IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

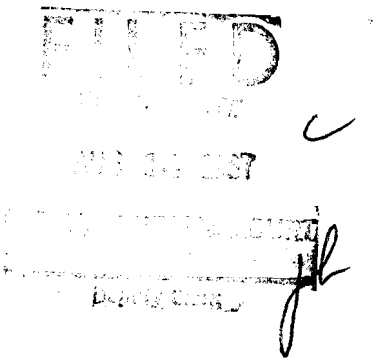
Petitioner,

vs. CASE NO. 70,510

PAUL A. WELKER,

Respondent.

_____/



ANSWER BRIEF OF RESPONDENT

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FLORIDA RULES OF CRIMINAL PROCEDURE:

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PRELIMINARY STATEMENT

Paul A. Welker, defendant in the trial court and appellant in the First District Court of Appeal, will be referred to herein as Respondent. The State of Florida, plaintiff in the trial court and appellee in the First District Court of Appeal, will be referred to as Petitioner.

References to the transcript of the record on appeal will be designated "(TR ___)" followed by the appropriate page number.

References to petitioner's initial brief will be designated "(PB ___)" followed by the appropriate page number.

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STATEMENT OF THE CASE

Respondent was charged by information with trafficking in more than 28 grams but less that 200 grams of cocaine on December 9, 1985 and after a trial by jury on April 2, 1986 was convicted of the lesser included offense of sale, delivery or possession with the intent to distribute cocaine.

On May 13, 1986, respondent was sentenced to confinement in the state prison for a term of four years, the trial court giving four reasons for its upward departure. Respondent's recommended sentence, according to the guidelines, was any non-state prison sanction. At the same time, the trial court denied respondent's motion for release on bail pending appeal and the First District Court of Appeal, on July 7, 1986, denied respondent's motion for review of the trial court's denial of bail pending appeal.

On April 1, 1987, the First District Court of Appeal vacated respondent's sentence, finding all four of the reasons given for departure as invalid: Welker v. State, 504 So.2d 802 (Fla. 1st DCA 1987). That court also ordered a new trial, finding that the trial court erred in allowing into evidence, over objection, two tape recorded conversations between respondent and a non-testifying informer. This, the court held, was not harmless error.

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STATEMENT OF THE FACTS

Respondent relies upon the facts set out by the First District Court of Appeal in Welker v. State, supra.

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SUMMARY OF THE ARGUMENT

CERTIFIED ISSUE I

The only way to fulfill the Statement of Purpose set out in Fla.R.Crim.P. 3.701 and to harmonize the decisions of the district courts of appeal is to prohibit upward departures in drug cases based solely on the amount of the drug. The discordance among decisions is difficult, if not impossible, to reconcile and offers little guidance to the Bench and the Bar. Even if this Court were to allow upward departures based on the amount of drugs involved, the amount in this case is not large enough to warrant an upward departure.

CERTIFIED ISSUE II

In Tollett v. State, 272 So.2d 490 (Fla. 1973), this Court fashioned the rule that before a tape recorded conversation between an informant and a defendant will be admitted into trial, the informer must take the witness stand and testify as to his consent to the taped communication. This ruling was based on the privacy safeguards embodied in Chapter 934, Fla. Stat. and should not be revisited because the membership of this court has changed. The recent amendment to Article I, Section 12, of the Florida Constitution adopting federal standards does not require a different result because Tollett, supra, was based on

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statutory construction and rules of evidence. Even if it were based in part on constitutional grounds, the case cited by petitioner, United States v. White, 91 S.Ct. 1122 (1971), because it was a plurality opinion and "...did not reach the issue of [the informant's] consent...", is not controlling and should not be followed by this Court.

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ARGUMENT

CERTIFIED ISSUE I

MAY THE AMOUNT OF DRUGS POSSESSED BY THE DEFENDANT BE USED AS A REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES IN A PROSECUTION FOR UNLAWFUL POSSESSION OF DRUG, AND IF SO, UNDER WHAT CRITERIA OR CONDITIONS?

Although eight grams of cocaine were found in the rear seat of the vehicle respondent was in at the time of his arrest (TR 54), two other individuals were in the car (TR 80) and the state did not contend at trial that the additional eight grams was part of the charge of trafficking (TR 157, 175). Nevertheless, whether the amount was 35 grams or 42 grams, a departure sentence is not warranted in this case and should not be permitted in any case when it is based solely on the amount of drugs involved.

A strong argument can be made that any upward departure for an offense involving a controlled substance in the trafficking categories clearly infringes upon the legislature's determination of the penalty ranges for increased amounts of the substances but, more importantly, upward departures in this area infringe upon jury verdicts, as it did in the case sub judice.

The most recent opinion from a district court of appeal dealing with this very same issue is one in which a

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jury pardon was accepted - contrary to petitioner's position[1] - and an upward departure after a jury verdict of guilty of simple possession of cocaine wherein the defendant was charged with trafficking in cocaine was reversed, even though the uncontroverted evidence established that the defendant was in possession of 95 grams of cocaine: Woods v. State, 12 F.L.W. 1791 (5th DCA, 7/31/87).

An upward departure in this case (as in the Woods case), clearly infringed upon the jury verdict finding respondent not guilty of trafficking in cocaine in excess of twenty-eight grams.

The confusion among the trial courts and district courts of appeal in drug departure sentences is a direct result of:

1. the differing opinions of the judges of this State as to what is a "de-minimis" amount and what is a "large" amount; and,

2. that the legislature has created two categories of drug offenses:

    a. Trafficking offenses which are restricted to five different types of controlled substances and

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1 "Mysteriously, the jury exonerated respondent of the charge of trafficking in cocaine..." (PB 6)

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wherein the legislature has determined what amounts of these substances should result in more severe sentences.

b. Non-trafficking offenses which include all the rest of the controlled substances and wherein the sentence is the same for any amount of one of these substances.

The plethora of decisions emanating from drug-departure cases has left a trail of conflicting and contradictory decisions from the various courts of appeal. The only way to harmonize the decisions of the courts of this state and to give guidance to the trial courts is to disapprove of any upward departure based on the amount of drugs in a narcotic case. Just a cursory review of some of the decisions of the district courts of appeal will suffice. For example, in Stanley v. State, 507 So.2d 1131 (Fla. 5th DCA 1987), the Fifth District Court of Appeal held that possession of ninety-nine pounds of marijuana was not a valid reason to support an upward departure whereas the First District Court of Appeal in Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984), disapproved on other grounds, State v. Whitfield, 487 So.2d 1045 (Fla. 1986), held that possession of a bale of marijuana was a valid ground to support an

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upward departure. In Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986), the Fifth District Court of Appeal held that upon the defendant's conviction for possession of cocaine with intent to sell or deliver, his sentence could be aggravated because it involved 13.8 grams of cocaine. On the other hand, in Gallo v. State, 483 So.2d 876 (Fla. 2nd DCA 1986), the Second District Court of Appeal held in a conviction for trafficking in cocaine in excess of 28 grams, 15.5 grams over the threshold amount was not a valid reason for departure.

In Koopman v. State, 507 So.2d 684 (Fla. 2nd DCA 1987), the court of appeal held that possession and delivery of approximately 26.5 grams (1.5 grams short of the outer limit of 28 grams) was insufficient to support an upward departure however in Flournoy v. State, 507 So2d. 668 (Fla. 1st DCA 1987), the First District Court of Appeal held that 12.5 grams of heroin (1.5 grams less than the threshold amount of 14 grams) was a valid reason to support an upward departure.

That it is almost impossible to distinguish between cases was evidenced by the holding of the Fifth District Court of Appeal in Banks v. State, 12 F.L.W. 1733, opinion dated 7/24/87, wherein it held that the trial court was in error for upwardly departing based on the amount of drugs involved and then cited two cases in which upward departures

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were upheld: Flournoy v. State, supra; Santana v. State, 507 So.2d 680 (Fla. 2nd DCA 1987).

Although the First District Court of Appeal in Flournoy, supra, sitting en banc, attempted to reconcile some of the variances in the sundry decisions of the district courts of appeal and certified to this Court the following question:

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

five of the judges concurred, three concurred and dissented, Judge Joanos wrote a special concurring opinion and Judge Zehmer wrote an opinion concurring in part and dissenting in part. Judge Barfield, writing another opinion concurring in part and dissenting in part, expressed the most cogent viewpoint:

> "...I feel compelled to admit that the harder one tries to uphold the trial judge's departure based upon quantity of drugs, the more impossible such defense becomes." (p. 673)

Even the term "de-minimis" is subject to great variation. For example, in Pedraza v. State, 493 So.2d 1122 (Fla. 3rd DCA 1986), the Third District Court of Appeal, in a conviction for possession of over 400 grams of cocaine, held that a total of 468 grams of cocaine was de-minimis and would not support a departure. In Cortez v. State, 488 So.2d 163 (Fla. 1st DCA 1986), the First District Court of Appeal held

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that an additional 28 grams in excess of the threshold amount of 28 grams (total of 56 grams) was sufficient to support an upward departure but possession of 170 grams of cocaine, held the same district court of appeal in Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986), (142 grams over the threshold amount of 28 grams) was not sufficient to uphold an upward departure in the sentence, even though it was only 30 grams less than the next higher threshold. Yet in this case the state is urging this Court to uphold a departure based on 7 grams more than the threshold amount, contending that it "...far exceeds the threshold amount necessary to obtain a conviction for trafficking in more than 28 grams of cocaine..." (PB 7, emp. sup.).

Petitioner's reference to respondent's jury verdict in the case sub judice as "mysterious" is similar to the trial judge's description of a jury verdict of guilty of aggravated battery in a first degree murder case as "illogical", and is clearly an improper reason for aggravating any sentence: Pendleton v. State, 493 So.2d 1111, 1113 (Fla. 1st DCA 1986).

In fact, this Court reviewed an upward departure for an armed burglary conviction based on two murder charges which had been dismissed and had this to say:

> "...consideration of the murders in sentencing for the armed burglary would result in an egregious violation of due

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> process because the defendant has already been acquitted of the murders." State v. Tyner, 506 So.2d 405, 406 (Fla. 1987)

What petitioner is urging this Court to do is to allow sentences based on what a person is charged with, as opposed to what a person is convicted for. That was the erroneous reasoning of the trial judge in Dixon v. State, 492 So.2d 410 (Fla. 5th DCA 1986) who aggravated the defendant's sentence because, notwithstanding his conviction on 10 counts of theft, he had been charged with 48 counts and this may not be done held the Fifth District Court of Appeal:

> "Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained. Fla.R.Crim.P. 3.701(d)(11)" (p. 412)

Even more on point are a number of drug cases wherein the defendants were charged with trafficking offenses but the jury verdicts were for lesser included non-trafficking offenses and in all cases the departure sentences were reversed:

> Woods v. State, 12 F.L.W. 1791 (5th DCA 7/31/87), Defendant convicted of possession of cocaine (evidence showed 95 grams of cocaine).
>
> Garcia v. State, 504 So.2d 494 (Fla. 3rd DCA 1987), Defendant convicted of possession of cocaine (evidence showed over 400 grams of cocaine).
>
> Vicnair v. State, 501 So.2d 755 (Fla. 5th 1987), Defendant convicted of possession of cocaine (evidence showed 985 grams of

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cocaine).

Just as it is improper to thwart the benefit to the defendant of a jury verdict, it is improper to thwart a defendant's benefit from a plea bargain. In Brown v. State, 487 So.2d 1158 (Fla. 5th DCA 1986), the defendant was charged with sale of cocaine and possession of cocaine (two counts) and pursuant to a plea bargain, he pleaded guilty to the possession count and the state dismissed the sale count. When the trial court aggravated the defendant's sentence because of his involvement in a "...drug selling operation as opposed to simple possession", the district court of appeal reversed, holding, in part:

> "It is unfair for appellant to be punished for an offense which was dismissed." (p. 1159)

Petitioner uses the same tactic in this appeal in trying to uphold respondent's sentence by rationalizing that the sentence of four years imprisonment was imposed "...in a deliberate effort to equate respondent's punishment as closely as possible to a defendant guilty of selling more than 28 grams of cocaine." (PB 12). Just as it was in the Brown case, it is improper and unfair to punish respondent for an offense of which he was acquitted.

The only way to bring some degree of certainty and similarity to the sentences imposed by the trial judges of this State and at the same time to "...eliminate unwarranted

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variation in the sentencing process by reducing the subjectivity in interpreting specific offense - and offender - related criteria..."[2] is by prohibiting departures in drug cases based solely on the amount of the drug.

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[2] Statement of purpose, Fla.R.Crim.P. 3.701(b)

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ARGUMENT

CERTIFIED ISSUE II

HAS THE REQUIREMENT, ENUNCIATED IN TOLLETT V. STATE, 272 So.2d 490 (Fla. 1973), THAT CONSENT TO THE TAPING OF A CONVERSATION MUST BE ESTABLISHED BY THE TESTIMONY OF THE PERSON WHO CONSENTED, BEEN SUPERSEDED BY THE 1982 AMENDMENT TO ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION AND UNITED STATES SUPREME COURT DECISIONS CONSTRUING THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION?

Over objection, the trial court permitted the jury to hear tape recordings of two telephone conversations - the initial contacts - between respondent and a non-testifying informer (TR 37, 38, 41). As argued to the trial court (TR 25, et seq.) the non-testifying informer must take the witness stand and testify as to his consent as a necessary predicate to the admissibility of the tape recordings. This is even more of a requirement when, as here, the identity of the informer was not disclosed at pre-trial deposition (TR 196, 197). At trial, the police officer disclosed the name of the confidential informer (TR 21) however he did not know where the informer was at the time of the trial (TR 23).

This issue was first considered by this Court in Tollett v. State, 272 So.2d 490 (Fla. 1973) wherein this Court discussed the privacy safeguards of Section 934.(4), Fla. Stat.:

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> "It is our view that this language should not be interpreted to obviate the necessity of a police officer securing a warrant, unless one of the parties has given consent which must be shown through proper testimony - not hearsay." (p. 494)

This Court then fashioned the rule that the participant to a recording must testify as to his consent and, if not:

> "...it eliminates an accused's opportunity to cross-examine the alleged informant and opens the door for admission of an alleged participant in a communication who is not produced as a witness. Generally, it furthers the invasion of privacy by the police, encourages wire-tapping, entrapment and manufactured evidence." (p. 495; emp. sup.)

This Court should bear in mind that respondent's defense in the trial court was entrapment and it was accepted by the jury, at least to the trafficking charge.

Since Tollett, Section 934.03(2)(d), Fla. Stat. (1973), has been amended, however the principle survives:

> "Tollett v. State...construed this statute and Article I, S. 12 of the Florida Constitution to permit the introduction into evidence of an intercepted communication where (1) one party consented to the intercept and (2) the consenting party testified at trial that consent had been given. The first holding in Tollett has been modified by amendment to the statute; the second remains viable." Chiarenza v. State, 406 So.2d 66 (Fla. 4th DCA 1981), pet. for rev. den., 413 So.2d 875 (Fla. 1982)

Petitioner recognizes the requirement from Tollett but contends it was abrogated by the recent amendment to

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Article I, Section 12 of the Florida Constitution adopting federal standards and points to the decision of the United States Supreme Court in United States v. White, 91 S.Ct. 1122 (1971) as requiring a different result today. The First District Court of Appeal rejected that argument in its holding below, noting:

> "In Tollett the Florida Supreme Court considered, and rejected, the argument that the plurality holding in White was controlling. First, noting that Article I, Section 12, expressly protects against 'the unreasonable interception of private communications by any means,' whereas the federal constitution contains no such explicit provision, the court concluded that 'In Florida, at least, the protection of privacy in the area of communications is constitutionally mandated in express language. This court is not at liberty to relax this protection afforded by the state constitution.' 272 So.2d at 493. The court also discussed Section 934.01(4), Florida Statutes which serves to further implement the quoted constitutional right....The court then held that the 'consent' required by the statute 'must be shown through proper testimony - not hearsay'....The supreme court's decision in Tollett appears to be based on its interpretation of the constitution, its construction of Chapter 934, and on general rules of evidence. There is no acceptable basis for concluding that Tollett is a purely constitutional decision which was superceded by the 1982 amendment to the Florida Constitution. That amendment did not require that Florida general rules of evidence be construed in accordance with decisions of the United States Supreme Court, nor did it prevent our supreme court from setting evidentiary requirements for proof of consent under Chapter 934, Florida Statutes." Welker v. State, 504 So.2d 802, 806 (Fla. 1st DCA 1987)

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Even if the Tollett decision was based on a constitutional rationale, the First District Court of Appeal pointed out that the Supreme Court's decision in White, supra, would not establish a binding rule for the courts of this State to follow because only four justices joined the plurality opinion in White (at p. 806) and that is not a sufficiently definitive decision to overrule a contrary Florida Supreme Court decision (at p. 807).

Judge Smith, in a specially concurring opinion, sees no conflict between the Tollett requirement and the application of the principle from United States v. White, supra, under the recent amendment to the Florida Constitution, because that amendment:

> "...specifies only one condition under which the evidence shall not be admissible, i.e., if it would be inadmissible under decisions of the United States Supreme Court. It does not preclude the application of other reasons for inadmissibility, such as nonconformity with rules of evidence or procedures established by the court to effectuate the uses and purposes of statutory provisions." (p. 808)

It is clear that the United States Supreme Court left the door open for non-constitutional barriers to the admission of tape recordings in the absence of the informer:

> "[The informer's] unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance, but they do not

> appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights." (White, p. 1127)

In other words, as Judge Smith rationalized below, even if White applies by virtue of the recent amendment to the Florida Constitution, it "...does not purport to ordain a carte blanche rule of admissibility for all evidence proffered in the trial of criminal cases, regardless of all other considerations." (p. 808). Granted that if the decision of this Court is bound by the application of United States v. White, supra, even so it would not prohibit the evidentiary requirement fashioned by this Court in Tollett, supra.

Because it was tucked away in a footnote in the White opinion petitioner has overlooked - and perhaps even the First District Court of Appeal below - the following language which should be dispositive of petitioner's contention that White dictates a different result:

> "White argues that Jackson, though admittedly 'cognizant' of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so. Similarly, we do not consider White's claim that the Government's actions violated state law." United States v. White, supra, at fn. 1.

The issue in White was not whether or not a tape recording of a conversation between a non-testifying witness

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and the defendant could be admitted into evidence at trial without the non-testifying witness testifying as to his consent but rather, could the tape recording itself be introduced without the non-testifying witness. In other words, there was no consideration, constitutional or otherwise, as to the consent issue. At the trial, the objection to the introduction of the tape recordings was based on the contention that they violated the Fourth and Fifth Amendments to the federal constitution - not a statute specifically dealing with the subject - and the issue considered by the Seventh Circuit Court of Appeals was as follows:

> "The central issue presented is whether defendant White's fourth amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when the Government narcotics agents electronically intercepted his private conversations." United States v. White, 405 F.2d 838, 842 (7th Cir. 1969)

It is therefore abundantly clear that the principle of law fashioned by this Court in Tollett v. State, supra, is controlling and should not be revisited because, as petitioner contends, membership of this Court has since changed:

> "In the construction of statutes, the rule is almost invariably to adhere to the doctrine of stare decisis, since it is of the utmost importance that the statutory law be of certain meaning and fixed interpretation. It has been said that a court of highest resort

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> will not overrule one of its prior decisions construing a statute where the legislature has held several sessions since such decision without modifying or amending the statute, as it may properly be claimed that the legislature has acquiesced in the decision. A decision construing a statute becomes almost a rule of property, and should be followed by the courts, leaving any possible change therein to legislative action." 13 Fla.Jur.2nd, Courts and Judges, Section 140, p. 265

The construction of this statute by this Court has been consistent and clear:

> "The history and recent amendments to chapter 934 demonstrate that the act was intended to afford broad protection to private communications." State v. Tsavaris, 394 So.2d 418, 422 (Fla. 1981)

There is not now any reason to take away any of the protections afforded by that statute to private communications by overruling Tollett v. State, supra.

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CONCLUSION

As to Certified Issue #1, respondent respectfully urges this Court to approve the decision of the First District Court of Appeal below and, further, to prohibit departures in drug cases which are based solely on the amount of the drug.

As to Certified Issue #2, respondent respectfully urges this Court to again approve the decision of the First District Court of Appeal and to reaffirm the requirement fashioned by this Court in Tollett v. State, supra.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John M. Koenig, Esq., Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050 by regular U.S. Mail on this the 13th day of August, 1987.

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