denied the continuance on the basis that the Defendant had the benefit of counsel (R 233).22/ The court's denial of the repeated continuance requests constituted a gross abuse of discretion which severely handicapped the Defendant in his ability to defend against the charges.

In reviewing matters relating to the denial of a continuance, the law is settled that a trial court possesses broad discretion. Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, __ U.S. __, 105 S.Ct. 229 (1984); Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617 (1984). A court's "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay,'" Morris v. Slappy, 461 U.S. 1, 11, 103 S.Ct. 1610, 1616 (1983), is never an appropriate exercise of discretion. Yet, that is precisely the wooden stance adopted by Judge Futch and, indirectly, by Judge Fleet. Pastor suffered immeasurably by being forced to trial under circumstances where his counsel could do little more than monitor the prosecution's case. Pastor should not have been made to suffer for the inaction of his appointed counsel, who admitted to the court that he was not

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22/ This request had been presented to Circuit Judge Fleet, the original trial judge. Assistant Public Defender Bober stated that he received the file on the day of the status conference (the Friday before the Monday trial date) and was unprepared. Judge Fleet denied the continuance without prejudice to renew after working through the weekend to prepare (R 227-230). The matter was again raised on the trial day before the administrative judge, with the additional factor that the Defendant had been able to retain counsel during the weekend (R 231-233, 448).

ready for trial and explained the circumstances underlying his unpreparedness. Pastor's efforts to retain counsel from his jail cell should not be condemned and turned against him so as to defeat his entitlement to a reasonable time to prepare for trial.

The First District recently validated Pastor's position, ruling in Holley v. State, 484 So.2d 634 (Fla. 1st DCA 1986), that a criminal defendant is entitled to prepared counsel, even if that necessitates a short delay of the trial. Holley faced several substantial criminal charges arising out of a robbery episode. Although the defendant was advised by his retained counsel on the day before trial that two other lawyers would try the case, neither of the other lawyers had previous involvement with the case and both lawyers "had less than two weeks to prepare for trial." The defendant sought a continuance, although defense counsel acknowledged their preparedness for trial. The court denied the continuance. In post-conviction proceedings, the defendant contended that the denial of a continuance deprived him of effective counsel. The First District agreed, finding that the defendant had not sought the continuance for purposes of delay or in bad faith. The court held, at 636:

> The totality of the circumstances of this case compels a presumption that Holley was prejudiced by the eleventh hour substitution of counsel and subsequent denial of a continuance and that his Sixth Amendment rights were violated.

On this record the trial judge penalized Pastor because of the decision to retain private counsel shortly before trial and because the assigned Public Defender had not reviewed the case file, notwithstanding that the lawyer received the file only a few days before.[23/] The Fourth District improperly ruled that

under these circumstances, the trial judge fairly exercised his discretion. The net effect of that ruling is that the need to move cases to trial will be viewed as more substantial than considerations of fundamental fairness.

The Defendant recognizes that continuances made near the time of trial are viewed cautiously. Holman v. State, 347 So.2d 832 (Fla. 3d DCA 1977), cert. denied, 354 So.2d 981 (Fla. 1978). The continuance in this case was not sought for delay, but to accommodate the Defendant's constitutional right to be represented by counsel of his choice. E.g., Wilson v. Mintzes, 761 F.2d 275, 279 (6th Cir. 1985); Birt v. Montgomery, 725 F.2d 587, 592 (11th Cir. 1984). The Defendant's need to obtain competent counsel was not a dilatory. His previous counsel withdrew well before trial, citing strategy and financial disputes with the Defendant's family and, to a lesser extent, with the Defendant (R 89-101). The Defendant did not demand or request this withdrawal (R 96). Even though the judge appointed substitute counsel at that time (R 101), the appointment was not effectuated until the **weekend before trial**, when appointed counsel first came into possession of the file. Surely, the Defendant was rightfully frantic at that point, knowing that his life -- at least 30 years of it -- hung in the balance. Meanwhile, the Defendant remained incarcerated.

The case, perhaps a simple one by the prosecution's standards, was nevertheless fraught with complexities which

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23/ Despite Judge Futch's willingness to accuse appointed counsel of a lack of preparedness and refer him to The Florida Bar and the Supreme Court (R 232), counsel fulfilled his ethical obligation to advise the court that he was not prepared to proceed. Fla. Bar Code Prof. Resp., Canon 6.

demanded careful and detailed preparation, not simply a one time reading of the depositions taken by prior counsel (R 232). The issue of knowledge of the presence of the charged controlled substance,[24] which was raised as a defense at trial, required careful **preparation.** It was not sufficient, as the judge believed, to have the Defendant represented by unprepared private counsel and backed up by unprepared appointed counsel (R 223). In this case, two unprepared lawyers were no better than one unprepared attorney. Javor v. United States, 724 F.2d 831 (9th Cir. 1984)(mere physical presence of counsel not satisfy Sixth Amendment). The judge conducted no detailed inquiry into the preparedness of counsel. See generally Mansfield v. State, 430 So.2d 586 (Fla. 4th DCA 1983)(court to conduct detailed inquiry to determine if accused can represent self); Morgano v. State, 439 So.2d 924 (Fla. 2d DCA 1983).[25]

The **need** for additional time to obtain counsel should result in the granting of a continuance where the accused is not at fault in arranging for representation. See Palladino v. State, 267 So.2d 837 (Fla. 3d DCA 1972)(defendant, after stating his intention to retain counsel at arraignment, did nothing until the time of trial). While there is no set time period which

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[24] In State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982), the court ruled that the evidence must prove that the accused intended to possess the **charged** controlled substance and not simply contraband.

[25] At the very least, Judge Futch should have inquired of the Defendant regarding when he decided to change counsel, whether and when appointed counsel discussed trial preparation with him, and the extent of discussions concerning trial preparation versus plea negotiations, among other matters. Since the court conducted no inquiry, it cannot be said that the denial of a continuance was a decision based on reasoned judgment.

establishes as a matter of law a lack of preparation on the part of counsel, see Berriel v. State, 233 So.2d 163 (Fla. 4th DCA 1970), the crucial question is whether the limited time deprived the accused of a realistic trial. State v. Barton, 194 So.2d 241 (Fla. 1967).

The record reflects that counsel was not prepared. Notwithstanding the commendable trial display by counsel, the Defendant was shortchanged by the judge's haste to proceed. The Defendant was unable to challenge the prosecution's proof, prepare an effective defense, or even make a knowing decision whether the accused should testify. To resolve this question on the basis of a subjective post hoc decision that the Defendant was guilty and that counsel did the best job possible is to minimize the significance of the constitutional right to the assistance of prepared counsel.[26] This substantial first degree felony demanded considerable attention. That the stakes were so high is a reason to make sure that counsel had reasonable time to prepare. On this record, the trial judge abused his discretion in summarily denying the repeated requests for a continuance. The Fourth District was obligated to reverse and remand the case for a new trial.

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[26] The Defendant does not contend at this time that he was denied the effective assistance of counsel, as enunciated in Knight v. State, 394 So.2d 997 (Fla. 1981). That contention is not the proper subject of this proceeding. See Stewart v. State, 420 So.2d 862, 864 n.4 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802 (1983).

POINT IV

THE PROSECUTOR'S CLOSING ARGUMENT UNFAIRLY COMMENTED ON THE DEFENDANT'S FAILURE TO TESTIFY AT TRIAL AND SO PREJUDICED THE DEFENDANT AS TO DENY HIM ANY SEMBLANCE OF FUNDAMENTAL FAIRNESS.

In closing argument, the prosecutor directly commented on the Defendant's failure to testify (R 392-393):

> The Judge is going to instruct you all that you are to decide the case based on the evidence and the evidence alone. Not what I say, not what defense counsel says, but what you heard from the witness stand and what you see from the physical evidence. And what you heard from the police is the uncontroverted evidence. **You haven't heard one word of testimony to contradict** what the police officer told you. [Emphasis added].

The Defendant's request for a mistrial (R 393) was met with protestation from the prosecutor that he only "said" that there was no testimony to contradict the lawyer's argument (R 394). The court, while considering the comment to be "close," ruled that White v. State[27/] controlled. He denied the mistrial motion and

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27/ In White v. State, 348 So.2d 368 (Fla. 3d DCA 1977), aff'd, 377 So.2d 1149 (Fla. 1979), the prosecutor stated "you haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument." The court stated, at 369:

> If the evidence presented a situation where the only person who could have contradicted the witness's testimony was the defendant himself, then this comment might be interpreted as the defendant suggests. We hold that in this case, where the testimony of several witnesses was heard and there was nothing in the testimony to show that the defendant was not present at the scene of the crime, that the statement by the state's attorney was a fair comment upon the evidence.

On certiorari, the Supreme Court affirmed, concluding that "a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury." 377 So.2d at 1150.

instructed the jury that "no defendant has a job to come in and prove anything." (R 394-395). Contrary to the lower tribunal's decision, the statement was an impermissible comment on the **Defendant's** failure to testify, so infecting the case as to require a new trial. The Fourth District's unexplained citation to White v. State in rejecting this appellate point was wrong, and conflicted with the substantial precedent cited in this appeal.

This comment was "fairly susceptible" of being interpreted as referring to a criminal accused's failure to testify, since Pastor was the only person in a position to contradict the police testimony. State v. Kinchen, 490 F.2d 21 (Fla. 1985). It is error of constitutional magnitude. Samosky v. State, 448 So.2d 509 (Fla. 3d DCA 1983). State v. Marshall, 476 So.2d 150 (Fla. 1985), reaffirmed that such comments are error, but reversed prior authority in determining that the error could be harmless:

> We now adopt the harmless error rule. Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged. Such a comment, however, should be evaluated according to the harmless error rule **with the state having the burden of showing the comment to have been harmless beyond a reasonble doubt.** Only if the state fails to carry this burden should an appellate court reverse an otherwise valid conviction. [Emphasis added].

E.g., State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)(comment on silence, while subject to constitutional harmless error analysis must be avoided).

This case, which pitted two policemen against the Defendant, pointed out that there was no one else who possibly

could testify to contradict the police officers **other than the Defendant**. The statement is as direct a reference to the Defendant's failure to testify as was the comment in Andres v. State, 468 So.2d 1084 (Fla. 3d DCA 1985)("There is no testimony at this point in the evidence to indicate that he ever intended to withdraw..."), or in State v. Marshall, 476 So.2d at 151 ("...the only person you heard from in this courtroom...was Brenda Scavone."). It is not a statement that **defense counsel** failed to rebut the prosecution's case. See United States v. Austin, 585 F.2d 1271, 1279 (5th Cir. 1978). Nor was the remark a comment referring to the **defense** generally as opposed to the **Defendant** specifically. Compare State v. Sheperd, 479 So.2d 106 (Fla. 1985)(statement not refer to defendant's silence). In short, the prosecutor's statement was an impermissible comment on the Defendant's failure to take the stand and testify, and was not in response to any argument of defense counsel.28/

With respect to the harmless error question, the comment did effect the jury's deliberations. The Defendant's defense was that he lacked knowledge of the presence of cocaine within the suitcase. Through examination of the witnesses and lawyer argument, he negated the prosecution's illusory proof of knowledge. By calling on the Defendant to come forward with testimony, the prosecutor boldly reminded the jury that only one person knows what the Defendant knew, and that if the Defendant was innocent, he would have accounted for his actions to the jury. Since the Defendant himself did not rebut the evidence,

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28/ The court's cautionary charge, moreover, was inadequate and did not remove the taint of the impermissible comment.

the jury was led to believe that he was guilty.[29] This type of deliberative process is incorrect and, to the extent that it existed in this case, affected the outcome. The verdict very well may have been different. Since the record does not support a finding of harmlessness beyond every reasonable doubt, the conviction should have been reversed and the case remanded for a fair trial.

CONCLUSION

For the many substantial reasons discussed in this brief, the certified question must be answered in the negative and the Defendant's conviction and sentence must be reversed and the case remanded. The trial court erred in sentencing the Defendant in excess of the guidelines and the mandatory minimum. The quantity of drugs, standing alone, is not a permissible aggravating factor. The trial judge was predisposed to impose the maximum punishment notwithstanding the presence of mitigating evidence. To insure a fair resentencing, this court must order that the case be remanded to another judge of competent jurisdiction familiar with the facts.

The illegal search and seizure requires a reversal of the conviction. The court below should not have validated a confrontation and stop of an interstate traveler not supported by

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[29] In addition to this comment, the prosecutor's references that the police officers should be believed because they have no personal stake in the outcome of the case, are not paid contingency fees or given promotions based upon the success or failure of the case, and other statements designed to vouch for the credibility of the witnesses (R 396-397) were improper and contributed to the denial of a fair trial. See, e.g., Darden v. State, 329 So.2d 287 (Fla. 1976); Price v. State, 267 So.2d 39 (Fla. 4th DCA 1972); Cumbie v. State, 378 So.2d 1 (Fla. 1st DCA 1978).

reasonable cause. The confrontation was coercive, thereby tainting the ability of the Defendant to give free and voluntary consent. The court must order the reversal of the conviction and remand this case with directions to enter an order suppressing the seizure of evidence.

The trial and appellate courts also erred in denying the Defendant's request for a continuance, thereby forcing the accused to trial without the guiding hand of prepared counsel. This court must order the conviction reversed and the case remanded for a new trial.

The prosecutor's closing argument, which unfairly commented on Pastor's failure to testify and rebut the police officers' testimony, is error of constitutional significance. The jurors had no choice but to consider the Defendant's lack of testimony in assessing the evidence. The court's inadequate cautionary instruction did not cure the error. Because this comment contributed to the verdict, the error is not harmless beyond all reasonable doubt. The case must be remanded for a new trial.

Respectfully submitted,

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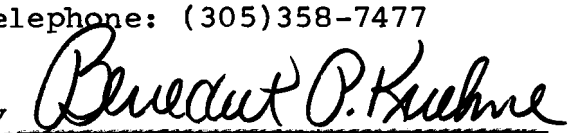
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was delivered by mail this 17 day of February 1987 to RICHARD BARTMON, ESQ., Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.

By Benedict P. Kuehne
BENEDICT P. KUEHNE