IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL FLOURNOY, Petitioner,	)	
vs.	)	CASE NO. 70,713
STATE OF FLORIDA, Respondent.	)	FIRST DISTRICT COURT OF APPEAL NO. BI-269

ON APPEAL FROM THE FIRST DISTRICT
COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The Petitioner was arrested on April 23, 1985, after the execution of a search warrant on a dwelling (R.1). On May 13, 1985, a two count information was filed charging trafficking in heroin and possession of cocaine (R.10). On May 23, 1985, a Motion to Compel Identity of the confidential informant was filed (R.27). On May 29, 1985, the Court refused to grant an evidentiary hearing and denied the Motion (R.60). On June 21, 1985, an Amended Motion to Compel Identity of the confidential informant was filed with attachments (R.70-82). On June 26, 1985, a Motion for Disclosure of the informant's whereabouts was filed (R.88). An Order was entered denying both motions on June 26, 1985 (R. 89,90).

On July 30, 1985, a Motion to Suppress oral statements of the Petitioner was filed (R.99). A Motion in Limine to exclude reference to firearms found during the search was filed on August 2, 1985 (R.101). A second Amended Motion to Compel Identity of the Confidential Informant was filed on August 2, 1985 (R. 102-123). An Order was entered denying both Motions on August 5, 1985, (R. 124,125).

The case proceeded to trial on August 8, 1985, through August 9, 1985. On August 8, 1985, an Order was entered denying the Motion to Suppress oral statements (R. 135). A jury verdict was returned on August 9, 1985. As to count one, the Petitioner was found guilty of the lesser included offense of attempted trafficking. As to count two, the Petitioner was found guilty of possession of cocaine (R. 142,143).

On August 14, 1985, a Motion for New Trial was filed (R. 144). An Order denying the Motion for New Trial was entered on August 27,

1985 (R. 148). The Court sentenced the Petitioner to ten years on count one and five years on count two to run concurrently on August 27, 1985, as well as entered a statement for reasons for departure from the guideline recommended sentence of zero to twelve months (R. 151). The Petitioner was adjudged insolvent for costs on Appeal and a Notice of Appeal was filed on August 29, 1985 (R. 163).

An appeal to the First District Court of Appeals followed. The District Court in an en banc opinion affirmed the convictions but reversed the sentence. Finding the trial court had relied on both valid and invalid reasons for departure and certified the following question:

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

On June 15, 1987 the Petitioner filed a Notice to Invoke Discretionary Jurisdiction. This Court accepted jurisdiction and this brief on the merits follows.

STATEMENT OF THE FACTS

On April 23, 1985, at approximately 2:45 p.m., T.D. Bean, a vice officer with the Jacksonville Sheriff's Office and other officers executed a search warrant at 1571 West 32nd Street, Jacksonville, Florida (T. 164). Detective Bean and Detective E.W. McNeal approached the front door of the duplex structure with a crowbar, their intent being to pry the door open, if no answer were received (T. 165). Detective Bean knocked and indicated "Police, we have a search warrant. Open the door" (T. 165). Upon receiving no response, he began to pry the door open, when he observed two black females and a black male run out of the bedroom towards the rear of the apartment (T. 165) The two black females stopped in the kitchen area and the black male proceeded out the back door (T. 166). When Detective Bean entered the backyard, he saw the black male standing with his hands in his pockets (T. 167). Detective Bean and three other detectives then escorted the Petitioner back into the apartment. At this time, Detective Bean observed two or three people doing some type of construction work (T. 168).

Detective Bean then asked the Petitioner if he lived there, allegedly for purposes of reading the search warrant (T. 169). The Petitioner allegedly replied "yes". At the time, the suspect was detained, Detectives D.P. Smith, W.J. Mooneyham and Wayne McNeal were present (T. 170). Detective McNeal had a crowbar in his hand (T. 170). Detectives Smith and Mooneyham may have had their weapons drawn (T. 171). The Petitioner was physically restrained and transported inside (T. 171). The Petitioner was not free to leave and could not have walked off or left (T. 171). At the time Detective

Bean executed the warrant, he was looking for an unknown black male, and according to his testimony, the Petitioner was the only black male present (T. 171). At the time of his seizure by Detective Bean, he was considered a suspect by Detective Bean and would not have been allowed to leave until the apartment was searched (T. 172). He was physically escorted by Detective Bean back through the kitchen, down the hallway, and into the living room (T. 172). While in the living room, he was asked whether he lived there and his response was to Detective Bean's question and was not volunteered (T. 172). Detective Bean testified that he considered the fact that a person who lived in a residence, and drugs were found there, to be a circumstance indicating guilt (T. 173). He indicated that an affirmative response to his question regarding residency would have been probable cause for arrest (T. 173). No effort was made to advise the Petitioner of his rights prior to questioning (T. 173). Other detectives were in the immediate vicinity (T. 173). Over the Petitioner's objection, the statement was introduced to the jury (T. 178).

During the execution of the search warrant, Detective Bean observed a white powder along with several straws on a nightstand (T. 181). He testified the straws are commonly used to inhale drugs (T. 183). A 30.06 rifle was found on the bed along with a tan suitcase (T. 184). The suitcase was opened and an airline ticket with the name Flournoy, cash, and twenty-two packets of heroin were found inside a gray attached case contained in the suitcase (T. 185). The airline tickets were on top of the attache case (T. 185). A second ticket bearing the name of Harry Lewis and two boarding passes

were found. Ironically, the Detective had overlooked Harry Lewis's tickets at the initial search and only discovered them the day before he testified (T. 186). The boarding passes were dated and indicated that Mr. Flournoy and Harry Lewis had seats beside one another (T. 186). The attache case was closed (T. 186). A .38 caliber revolver was found behind a bedroom dresser (T. 187). The living room was searched and a burgundy totebag containing a .25 caliber baretta was found (T. 187). Detective Bean advised the Petitioner he was under arrest for possession of heroin and cocaine and asked him if the burgundy totebag was his to which he replied "It's mine" (T. 188). Detective Bean allegedly said, "We have found a tan suitcase, a gray briefcase, and an airline ticket", and Mr. Flournoy allegedly replied, "It's mine" (T. 189). Exhibits 1-11 were then introduced through Detective Bean.

On cross examination, Detective Bean stated he had been with the vice squad for six months (T. 210). Detective Bean had been to the residence twice before the execution of the warrant, and had not seen anyone in the residence (T. 211). No surveillance was done prior to service of the warrant (T. 211). No check of court records, with neighbors or anyone else was attempted to determine who owned the property (T. 211).

The search warrant did not bear the Defendant's name, but was for a single unknown black male (T. 212). Detective McRoy, a very large in statute detective, accompanied Detective Bean to the front door initially (T. 213). Four or five unmarked vehicles arrived at the residence (T. 213). No photographs were ever taken at the residence (T. 214). Detectives Strother, Smith and Mooneyham had initially

gone to the back door simultaneously, with Detective Bean's approach to the front door (T. 215). Detective Bean had approached the front door, announced "Police Officer", and ran through the house after prying the door off. According to him, he accomplished all of this in the same time the other officers were able to walk straight back (T. 217). Detective Bean did not question the two or three other persons in the backyard (T. 218). Detective Bean never questioned one of the black females, Cassandra Gillespie, as to whether she lived at that address (T. 221). He had lost or misplaced or failed to save the burgundy totebag (T. 222). In a previous deposition, he had indicated the bag had been seized and was in the property room (T. 223,224).

An inventory of the search warrant was introduced, and did not reflect the airline ticket bearing the name of Harry Lewis (T. 229). The inventory reflected three straws, though four straws were introduced into evidence (T. 229). Detective Bean who seized all the evidence as the lead detective did not remember seeing a Florida driver's license with Harry Lewis's name on it, though he indicated he would have seized it had it been there (T. 230). Cassandra Gillespie's driver's license and a work I.D. were seized from her purse located in the bedroom where the drugs were found (T. 230,231). One piece of identification was taken from the Petitioner (T. 231). The inventory listed four personal identifications, though only three were accounted for by Detective Bean (T. 231). The Petitioner's used airline ticket was on top of the closed briefcase (T. 233). Detective Bean never saw anyone in possession of the cocaine (T. 234). When the three persons allegedly exited the bedroom, they

came out together (T. 234). Men and women's clothing was in the bedroom (T. 234). No evidence technician was ever called because according to Detective Bean, his supervisor, Sgt. Phillips, declined to do so. Sgt. Phillips never testified at trial (T. 236). He recalled the bedroom having a closet area (T. 239). None of the clothing or other personal items in the bedroom was seized or photographed (T. 239). A piece of identification located on the handle of the suitcase was unknown to the detective (T. 240). Detective Bean indicated that he was meticulous in his efforts not to contaminate the evidence with his fingerprints, etc. (T. 242). He never requested that the evidence be processed for fingerprints at the Crime Lab (T. 243). He never interviewed the women to determine if either one lived there, though he considered this important (T. 243). The bedroom where the drugs were found appeared to be shared by a male and a female. Cassandra Gillespie had initially been charged with trafficking in heroin (T. 244). Her identification was found in the room where the drugs were located. Women's clothing was in the room. She was seen exiting the bedroom. In Detective Bean's opinion, however, it was a mistake to charge her with trafficking (T. 245). When the Petitioner allegedly made the statement to Detective Bean, detectives Smith, McRoy, Mooneyham, and Strother were present (T. 247). He never asked the Petitioner if the drugs were his. He never asked him if the briefcase was his. He never asked him if the airline ticket was his (T. 248). The Petitioner's ambiguous statement to the detective "It's mine" was not considered that significant (T. 249). The statement was never reduced to writing, and does not appear in the arrest and booking report

(T.249,256). The Petitioner interrupted Detective Bean several times as the search warrant was being read to indicate that he did not know what was happening, and had no idea what the Detective was doing (T. 257). The Petitioner was never seen in possession of the contents of the bag (T. 257). The suitcase's contents were not visible until it was opened (T. 258). In a deposition, Detective Bean had indicated that he mentioned the suitcase, briefcase, airline ticket and burgundy totebag in the same conversation, and received the answer "It's mine" (T. 259). Detective Bean said that he advised the Petitioner he was under arrest, and "we had found a tan suitcase, a gray briefcase, and an airline ticket with his name on it" The Petitioner replied "It's mine" (T. 261).

Detective E.W. McNeal participated in the execution of the warrant. After approaching the door, he testified he saw the black male exit the bedroom followed by two females (T. 266). He broke the door down, and pursued him into the backyard through the house, and saw three detectives seizing the Petitioner (T. 267). The search warrant was read to all three persons (T. 268). Detective McNeal testified he saw money, powder, and an airline ticket inside the briefcase (T. 269). Detective McNeal recalls seeing three men outside working (T. 271). A Florida driver's license in the name of Lewis was found in the bedroom where the drugs were located (T. 274). This Lewis was an older black male (T. 274). He overheard Cassandra Gillespie say she was living there and it was her purse in the bedroom. She also indicated the clothing in the bedroom was hers (T. 274). He stated Lewis's driver's license should have been seized

(T. 275). The item that appeared to be an airline ticket was located in the briefcase as opposed to the suitcase (T. 276).

Al Marinari, the chemist, testified the weight of the heroin was approximately 13 grams (T. 285,286). The material found on the tray was cocaine (T. 290).

The Defendant presented pursuant to stipulation Exhibit A through C. These consisted of a letter from the Jacksonville Electric Authority, documents from Area Cablevision, and documents from Southern Bell, indicating that the purported owner of the premises where the search was executed was one Harry Lewis.

Freddie Goins, a laborer with Elbert Moment Construction Company, testified he was working at the residence on the date the warrant was executed (T. 315). He was working when individuals with guns drawn came up and said they were police officers, and to freeze "suckers" (T. 315). He was laying a stoop on a back porch of the residence when the officers came up. He and Mr. Moment and a black male named Harry were outside (T. 316). Harry was getting ready to do some plastering work on a back apartment (T. 316). He assumed Harry owned the apartment where the search occurred (T. 316). Harry was fifteen to twenty feet from him. He was described as an older person with grayish hair (T. 317). He was shown a photo of Harry Lewis, and said it looked like him (T. 318). Three white officers came around back (T. 326). A black officer came through the house (T. 326). The actions of the officers scared Mr. Goins (T. 326). He and Mr. Moment were asked to go inside the apartment (T. 327). The officers were not readily recognized as officers (T. 326). The Petitioner was taken inside and a larger black officer was punching

him in the ribs while inside (T. 327). Mike, who was identified as the Petitioner, Michael Flournoy, had been in the backyard for thirty to forty minutes standing ten to fifteen feet away from Mr. Goins(T. 328). He had observed two females in the apartment earlier and had seen the slender one there before (T. 330). They were cooking "chili" (chittlings) (T. 330). Mike was outside when the police arrived (T. 33). He had never seen Mike inside the apartment (T. 33). He had seen Harry come out of the apartment a couple of times (T. 331). One of the police officers asked him who Harry was (T. 332). Harry left the area after the officers arrived (T. 333). He left ten to fifteen minutes later (T. 333). He has been convicted of a felony once (T. 334).

Elbert Moment testified he was self-employed in home repair (T. 339). He had been hired to do the work at the West 32nd Street address by Harry Lewis (T. 339). Harry was described by him (T. 340). He stated the officers came around the corner where he and Freddie Goins were working with pistols drawn and frightened them, telling them to freeze (T. 341). He identified the Petitioner as a man who was present approximately fifteen feet away on a sidewalk by the rear apartment (T. 342). He indicated Mr. Flournoy had been outside ten to fifteen minutes talking to them (T. 343). He had never seen him inside the residence where he was taken by the police (T. 343). He observed two females inside cooking at the time (T. 344). Harry disappeared when the police arrived (T. 344). He heard Freddie say the police were whipping Mr. Flournoy and when he went to look, one of the officers dissuaded him (T. 345). The officers came out and asked who Harry was (T. 345). Harry was the owner of the property

(T. 345). He identified Harry Lewis's photo (T. 346). He recollects four officers coming around the corner of the building and one at the back door (T. 348). He testified Harry Lewis was outside ten to fifteen minutes before the police arrived (T. 349).

Detective Bean on rebuttal testified he did not see Detective McRoy strike the Petitioner (T. 438). Detective McNeal also testified to this fact (T. 441). He was not continually in the Petitioner's presence (T. 441). Detective McRoy stated that he was a former football player at Florida A & M. He said he did not strike the Petitioner (T. 445).

Sarah Lewis testified she lived at 1563 West 32nd Street, and was married to Harry Lewis, Sr. (T. 352). She lives next door to the duplex (T. 353). Harry Lewis, Jr. owns the duplex (T. 353). Harry is in his sixties, with grayish hair (T. 354). On the date of the search, she watching television when she heard a commotion and looked outside to see two men holding the Petitioner by the arms and one had a gun to his head (T. 354). The Petitioner was staying at 1563 West 32nd Street with her and her ill husband (T. 355,356). She herself is not in good physical condition, and could not control her husband who is prone to fits of anger and inappropriate behavior (T. 356,357). The Petitioner was staying in the middle bedroom and had brought a green bag with his clothes in it when he arrived (T. 357). When he was released from jail, he came back and got the bag (T. 358). The Petitioner was in Jacksonville at her request (T. 359). The Petitioner had not been seen by her inside the residence next door (T. 360). He son Harry had a girlfriend, Sandy, who lived next door (T. 360). She was sure Harry Lewis, Jr. was in the house

next door because it was his house (T. 361). Harry may have been staying next door on April 23, 1985, and may have been in the yard (T. 361, 362). The Petitioner is considered a grandson by her and calls Harry Lewis, Jr., pappa (T. 363). The Petitioner and Harry live in New York (T. 363). The Petitioner had been down a week before his latest arrival and had been called back down by her (T. 364).

Deloris Jenkins testified and she was Harry Lewis's sister (T. 369). She said Harry lived in Brooklyn, New York (T. 370). She knew the Petitioner and he had a wife and son (T. 371). She knew Cassandra Gillespie was Harry's girlfriend, and that she was living at 1571 West 32nd Street, and that her brother, Harry, would stay there when he was in town (T. 371). She spoke with Harry after April 23, 1985, and at his request, went to the apartment and removed some of Harry's belongings (T. 372). She discovered his belongings in the bedroom (T. 372). She saw her brother's sweatsuit, trousers, jeans and some women's clothing and shoes in the room (T. 373). She removed his clothes and some identification she found on the floor, which consisted of a brown wallet, his New York driver's license, credit cards, some papers and notes(T. 374). Missing was Harry's Florida driver's license (T. 374). Cassandra Gillespie was still living in the apartment at the day of the trial (T. 375). She saw the Petitioner the day he was released from jail with his pant's pocket torn and a small bruise which he indicated the police had inflicted (T. 375). She said her father was very senile, and that she and her mother were incapable of caring for him (T. 375). She indicated that Harry Lewis weighed between 270 and 290 lbs., and he is a much bigger man than the Petitioner and they do not wear the same clothing (T. 376).

The State stipulated to a photograph of Harry Lewis, Jr., which was taken in 1972 (T. 390). A further stipulation that a quit claim deed to Harry Lewis, Jr., was entered on January 27, 1985, as to the property located at 1571 West 32nd Street.

John Wilson, a fingerprint expert with the Florida Department of Law Enforcement, processed the briefcase, the suitcase, and assorted papers for prints (T. 401). Two latent fingerprints were developed on the briefcase. A latent fingerprint and a latent palmprint were developed on one of the cases that was in the briefcase, and a latent fingerprint was developed on a portion of an airline ticket (T. 402). He compared the prints to Harry Lewis's and the Petitoner's, and there was no match (T. 403).

Linda Hart, a questioned documents expert, testified that she examined a piece of paper found in the identification they attached to the suitcase containing the drugs and other articles and compared it to known samples of the Petitioner's handwriting, and concluded that it was not the Petitioner's handwriting (T. 430).

SUMMARY OF ARGUMENT

The trial court exceeded the sentencing guidelines tenfold without any lawful basis. The Petitioner was convicted of attempted trafficking, yet the court indicated one of the reasons for departure being the quantity of drugs possessed, a factor for which the jury acquitted the Petitioner. The last reason given was two convictions of over ten years ago which were not scored against the Petitioner and bear no similarity to the instant offenses of convictions and should not serve as a basis of departure and if they do then the departure was clearly excessive.

The trial court improperly instructed the jury on flight and read the circumstantial evidence instructions improperly.

The court failed to give the defense's requested instructions on knowledge of the nature of the contraband in spite of the fact that this is an essential element of proof of the trafficking and possession charges.

The trial court improperly allowed Detective T.D. Bean to testify that the Petitioner stated that he lived in the residence where the drugs, which formed the basis of the charges against the Petitioner, were located. Miranda warnings should have been administered prior to questioning.

The evidence presented against the Petitioner was insufficient to sustain a conviction. The facts demonstrated joint occupancy of the residence where the heroin was discovered secreted in a briefcase within a suitcase. The evidence was not inconsistent with innocence and a reasonable jury could not have so concluded.

.he trial court committed error in denying the Petitioner's first motion and two amended motions to compel identity of the confidential informant. This was done without an evidentiary or an in camera hearing. The Petitioner made a sufficient showing as to entitlement to the identity of the confidential informant or at least to an entitlement to an in camera hearing. The Petitioner demonstrated that the identity of the confidential informant was relevant and was helpful and essential to his defense.

The trial court erroneously referred to the fact that a Defendant might testify when the Defendant did not testify. The court also commented on the credibility of police officers and arrests and failed to remove for cause a former probation officer whose husband is presently employed as a detective with the Jacksonville Sheriff's Office who indicated she would probably believe a police officer's testimony more readily than another witness.

The trial court erroneously allowed the State to introduce evidence of the discovery of a rifle and two pistols none of which were charged against the Petitioner's nor were identified as belonging to the Petitioner.

The prosecutor in his closing argument expressed his personal opinion as to the magnitude of the State's case and in so doing deprived the Petitioner of a fair trial.

POINT I

THE TRIAL COURT ERRED IN EXCEEDING THE SENTENCING GUIDELINES

As to the certified question the Petitioner would respectfully submit that it should be answered in the negative. Prior to addressing the certified question, the Petitioner would submit that the decision of the District Court of Appeal has misapprehended the facts of the instant case. The trial court stated, "Defendant's possession of 12.5 grams of heroin is a clear and convincing reason for departing from the guidelines recommendation." (R. 158). The Petitioner was not convicted of trafficking in the instant case but of the lesser included offense of attempted trafficking in heroin. The jury, by their verdict, specifically found that the Petitioner did not possess the heroin but arguably was attempting to possess the heroin. The Petitioner was charged with trafficking or possession of the heroin but was acquitted of trafficking in that particular quantity of drugs. Petitioner would submit that the reasoning of Judge Zehmer in his dissenting opinion that "when the Defendant is either acquitted or not charged with a more serious offense which could be supported by the quantity of drugs allegedly possessed or sold, the use of quantity as a reason to depart from the guidelines is tantamount to sentencing the Defendant for an offense regarding which the State has not obtained a conviction, contrary to Florida Rule of Criminal Procedure 3.701(d)(11) (reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained"). Banzo v. State, 464 So. 2d 620 (Fla. 2DCA, 1985), failed to uphold departure based upon the Defendant's alleged possession or delivery of 1000 grams of cocaine

and found this was not a proper basis for departure from the recommended guidelines sentence. The Second District Court of Appeals reasoned that the Defendant in that case was never charged with trafficking in cocaine in excess of 400 grams nor was he charged with delivery of 1000 grams of cocaine. The court found that the trial court improperly considered crimes for which no convictions were obtained. The same rationale was used in Scurry v. State, 489 So. 2d 25 (Fla. 1986). After a conviction for second degree murder the trial court exceeded the guidelines reasoning that the offense was committed in a calculated manner without pretense of moral, legal justification, or provacation. The First District Court of Appeals held and this Court agreed that this reason was impermissible due to the fact that the Defendant was convicted of a lesser offense of second degree murder and the jury obviously did not feel the crime was committed with the necessary premeditation and calculation to sustain a conviction of first degree murder Id at 781. As in Scurry, the trial judge in the instant case improperly usurped the jury's function when in fact the jury rejected the allegations the Appellant possessed 12.5 grams of heroin. As such this reason for departure is impermissible.

The rationale for finding that a quantity of drugs is a basis for departure is inappropriate in that to so find would lead to a great deal of confusion and the consistency and uniformity sought by the guidelines would be obviated.

On the category 6 sentencing guidelines scoresheet, a defendant who possessess less than four grams of heroin receives 42 points, for the third degree felony as the primary offense. This translates

into any non-state prison sanction as the presumptively-correct disposition. But a defendant who traffics in between four and fourteen grams commits a first degree felony, with a corresponding point assessment of 137, which calls for a 3½ - 4½ year sentence. Such a defendant must also receive at least a three year mandatory minimum. If the defendant traffics in between 14 and 28 grams, his point total and recommended sentence remain the same, but his mandatory minimum 10 year sentence takes precedence over his 3½ - 4½ year range. Florida Rule of Criminal Procedure 3.701(d)(9). If he traffics in more than 28 grams of heroin, his point total and recommended sentence remain the same, but his 25 year mandatory minimum sentence takes precedence over his 3½ - 4½ year range. Id. Thus, the legislature and this Court, through the guidelines rule, have mandated that anyone who traffics in more than four grams of heroin must go to prison, for at least 3½ years.

Since the legislature classified trafficking as a first degree felony, automatically requiring some prison time, including some mandatory minimum time, a defendant who commits the trafficking crime solely because he possesses more than four grams of heroin is already being punished for the amount of heroin involved. To use the quantity of drugs to punish him again by allowing a departure from the recommended guidelines range, which already calls for prison time, constitutes a violation of Hendrix v. State, 475 So. 2d 1218 (Fla. 1985) and State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986).

An "inherent component" of trafficking is the quantity of drugs. Without the threshold amount, the crime is only possession and only a second degree felony. A "factor already taken into account" in

the scoresheet is the elevation of the crime from a third degree to a first degree felony, an increase of 22 points, which automatically takes the disposition out of the non-state prison cell and into the mandatory state prison range. Thus, the lower tribunal was totally incorrect in refusing to find a Hendrix or Mischler violation.

If the legislature chooses not to distinguish among quantities more narrowly than the 4-14 grams, 14-28 grams, or over 28 grams rnages, the judiciary may not draw distinctions which the legislature has not chosen to.

There is nothing to prevent the legislature or this Court from drawing finer distinctions among quantities of heroin. They could, for example, include extra points on the scoresheet based on quantity -- such as no extra points for the 4-14 gram range, x additional points for 14-28 grams, xx additional points for more than 28 grams. The legislature, the Sentencing Guidelines Commission, nor this court has done this; trial or appellate judges may not do it for them.

Allowing an amount inherent in the offense to be a reason to depart opens the door for departures based on quantity/amount in other statutes containing such ranges. The most common would probably be the grand theft statute, which covers amounts ranging from $300.00 to $20,000 and from $20,000 upward. Section 812.014(2)(a), 2(b)1, Florida Statutes, as amended by Ch. 86-161, Laws of Florida. Logically, there is a distinction between stealing $301 and stealing $19,999. But legally, the statute does not make this distinction. Using the quantity of drugs as analogy, any time a defendant stole $3,000, or ten times the minimum, there would be a reason to depart. The grand theft statute has not bee so construed. Dawkins v. State,

479 So. 2d 818 (Fla. 2d DCA 1985) and Knowlton v. State, 466 So. 2d 278 (Fla. 4th DCA 1985).

These arguments point out the greatest pitfall of basing departure on quantity, which is simply that it is too subjective. The guidelines are supposed to be objective and lead to uniform sentences. How would a trial court decide the appropriate extent of departure for a quantity of heroin? Is it a one cell increase for ten grams, or a two cell increase for 20 grams, or a three cell increase for 30 grams?

The question would be what would serve as the cut-off point in determining whether there was a legitimate basis for departure. The question would then arise as to whether there should be a basis not only upon the quantity of drugs but upon the degree of purity of the drugs or the percentage of the drugs that were actually a controlled substance as opposed to a mixture. To allow quantity to serve as the basis for departure would be a literal opening of Pandora's box for both the courts and the litigants. To allow departure based upon the quantity of drugs is also to ignore the legislatively imposed minimum mandatories with the divisions being previously set by the legislature. Petitioner's position first and foremost is that he was not convicted of possession, therefore this case, on the facts, is inappropriate for consideration for departure. Secondly that the rationale for using the quantity of drugs as a basis for departure is inconsistent with the express purpose of the guidelines to promote consistency and uniformity. The last reason given for departure was the prior previous convictions for armed robbery in 1968 and 1971.

The lower court cited Weems vs. State, 469 So. 2d 128 (Fla. 1985) Weems committed hs eleventh burglary including the instant offense. Weems also had thirteen juvenile dispositions which were the equivalent of convictions had he been an adult.

In the instant case, the Petitioner's convictions occurred over fourteen years previously and were totally unrelated to the offenses of conviction in the case at bar.

The departure in the instant case is clearly excessive and an abuse of discretion and reviewable by this Court. Albritton vs. State, 476 So. 2d 158 (Fla. 1985).

POINT II

WHETHER THE TRIAL COURT ERRED IN THE JURY INSTRUCTIONS PRESENTED TO THE JURY

The Petitioner requested an instruction on knowledge that the substance allegedly possessed by the Petitioner was, in fact, heroin. Part of the instruction specifically requested "The statements proved beyond a reasonable doubt that the Defendant either had actual knowledge that the substance was heroin, or the state must prove incriminating statements and circumstances beyond a reasonable doubt to convince you that the Defendant knew the substance was heroin. The trial judge refused to give the special requested instruction (T. 463). State v. Antonio Dominguez, 12 F.L.W. 299 (June 19, 1987) affirmed a Fifth District Court of Appeals ruling reversing a conviction for failure to give the following jury instruction in reference to a trafficking in cocaine charge "The statements proved beyond and to the exclusion of every reasonable doubt that at the time of the transaction that the Defendant knew the substance was cocaine." The court further found the present standard jury instructions to be inadequate and amended those instructions to include Section 893.135(1)(c) Florida Statutes, the statutory provision under which the Defendant was charged with trafficking in heroin.

One of the main lines of the Petitioner's defense was a lack of knowledge of the controlled substance. An airline ticket bearing the Petitioner's name was found within a suitcase on top of a gray attache case which contained heroin (T 185). A viable defense was the lack of knowledge of the nature of the substance in the attache case in the event that the jury were to have believed that the

Petitioner's airline ticket was found in the suitcase along with the attache case. Had the jury been properly instructed, the Petitioner would have been able to argue that even knowledge that the attache case contained a powdery substance was not sufficient but that the State was required to prove that the Petitioner knew that the substance contained within the case was heroin as opposed as to any other controlled substance. The failure to give the requested instruction failed to completely and adequately inform the jury of the State's burden of proof. The trial judge did not properly and correctly charge the jury in the instant case as knowledge of the substance possessed, to wit: heroin was an essential element in which the trial court should have instructed the jury. There can be no doubt that the Petitioner was prejudiced in the instant case as the only real issue was his knowledge of the substance possessed. The State, in their concluding argument, stated of the three essential elements necessary for proof in trafficking "the only element you have is the first charge whether he knowingly possessed that substance" (T 469). Based upon this Court's decision in Dominguez reversal of the judgment and sentence and remand for a new trial is mandated because the trial court failed to adequately instruct the jury.

The trial court erred in the circumstantial evidence instruction. The Court referred to Page 41, of the 1st Edition of the Standard Jury Instructions in Criminal Cases setting forth an instruction on circumstantial evidence, and indicating that he had given his general feelings to counsel yesterday as to the validity of that particular charge (T. 455). The Court stated "I did not mean to indicate yesterday your entire case was circumstantial, there is a substantial

portion of it that is circumstantial. There is certainly a considerable amount of circumstantial evidence, such as plane tickets and mere presence and a number of other things" (T. 456). Counsel submitted to the Court the appropriate jury instruction excluding the word "equally" from the circumstantial evidence instruction, and the Court indicated that that was the same instruction the Court proposed (T. 463). The Court in giving the instruction to the jury indicated that circumstances are susceptible of two "equally" reasonable constructions, one indicating guilt, and the other innocence, you must accept that construction indicating innocence (T. 544). At the conclusion of the instructions, counsel voiced his objection to the instruction as given indicating that this was an reading of the circumstantial evidence instruction. The Court acknowledged that he had indicated to counsel that his instruction was the same when in fact, it was not (T. 555). The Court indicated that he apologized for the instruction that he gave and indicated to counsel that it was the same as that counsel was in possession of and then overruled the objection (T. 556).

Wilcox v. State, 258 So. 2d 298 (Fla. 2DCA 1972), addressed this issue and found it to be error to include the word "equally". In this instruction the Court in Wilcox stated, "The jury ought not to be told even by implication they may reject a reasonable hypothesis of innocence simply because it is not at least equally as strong as a reasonable hypothesis of guilt," Id at 300. While discussing the circumstantial evidence instruction at the charge conference, the trial court stated, "In cases where it is found and totally upon circumstantial evidence, I will give the circumstantial evidence."

The Court further indicated, "I don't feel that the standards cover it in a case solely based upon circumstantial evidence" (T 387). In suggesting that the instructions would be appropriate, the Court indicated to counsel that counsel could request it without doing it formally and he would refer to the standards in the prior edition of jury instructions (T386, 387). Counsel agreed that it would be appropriate and when the Court gave the erroneous instruction defense counsel objected. Counsel would submit that the instruction as given is not harmless error in the instant case, in that the Court had categorized the presented case as wholly circumstantial in nature. Therefore in the instant case, to suggest to the jury that unless a hypothesis of innocence was equally reasonable with one of guilt that it must be rejected, was misleading and erroneous and mandates reversal.

Counsel also objected to the instruction by the Court on flight (R. 140). The rule with respect to the flight instruction is as follows:

> When a suspected person in any manner endeavors to escape or evade a threatened prosecution, by flight, concealment, resistance to a lawful arrest or other ex post facto indication of a desire to evade prosecution, such fact may be shown in evidence as one of a series of circumstances from which guilt may be inferred. See Harrison v. State, cited at 104 So. 2d 391, and Proffitt v. State, cited at 315 So. 2d 461.

Counsel would submit that the facts in the instant case occurred at such a time that the Petitioner was not a suspect nor had he been formally accused of having committed a crime, nor were his actions, when standing alone, more consistent with guilt than with innocence.

POINT III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PETITIONER'S STATEMENT TO DETECTIVE BEAN IN EVIDENCE ABSENT MIRANDA WARNINGS

Detective T.D. Bean of the Jacksonville Sheriff's Office chased an allegedly fleeing Petitioner out of an apartment located at 1532 West 32nd Street, and grabbed him in the backyard of the apartment (T.167). Once Detective Bean seized and apprehended him, he was escorted back inside the apartment, "I had other detectives assist me, maybe three other detectives" (T. 168). One of the detectives, E.W. McNeal, had a crowbar in his hand, and the other two detectives, Smith and Mooneyham, may have had weapons drawn (T. 170, 171). According to Sandra Lewis, Elbert Moment, and Freddie Goins, three witnesses called by the Petitioner did have their weapons drawn.

The Petitioner was physically restrained by the officers and "told" to go back inside by Detective Bean (T.171). He was not free to leave and obviously would not have been allowed to leave, and according to the detective, when he tried to leave initially, he was detained and taken back inside. At the time he was seized, he was a suspect who would never have been released until the apartment was searched (T.172). He was told to go inside and was transported through the kitchen area, down the hallway, and to the front of the house by at least four officers (T. 172). There were officers at the scene. The Petitioner was asked by Detective Bean if he lived there, and in response to the queston he replied with an incriminatory response, "Yes". He was never advised of his Miranda rights prior to this questioning (T. 173).

Detective Bean testified that the fact that he "lived" there and the fact that drugs were found there was a circumstance indicating guilt (T. 173). Detective Bean stated that the admission that he lived there furnished him probable cause for the arrest (T. 173).

The Court allowed the statement into evidence over the Petitioner's objection and Motion for Mistrial on the mistaken and misguided theory that the officers had a duty to determine who the residents are at the premises prior to the actual execution of searching, pursuant to the search warrant" (T. 178).

The Court must initially determine if the Petitioner was in custody at the time statement was made. The First District Court of Appeals set forth the test for this determination in Williams v. State, 403 So. 2d 453 at page 455 as follows: "In determining "custody", the majority of courts have utilized an objective test, to wit: whether, under the circumstances, a reasonable person would have believed he was in custody." Being physically restrained by four officers, one with a crowbar in his hand and two with weapons drawn and being told to go inside and then "escorted inside the premises" without being told you are free to leave, and in fact not being free to leave, clearly would cause a reasonable person to believe he was in custody. The actions of the officers clearly conveyed this message and according to their testimony, the Petitioner's efforts to leave were clearly and forcefully rebuked.

A reasonable person under the circumstances would not have felt he was free to leave and break off police questioning, and according to Detective Bean, he was indeed not free to leave and would not have been allowed to leave.

The United States Supreme Court in the landmark case of Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966), established procedural safeguards and protection of an individual's privilege against self incrimination while in custody or deprived of his freedom in any significant way. The prosecution must demonstrate the use of such safeguards before it may introduce any statement stemming from custodial interrogation into evidence.

The United States Supreme Court in Orozco v. Texas, 394 US 324 22 L Ed 2d 311, 89 S Ct 1095, reversed a conviction based upon the admission of statements obtained in the absence of Miranda warnings. Four police officers questioned the Defendant at his apartment in reference to a homicide. The Supreme Court held that Miranda had iterated and reiterated the absolute necessity for officers interrogating people "incustody" to give the described warnings. According to one of the officers, the Petitioner was under arrest and not free to leave when questioned. The Court referred to the language of the Miranda opinions that the warnings were required when the person being interrogated was "in custody" at the station or otherwise deprived of his freedom of action in any significant way. 384 US at 477, 16 L Ed 2d Ct 725, 86 S Ct 1602 10 ALR 30 974. In the instant case, manifestly seizing an individual and physically escorting him back into a premise from which they have allegedly fled with the express intention of not allowing him to go significantly deprives him of his freedom of action and the Miranda warnings must be given.

In Mathis v. United States, 391 US 1, 20 L Ed 2d 381, 88 S Ct 1503, the Supreme Court once more reversed a conviction based on

statements obtained absent Miranda warnings. Incriminating statements were obtained from the Defendant by Internal Revenue agents during an interview while he was in jail serving a state sentence and before criminal investigation had begun. Even though the questioning was pursuant to a routine tax investigation from which no criminal prosecution may be brought, and the government unsuccessfully attempted to argue the position among others, the Court invoked the protections of Miranda. In the case at bar, the trial Court attempted to justify the question under the conduct of routine execution of a search warrant, however, as the Court in Mathis affirmed "routine tax investigation" may frequently lead to criminal prosecution. As Detective Bean indicated in the instant case, the Petitioner's response gave him probable cause (T. 173). Clearly the Petitioner's freedom of action was significantly restrained and Miranda warnings were mandated and the constitutionally protected rights fifth amendment of the Petitioner cannot be assaulted under the guise of "routine" execution of a search warrant.

United States v. Menichino, 497 F.2d 935, 1974, cited by the State during the argument to the trial Court is clearly distinguished from the instant set of facts. In Menichino's case, he made certain incriminatory statements during the booking process after having been advised of his constitutional rights. Secondly, the statements he made were volunteered, and as the Court noted on page 941, "had his statements been made, his answers to officer's initiated inquiries, we would have to decide whether to follow Procter and exclude such voluntary utterances." Here, however Menichino volunteered the statements incriminating him, and their admission

constitutes no affront to Miranda. The language of the Court that is most relevant to the instant situation is found on page 940, (in which the Court stated "incriminating statements elicited by law enforcement officers through questions relating to criminal activity itself during an interrogation fairly characterized a custodian and after a refusal to sign a waiver form on a request for may not be admitted at trial.")

State v. Simmoneau, 402 F. 2d 870, a Supreme Court of Maine decision again is easily distinguishable in that the Appellant was immediately given the Miranda warnings. He had indicated that he was willing to talk without an attorney. Afterward at the police station, he saw a Chief Moran whom he had known for some twenty years, and in response to the chief's question as to "What is going on?", made certain incriminatory statements. Only after these statements was an attorney requested. There had only been a twenty minute gap between the initial warnings and the inculpatory statements. Also in that case, counsel failed to file a pre-trial Motion to Suppress testimonial evidence. The Court refers to whether the questions are an effort to elicit an admission. According to Detective Bean in the instant case, he considered the admission that the Petitioner lived there to be probable cause for arrest, and also considered it to be a circumstance indicating guilt which clearly would constitute an admission which is prohibited without Miranda warnings being given. Clearly in the instant case, this was not a clarifying question in response to an ambiguous statement by a suspect as the Petitioner had made no statements. The absence of an intent to elicit a confession or admission is critical to the decision, and

the Court indicated that most of these statements are typically spontaneous (P.874). Clearly this is not the situation in the instant case in that it was a direct question posed to the Petitioner by Detective Bean and viewed by him as an admission. It is also equally clear that in Detective Bean's mind the investigation had focused on the Petitioner, who he had seen allegedly fleeing the residence, and who was the only black male present, as he was looking for a black male at the residence. The Maine Supreme Court characterized Chief Moran's brief and neutral question as a natural reaction to the sight of a long time acquaintance being held in custody. His inquiry, "What is going on?" did not constitute interrogation. Clearly the facts of the instant case are distinguishable and reversal is mandated as the statement was obtained in contravention of the Petitioner's Fifth, Sixth and Fourteenth amendment rights.

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR DIRECTED JUDGMENT OF ACQUITTAL

The facts relied upon by the Respondent to establish constructive possession consisted of the fact that the Petitioner and two black females were seen running out of the bedroom where the drugs were located (T. 165). The Petitioner allegedly replied in response to Detective Bean's question that he lived at the premises (T. 170). A white powdery substance along with several straws was found on a nightstand in the bedroom from which the Petitioner had exited (T.181). A tan suitcase was located on a bed, and inside was found an attache case which contained drugs and money (T. 185). An airline ticket bearing the Petitioner's name, though dated two weeks earlier, was found on top of the attache case (T.185). A second ticket bearing the name of Harry Lewis was also found therein (T. 185). Detective Bean allegedly said, "We have found a tan suitcase, a gray briefcase and an airline ticket". To which the Petitioner allegedly responded, "It's mine" (T.189). Cassandra Gillespie, one of the occupants of the house had her driver's license and a work I.D. seized from her purse located in the bedroom where the drugs were found (T. 231). Detective Bean never saw anyone in possession of the cocaine nor the heroin (T. 234). Men and women's clothing were found in the bedroom (T. 234). The clothing was identified as being the clothing of Harry Lewis by his sister, Deloris Jenkins. The Petitioner never acknowledged the drugs were his, nor specifically that the briefcase nor the airline ticket was his (T. 248). Detective Bean indicated

that he did not consider the Petitioner's ambiguous statement, "It's mine" to be that significant (T. 249).

Upon being initially questioned by Detective Bean, the Petitioner indicated that he did not know what was happening and had no idea what was going on (T. 257). The contents of the suitcase were not in plain view (T. 257). A Florida driver's license in the name of Harry Lewis was found in the bedroom where the drugs were located (T. 271). Cassandra Gillespie told Detective McNeal that she lived there, and it was her purse in the bedroom and the clothing in the bedroom was hers. The utilities, cablevision and telephone were all in the name of Harry Lewis.

The property was titled in the name of Harry Lewis, Jr. The construction workers testified that they had been hired to do work on the residence by Harry Lewis (T. 339). They also testified that Harry Lewis was present when the police officers arrived in the backyard area (T. 342).

Johnson v. State, 456 So 2d 923, Fla. 3DCA (1984), held that mere proximity to contraband without more is legally insufficient to prove possession. In that case, the defendant was alone in an apartment, and had been so for some unspecified period of time when the police arrived. In plain view was a gray metal box containing heroin and several syringes. The Court set forth three elements necessary to establish constructive possession. One, being the defendant's ability to exercise dominion and control over the contraband. Two, being his knowledge of the presence of the contraband, and three, his awareness of the illicit nature of the contraband. The Court held that the State had offered no proof that

the defendant regularly occupied the apartment or had a relationship with it's owner or renter. At best, the evidence showed that the defendant went to the apartment where the contraband was found and was alone at the apartment for some unspecified period of time. It was held insufficient evidence to convict the defendant for trafficking in heroin, and the case was reversed.

The Petitioner's mere presence in the bedroom, if the testimony of Detective Bean is accepted as true for purposes of this argument, is not sufficient to prove possession. The fact that there were two other occupants in the bedroom and that the residence itself was occupied by Harry Lewis, who witnesses testify was physically present outside at the time of the execution of the search warrant, establishes that the premises were in the joint and not exclusive possession of the Petitioner. Also there is absolutely no evidence to indicate his awareness of the illicit nature of the contraband in reference to the heroin or cocaine.

In D.K.W. v. State, 398 So. 2d 885 1DCA (1981), two boys were observed sitting on the top of a wall near a school office with a strong odor detected by the arresting officer. The officer noticed a marijuana roach on the wall where the boys had been sitting, and looking behind the wall found a quantity of marijuana cigarettes. The arresting officer testified that the Petitioner indicated that the marijuana was both of theirs and both defendants admitted smoking marijuana. The mere proximity of the Petitioner in the bedroom to the drugs along with two other persons and his statement to the arresting officer to the effect that when given a multitude of items, he responded, "It's mine", is clearly analogous to D.K.W. in that

in D.K.W., the Appellant had admitted smoking some marijuana, yet the Court did not find that statement in reference to the specific marijuana discovered behind the wall to be sufficient to sustain a conviction.

In Greene v. State, 460 So. 2d 987 (Fla. 4DCA 1984), police officers and a confidential informant entered the bedroom at an apartment to complete an alleged narcotics transaction in which they observed cocaine on a table with the appellant standing ten feet away. After the negotiations had been completed, the police arrived and the occupants in the apartment were arrested. The Court found that the evidence established the appellant's presence in the room with cocaine in plain view, and established that he knew of the illicit nature of the contraband. The Court found, however, that the appellant did not reside at the apartment and the appellee did not present other circumstantial evidence to establish that he had the ability to exercise dominion and control over the cocaine. The facts in that case would have been even stronger than in the instant case, in that the Petitioner was within ten feet of the cocaine and negotiations were taking place for purchase of the cocaine in his presence and quantity was allegedly five kilograms of cocaine which is a very substantial quantity.

In Doby v. State, 352 So. 2d 1236 (Fla. 1DCA 1977), drugs were found secreted in the defendant's wheelchair. The Court held, however, since others had "access to the wheelchair, no knowledge of the drug's presence could be inferred to the defendant for merely possessing the chair." Other evidence showing the defendant's

knowledge of the presence of the contraband would be necessary for this.

In Arant v. State, 256, So. 2d 515 (1DCA 1972), the Court held the fact that a person is or has been present in a place where marijuana is found is not sufficient that he is in possession of the drug, if it is not an exclusive possession of the place, and there must be proof of the knowledge of the drugs presence coupled with proof of control over such drugs. In that case, a potato chip can in which young marijuana plants were found contained a single fingerprint of the appellant. The Court noted that the fingerprint proved only that the appellant touched the can and it was no way declaratory of his knowledge that the contents of the can were contraband and no way declaratory that degree of control or dominion over the contraband which would show possession within the meaning of the statute.

Clearly in the instant case, the fact that the Petitioner's airline ticket was allegedly found in the suitcase, which contained the briefcase along with the drugs, does not establish when the ticket was placed in the suitcase. This does not establish that the airline ticket was placed in the suitcase at the time the drugs and briefcase were placed there. In fact, the airline ticket was dated April 12, 1985, and the arrest occurred on April 23, 1985. There was also a second airline ticket belonging to one Harry Lewis, Jr., whom the testimony showed to be the owner of the premises. Even if the Petitioner's airline ticket were held to be consistent with guilt, it is no less consistent with his innocence.

In Kresbach v. State, 462 So. 2d 63 (Fla. 1DCA 1984), this Court reversed a conviction for trafficking in cocaine. A Federal Express employee detected an envelope containing cocaine bearing the left thumbprint of the appellant. Other unidentified prints were found. The Court set forth the test for reviewing the denial of a Motion for Judgment of Acquittal is "whether the jury, as trier of fact, might reasonably conclude that the evidence excluded every reasonable hypothesis but that of guilt." Lowery v. State, 450 So. 2d 587, 588 (Fla. 1DCA 1984). In the instant case, fingerprints were recovered from the briefcase, containing the drugs and from documents within the suitcase. The prints were not those of the Petitioner. There was no testimony as to when the briefcase containing the drugs was placed in the suitcase or when the airline ticket bearing the Petitioner's name was placed there. The State's evidence does not support a conclusion by the jury, as tried of fact, that the evidence excluded every reasonable hypothesis but that of guilt.

POINT V

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION TO COMPEL IDENTITY OF THE CONFIDENTIAL INFORMANT, OR IN THE ALTERNATIVE REQUEST FOR AN IN CAMERA HEARING

The Court denied an initial Motion to Compel Identity of a Confidential Informant, and a subsequent amended Motion, and second amended Motion of the Confidential informant, and in the alternative Motion for an in camera hearing. Not only did the court deny the Motion to Compel Identity of the Confidential Informant, but the Court also prevented the Petitioner from presenting testimony in support of the Motion at a hearing, finding that the Motion itself was facially insufficient. The Court's final basis for denial would appear to be that the Court was under the misapprehension that unless counsel was attacking the validity of the search warrant, the identity of the confidential informant had no basis of relevance to any defense he may raise.

In a deposition that was attached as part of the first and second amended Motions to Compel Identity of the Confidential Information, Detective Bean indicated that he had received on April 23, 1985, at approximately 11:00 a.m., information from a confidential informant that a black male from New York was in town, and was residing at 1571 West 32nd Street, and at that address he was selling large quantities of heroin (D.6). The confidential informant indicated that she had been in 1571 East 32nd Street, earlier on that same date, and had seen large quantities of heroin in a bedroom, and had engaged a black male from New York in conversation in which the black male represented the substance in the bedroom to be heroin, and he was bragging about how much he had sold the night before

(D.8). The search warrant that was obtained had listed an unknown black male as being in the premises. The informant also indicated to the Detective that the person was residing at that address (D.13). The confidential informant was never requested to identify the Petitioner (D.72). The confidential informant saw the heroin, and according to the Detective, "she said it was a pretty good bit" (D.74). He indicated that based upon hs perception, he felt the person the informant was speaking of was the Petitioner, though he had never identified or been requested to identify the Petitioner (D.87). The detective is of the impression that the informant could identify the occupant of the dwelling. The informant indicated no one else was present in the dwelling at the time the conversations took place with the black male. The defense in this case was lack of knowledge of the contraband, and that the Defendant was innocent of possession of the controlled substances charged.

The defense was also that an individual by the name of Harry Lewis, Jr., was the person referred to by the informant and owned the premises, was residing at the premises, and was present in the backyard of the premises at the time the search warrant was executed. It was the Petitioner's position that it was Harry Lewis, Jr. who was in possession of the drugs, and this fact could have been borne out by the confidential informant had the informant be produced, and this would have been extremely relevant and material to the defense. State v. Acosta, 439 So. 2d 1024 (Fla. 3DCA 1983), set forth criteria the Defendant must establish in order to compel identity or disclosure. The Court stated initially, "In order to sustain this burden, the Defendant must first allege a specific possible defense" and "Make

a preliminary showing of the colorability of the defense". The Petitioner's affidavit as well as those of Elbert Moment and Freddie Goins, clearly established a possible defense, to wit, the black male from New York was Harry Lewis, Jr., or a person other than the Petitioner, and ownership and possession of In Acosta, the Court next stated, "In addition, the Defendant must demonstrate the testimony and the informant as essential to establish a defense". In the instant case, the only individual who would confirm that a third party had possession of the drugs on that particular morning, and acknowledged ownership would be the informant. Had the informant identifed a named individual, then counsel could have secured fingerprints. The Court stated, "The appropriate procedure for determining whether the confidential informant is an essential witness for the defense is an in camera hearing". The Court further held, "The burden of proof on a Defendant seeking an in camera hearing is lighter than the burden to establish a necessity to disclose the informant's identity". The Court held, "To invoke an in camera hearing, a Defendant must file a sworn motion or affidavit, alleging facts concerning the informant's involvement which, if true, would support the possibility of a specific asserted defense", Beasley v. State, 354 So. 2d 934 (Fla. 2DCA 1978).

Spataro v. State, 179 So. 2d 873, clearly dealt with the issue as to whether the identity of a confidential informant would be relevant and helpful to a defendant in establishing his defense where the informant had established probable cause for the issuance of a search warrant. Spataro indicated that an informant's identity may become significant for two distinct reasons. Citing Rigindorf v.

United States, 1964, 376 US 528, 84 S Ct 825 11 L Ed 2d 887. It may be necessary in order to establish "probable cause" for the lawful issuance of a search warrant, and it may be relevant and helpful to the defendant in preparing his defense, Roviaro, Rigindorf. In Spartaro, the Court found that the trial court committed reversable error in failing to require the prosecution witness to divulge the name of the informant in cross examination, in that the informant was not there, and it was necessary and relevant to her innocence or guilt, and his testimony would be helpful to her in the preparation of her defense. In the instant case, the Petitioner has indicated a clear line of defense, to wit, that the drugs were not his, but belonged to a third party, probably Harry Lewis, Jr., or one of the other occupants of the dwelling, and that he has never involved in any contact with the drugs, nor did he have any knowledge of the drugs. This case certainly involves more than the mere possibility that the informant's testimony would have helped the defense or affected the outcome of the trial. There exists here a strong probability that the informant's testimony could have affected the outcome of the trial, and is therefore material assuming the defense posture is correct, and this is a matter that could have easily been determined by the Court with an in camera hearing. The failure to do so mandates reversal.

POINT VI

THE COURT ERRED IN DENYING PETITIONER'S MOTION IN LIMINE REGARDING EVIDENCE OF PETITIONER'S POSSESSION OF FIREARMS.

Evidence of an uncharged criminal act is inadmissable when it merely shows bad character or propensity of the accused, Diaz v. State, 467 So. 2d 1061 (Fla. 3DCA 1985). The Court in the present case, over Petitioner's objection, allowed the State to introduce evidence of a number of firearms seized at the time of Petitioner's arrest (T. 54-57). In denying the Petitioner's Motion in Limine, the trial court reasoned that possession of weapons themselves is not a criminal act. However, pursuant to Section 775.087 of the Florida Statutes, possession of a firearm during the commission of a felony subjects the accused to a harsher penalty.

Since the State could have elected to charge the Petitioner with armed trafficking, evidence of Petitioner's alleged possession of firearms constituted evidence of an uncharged crime which is inadmissable. The admission of such evidence was extremely prejudicial to the Petitioner and as such, a new trial is warranted.

POINT VII

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR MISTRIAL BASED ON THE COURT'S IMPROPER COMMENTS DURING VOIR DIRE.

During voir dire, the following comments were made by the trial Judge in response to questions posed by defense counsel:

> Mr. Williams: Do any of the rest of you feel that way, in spite of the presumption of innocence and in spite of all of the law that you would be instructed, you, in your hearts and minds feel the person wouldn't be arrested if there wasn't some evidence of guilt?
> How about Mr. Steiger?
>
> A. Venireman: I think it's possible.
>
> Mr. Williams: Ms. Washington?
>
> The Court: I believe that question was somewhat misleading in that it is necessary to have evidence to arrest and convict, maybe the two are entirely different burdens.
>
> Mr. Williams: I understand, Your Honor. I'm talking about in their minds that the arrest, itself, attaches indicia of guilt.
>
> The Court: What you asked is that they feel like there must be evidence of a wrongdoing to have wrongdoing, which is a little different and I don't want you to mislead the jurors into thinking that police officers go around arresting people without any reason whatsoever, because they are not supposed to do that (T. 92,93).

Pursuant to Section 90.106 of the Florida Statutes, the Judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witness, or the guilt of the accused. After the trial judge made the above comments, defense counsel moved for a mistrial on the basis that the Court was interjecting an opinion as to the guilt of the accused (T. 93,94).

In Hamilton v. State, 109 so. 2d 422 (Fla. 3DCA 1959), the Third District Court of Appeal noted that in a jury trial, the judge's

dominant position makes his remarks or comments, especially relating to the proceedings before him overshadow those of the litigants, witnesses, and other court officers, and, therefore, conduct which expresses, or tends to express, a Judge's view as to the weight of the evidence, credibility of witnesses, or guilt of the accused denies the litigant or accused the impartial trial to which he is entitled.

Also during voir dire, the trial Judge interjected the following comment in an attempt to clarify a question posed by defense counsel: "Jurors are required to evaluate, in their own minds, the credibility of witnesses' testifying at any trial. Jurors are to disbelieve or believe the testimony of any and all witnesses, that is one of the functions of a juror, to judge, in their own mind, the credibility of witnesses involved in this case. Now, you might have defendants, you might have police officers, you might have bankers or judges, or you might have lawyers that are testifying. You might have anybody testifying. O.K.? (T. 85).

Defense counsel later moved for a mistrial on the basis that the Judge's statements could be construed as a comment on the Petitioner's fifth amendment right not to testify (T. 94). The Petitioner's motion for mistrial should have been granted.

POINT VIII

THE TRIAL COURT ERRED DURING VOIR DIRE IN DENYING PETITIONER'S CHALLENGE FOR CAUSE AND REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

On voir dire, juror Roberta Zipperer, a former probation officer and the wife of a Jacksonville Sheriff's Office robbery detective, responded to defense counsel's questions as follows:

> Q: "O.K. Would you tend to believe a police officer more than you would an ordinary citizen, simply because he was a police officer?"
>
> A: "Probably so."
>
> Q: "Are you indicating to me - I don't want to put words in your mouth, would you explain that to me, please, what you mean by that you would tend to believe them more?"
>
> A: "Having worked in probation and been around police officers and attorneys, I would tend to believe them over possibly someone else." (T. 65,84).

Although the trial court attempted to rehabilitate the juror through further questioning, the juror's bias had already been shown (T. 85).

On this basis, defense counsel moved to strike Roberta Zipperer for cause, and said motion was denied (T. 106). Defense counsel then exercised a peremptory challenge and excused Roberta Zipperer (T. 106). Based on the Court's denial of the challenge for cause, defense counsel made an oral motion for additional peremptory challenges which was denied by the Court (T. 110). Thereafter, defense counsel filed a written Motion for Mistrial based on the trial court's denial of the challenge for cause and refusal to grant additional peremptory challenges specifically stating that Petitioner would have striken two jurors which ultimately sat on Petitioner's

case (T. 137,138). This Motion was also denied by the trial court (T. 128).

This honorable court stated that the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdicts solely upon the evidence presented and the instructions on the law given to him by the Court. Lusk v. State 446 So. 2d 1038 (Fla.), cert denied, 105 S. Ct. 229 (1984). In applying this test, the trial court must utilize the following rule, set forth in Singer v. State, 109 So. 2d 7 (Fla. 1959):

> "if there is a basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or by the court on it's own motion.

The Court in Singer also stated that:

> The statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence (Id at 22).

Furthermore in Johnson v. Reynolds, 121 So. 2d 783 (Fla. 1929), the Supreme Court of Florida held that if there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused.

Certainly there was a reasonable doubt as to Roberta Zipperer's competence to sit as a juror on Petitioner's case. She was a former probation officer and is the wife of a Jacksonville Sheriff's Office robbery detective. Furthermore, counsel had exhausted all of his peremptory challenges.

POINT IX

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT

The State, in their concluding argument, remarked in reference to the quantity of drugs seized, "We are not talking about nickel and dime stuff, folks, this is the big time." Counsel moved for a mistrial based upon that comment and on three other occasions where the State commented on the failure of the Petitioner to testify (T. 531, 532). The action by the prosecutor in making the statement to the jury that "this is the big time", is an expression of his personal opinion and conveys to the jury with all the force and effect of the office that he represents, that this case should be singled out from others, and that indeed it is "the big time".

This Court noted in Reed v. State, 333 So. 2d 524, that the prosecuting attorney had injected his personal belief into his closing argument, and this was an impropriety.

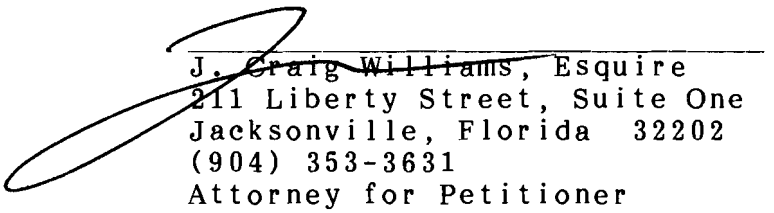
The Code of Professional Responsibility Disciplinary Rule 7-106(c)(4), states that an attorney shall not assert his personal opinion as to the justness of a cause, or assert his personal knowledge of the facts in issues except when testifying as a witness. Clearly, the comments to the amount of drugs being the "big time", is an expression of his personal knowledge of the facts from the prospective of the prosecutors office, and in a case where the evidence is primarily, if not wholly circumstantial, clearly prejudiced the jury against the Petitioner, and deprived him of a fair trial.

CONCLUSION

The certified conviction should be answered in the negative and the Petitioner's conviction should be vacated and set aside and remanded for a new trial based upon the numerous trial errors that were overloaded by the First District Court of Appeals.

Respectfully submitted

WILLIAMS AND STAPP



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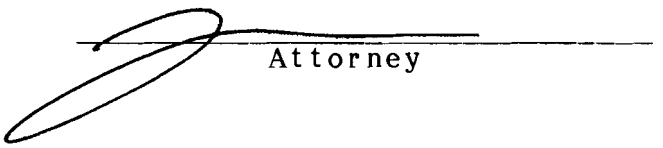
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Duval County Courthouse, Jacksonville, Florida, 32202, by mail this 16th day of July, 1987.



Attorney