IN THE SUPREME COURT OF FLORIDA



MICHAEL FLOURNOY,

Petitioner,

vs. CASE NO. 70,713

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Michael Flournoy, was the defendant in the trial court and the appellant in the court below, and will be referred to herein as "petitioner". The State of Florida was the prosecuting authority in the trial court, and appellee in the court below, and will be referred to herein as the respondent.

The Record on Appeal in the instant case consists of eight volumes. The volumes containing the pleadings and documents filed in the trial court will be referred to herein by the use of the symbol "R". The volumes containing the transcripts of the trial and sentencing hearing will be referred to by the use of the symbol "T". Finally, the deposition of Detective T.D. Bean

will be referred to herein by the use of the symbol "D". Reference to the record on appeal will be by the use of the appropriate record reference either "R", "T", or "D" and the apropriate page number. Petitioner's "initial brief on the merits" will be designated by the symbol "PB" followed by the appropriate page number(s) in parenthesis.

## STATEMENT OF THE CASE AND OF THE FACTS

With the following clarifications and additions as well as others which may appear within the argument section, (See, especially pp. 34-36, infra.) respondent accepts the statements submitted in the Petitioner's brief as a substantially accurate recitation.

1. Prior to prying open the burglar bar front door, vice detectives twice knocked and shouted, "Police, we have a search warrant, open the door". (T 164-165, 166, 216).

2. There was only one bedroom in the apartment. Through the burglar bars, detectives observed two black females and one black male run from the bedroom. The black male was the first out of the bedroom and left through the back door. Appellant was identified as that black man. (T 165-167, 214, 234, 265-267).

3. Cocaine and straw snorters were found on a tray in plain view in the bedroom. (T 181-184, 268, 230, 194).

4. A tan suitcase was on the bed in the bedroom. (T 184). A Remington 30.06 rifle was on the bed next to the suitcase. (T 268, 192-193). Inside the suitcase was a gray attache case containing $23,000 and 22 packets of heroin. Inside the suitcase sitting on top of the attache case was an Eastern Airlines ticket in petitioner's name. (T 184, 185, 268-269). Also inside the tan suitcase, but at the bottom, was a second airline ticket bearing

the name of Harry Lewis and boarding passes for Lewis and petitioner indicating side-by-side seats. (T 186, 232-234).

5. Defense witness Freddie Goins was impeached with a prior felony and his attitude toward the police. (T 334, 336). Although adamant that Harry Lewis was outside, Goins could not account for Lewis' presence the entire period of time. Goins was not "particularly watching him". (T 335).

6. Elbert Moment had a contractual relationship with Harry Lewis; he was hired to renovate Lewis' duplex. (T 339-340). He had never observed Harry Lewis come out of the duplex unit involved in the search. (R 343). A 'crippled fellow" lived in the other duplex unit. (T 346). Moment testified that both petitioner and Lewis were outside and that nobody came out the back door. (R 342-343, 348-349). He also stated he did not have personal knowledge of whether a black male left the bedroom. (T 349).

7. Sarah Lewis testified to caring a great deal for petitioner. Petitioner was like a grandson and called her "grandma". (T 362, 366). Petitioner refers to Harry Lewis, Jr. as "Pops". (T 363). Petitioner and Harry Lewis, Jr. live in New York. (T 363). Mrs. Lewis didn't know what either did for a living. (T 365-366).

## SUMMARY OF ARGUMENT

ISSUE I Respondent argues that the trial judge did not err in exceeding the recommended guidelines sentence of non-state sanctions in imposing a ten year sentence due to the fact that petitioner attempted to traffic in an amount of heroin more than three times the threshold amount. Committee note (d)(11) states that factors consistent with the statement of purpose may be considered and utilized by a judge in determining reasons for departure. Rule 3.701(b)(3), one statement of purpose, provides that the penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense. When the legislature set minimum mandatory sentences which increased as the quantity of drugs increased, it indicated its intent to punish more severly defendants trafficking in greater amounts of drugs. The fact that it chose broad quantity categories for imposition of the mandatory minimum sentences did not likewise indicate an intent that all sentences imposed within a bracket be identical. Thus, because the legislature reimposed the same three year minimum mandatory sentence on a defendant trafficking in four grams of heroin as one trafficking in 12.5 grams of heroin did not mean the judge could not rely upon Rule 3.701(b)(3) to impose a greater sentence due to the increased of severity of the crime. The offense of attempted trafficking in heroin is derived from the trafficking statute itself but the same amount of points are provided for attempted trafficking in

four grams of heroin as any other larger amount. Therefore, the judge could rely upon rule 3.701(b)(3) to impose a greater total sentence due to the increased severity of the crime. The fact that petitioner, in the case sub judice, held 12.5 grams of heroin was not factored into the scoresheet which accounted for only four grams and thus, was not an inherent component of the crime.

Inasmuch as it is clear that the judge imposed a ten year sentence in an effort to punish petitioner for the relatively large amount of heroin he had, a factor which did not have any effect on the number of points assignable to the scoresheet, regardless of the amount, the invalidity of other reasons assigned for departure would not, beyond all reasonable doubt, have affected this sentence imposed. Consequently, because the quantity of drugs in this case was a proper reason for departure, this court should affirm the ten year sentence imposed.

ISSUE II The state submits that the jury was properly instructed. The specially-requested defense instruction on knowledge of the nature of the contraband repeated an element of the offense of trafficking which was substantially covered by the standard jury charges. The trial judge was not required to give an instruction on circumstantial evidence, but elected to do so. The instruction given was not the precise language desired by the defense, but was the former standard instruction.

Finally, the factual circumstances supported a flight instruction Therefore, the giving of such an instruction was not error.

ISSUE III A question by a law enforcement officer concerning occupancy during execution of a search warrant is not "custodial interrogation" requiring Miranda warnings, but is a question of neutral subject matter required by statute. §933.11 Fla. Stat.

ISSUE IV Evidence presented at trial establishing petitioner's acknowledgement of ownership of a suitcase in which $23,000 in cash, 22 packets of heroin and an airline ticket bearing petitioner's name was found, seizure of assorted firearms, petitioner's attempted flight and the guilty knowledge inferable from other controlled substance (cocaine) and snorters in plain view was sufficient to present a prima facie case on the charges and to place the case before the finder of fact.

ISSUE V A defendant is not entitled to disclosure of identity of a confidential informant who merely provides probable cause for the search warrant. Therefore, denial of the motions to compel disclosure was not error.

ISSUE VI It was not necessary for petitioner to be charged with a firearms offense for evidence of the three weapons seized during a search warrant to be admitted at trial. The evidence was relevant and highly probative of trafficking and petitioner's intent to traffic.

ISSUE VII The trial court's question in clarification of a misleading defense question was neither expression of a personal opinion nor comment upon petitioner's Fifth Amendment right not to testify.

ISSUE VIII The trial court's questions to the prospective juror during voir dire clarified the juror's response and established the juror's ability to lay aside personal considerations concerning the testimony of police officers and to render a verdict based solely upon the evidence presented and the instructions of law given. Under these circumstances, excusal for cause was not required.

ISSUE IX The closing argument when viewed in its entirety does not support reversal. The alleged personal opinion of the prosecutor concerning this "big time" operation (T 531) was a comment upon the evidence: $23,000, 22 packets of heroin, 3 firearms, tickets to New York and in response to the defense argument regarding the allegedly ineffective handling of the case by law enforcement officers. The comments allegedly focusing on the defendant's failure to testify were in fact comments emphasizing the testimony of the vice officers. (T 531).

## ARGUMENT

### QUESTION CERTIFIED, ISSUE I

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

The guidelines recommendations specified a non-state sentence. (R 156). Petitioner was sentenced to ten years for the attempted trafficking (heroin) charge in count one and five years for the second count of possession of cocaine, to be served concurrently. (R 151-156). Petitioner argues that the guidelines departure must be reversed as it is not supported by clear and convincing reasons. It is the state's position that the quantity of drugs involved in a crime may be considered by the sentencing court as clear and convincing reason for departure from the recommended guidelines sentence.

In the case sub judice, the trial court was influenced by the amount of heroin; 12.5 grams, and emphasized that the amount "is more than (3) times the statutory threshold amount which defines attempted trafficking (four grams) (Fla. Stat. 893.135(c) (1983)." (R 158). The factor is supported by the First District's opinion in Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984) wherein Judge Nimmons wrote that the guidelines make no distinction between possession of 21 grams of marijuana and 100 pounds. The conviction is for possession of more than 20 grams regardless of the amount.

> "[T]he guidelines sentence in such cases do not reflect the 'aggravation' present in a given case by reason of a large quantity of cannabis possessed by the defendant.
>
> * * *
>
> We have no difficulty in finding that a large quantity of cannabis, such as that involved in the instant case, is a clear and convincing reason for departing from the guidelines. This is a 'factor relating to the instant offense' for which the defendant has been convicted and is thus not violative of rule 3.701(d)(11)." Id. at 11; (R 158).

Unlike Banzo v. State, 464 So.2d 620 (Fla. 2d DCA 1985), cited by petitioner, this case does not involve charges arrising from the same criminal episode which were not filed. Possession is inherent in the trafficking charge. The circumstances do not involve conviction of a lesser included crime having vastly different elements. Scurry v. State, 472 So.2d 779 (Fla. 1st DCA 1985).

The issue before this court is whether the trial judge erred in imposing a sentence which exceeded the highest sentence available in the recommended guidelines range (non-state sanctions) by imposing a ten year sentence for attempted trafficking in heroin on the grounds that the amount of heroin involved in this offense (12.5 grams) is more than three times the statutory threshold amount which defines attempted trafficking (four grams). §893.135(c) Fla. Stat. (1983).

Trafficking in four grams or more of heroin is a first degree felony, regardless of the amount of heroin involved but the legislature saw fit to provide for increased minimum sentences and increasing fines for specified amount parameters up to and including a mandatory minimum term of imprisonment of 25 calendar years and a fine of $500,000 for trafficking in more than 28 grams of heroin. In the case sub judice the amount of heroin involved was more than three times the threshold amount to satisfy the elements of the trafficking statute. The minimum mandatory sentences associated with trafficking in different quantities of heroin have no application here. The sole question sub judice is whether the trial court properly departed from the recommended sentence of non-state sanctions for a felony of the second degree, based upon petitioner's guidelines score in imposing a ten year departure sentence which is well within the statutory maximum based upon the quantity of heroin involved. Thus, the court is not concerned with how close 12.5 grams of heroin is to 14 grams, the next highest bracket in a trafficking case which carries with it a mandatory minimum term of imprisonment of ten calendar years and a fine of $100,000.

First, the state submits, that the provisions of the sentencing guidelines rules and committee notes support the trial judge's departure based on quantity. While committee note (d)(11) to rule 3.701 of the Florida Rules of Criminal Procedure has been cited numerous times in cases involving the guidelines,

the state submits the last sentence of the committee note has purhaps been inadvertently overlooked at times, yet it is of no less significance than any other provision of the committee notes. The last sentence provides:

> "Other factors, consistent and not in conflict with the statement of purpose may be considered and utilized by the sentencing judge."

This specific provision in committee note (d)(11) has been a part of the committee notes since their adoption by this court in 1983 and it has remained unaltered through the subsequent amendments and through currently proposed amendments. In fact, in December of 1985, this court expressly made all the provisions of the committee notes a part of the rules. The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311 (Fla. 1985). Thus, if a factor relied upon by a sentencing judge is consistent with and not in conflict with any one of the principles set forth in subsection (b) of Rule 3.701, the Statement of Purpose, then committee note (d)(m) expressly approves consideration of and utilization of that factor in departing from the guidelines sentence. Respondent submits that attempted trafficking in an amount of heroin which exceeds the threshold amount necessary for trafficking conviction is entirely consistent with Rule 3.701(b)(3) which states: "the penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." (Emphasis added).

Inasmuch as a higher quantity drugs increases the severity of the offense, committee note (d)(11) expressly permits utilization of that factor as a reason for departure.

This court has recently relied on the principles espoused in Rule 3.701(b)(3) to support departure reasons in non-drug cases and those cases are applicable by analogy in the matter sub judice. For example, in Vanover v. State, 498 So.2d 899 (Fla. 1986), the defendant, Vanover, was convicted of aggravated battery for shooting in the arm a visitor to his home. Vanover was found not guilty of shooting the visitor's brother in the mouth. Both victims aparently lived. To convict Vanover of the aggravated battery the State had to prove that Vanover, in committing the battery: **(1)** knowingly or intentionally caused bodily harm, permanent disability or permanent disfigurment or **(2)** use a deadly weapon. §784.045 Fla. Stat. (1985). Aggravated battery is a second degree felony punishable by a maximum of 15 years imprisonment. The guidelines sentence calculated for Vanover recommended a maximum sentence of 30 months incarceration. Because the aggravated battery was committed with a firearm, the three year mandatory sentence was held to take precedence over the 30 month recommendation. Fla.R.Crim.P. 3.701(d)(9). The trial judge departed from the guidelines beyond the three year minimum mandatory and imposed a sentence of ten years. One of the five reasons for departure reviewed by this court stated: "this was a particularly aggravated set of

circumstances which sets this case far and above the average aggravated battery." Recognizing its authority to "flesh out the factual support to better ascertain the sufficiency of the reasons given" (See Vanover v. State, 481 So.2d 31, 32 (Fla. 2nd DCA 1985)), this court upheld this reason based on the following rationale: "noting that Florida Rule of Criminal Procedure 3.701(b)(3) allows departure based on 'the circumstance surrounding the offense', and that the record on appeal in this case amply illustrates sufficient facts rendering the crime a highly extraordinary and extreme incident of aggravated battery, we find the reason a clear and convincing basis for departure in this case." Id. at 902.

In a sexual battery context, this court held that excessive brutality could be a valid reason for departure as the fact that the defendant committed two separtate acts of sexual battery, i.e., intercourse and fellatio. Lerma v. State, 497 So.2d 736 (Fla. 1986) Of course, this court's rationale in approving those reasons for departure in Lerma, supra was set forth in Rule 3.701(b)(3), that the penalty imposed be commensurate with the severity of the offense and circumstances surrounding it. More recently, this court relied on Rule 3.701(b)(3) in upholding as a clear and convincing reason for departure the fact that a sexual battery victim's son witnessed the brutal sexual violation of his mother. Casteel v. State, 498 So.2d 1249 (Fla. 1986) This fact

evidenced more than "normal" emotional trauma associated with sexual offenses.

This very sentencing guideline rule which has recently pursuaded this court to approve departures due to "excessive" aggravated battery, due to "excessive" brutality in a sexual battery offense, due to "extraordinary" emotional trauma resulting from a sexual battery, and due to an "aggravated" sexual battery that was factually premised on more than one requisite act of sexual battery, should convince this court in the case sub judice to approve a departure from the recommended sentence of non-state sanctions where the quantity of heroin is more than three times the threshold amount required for the first degree felony conviction and where the quantity of drugs is to a minimal extent, less than the quantity of heroin which would have subjected the petitioner to a minimum mandatory sentence of ten years in a case of actual trafficking. Rule 3.701(b)(3) in conjunction with committee note (d)(11) applies to drug cases as readily as it applies to sexual battery and aggravated batteries. In fact, the district courts have relied on the principles in Rule 3.701(b)(3) to approve upward departures based on a large quantity of drugs. Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984); Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985); Irwin v. State, 479 So.2d 153 (Fla. 2d. DCA 1985). The quantity of drugs is a factor which relates to the instant offense, relying on Smith v. State, 454 So.2d 90 (Fla. 2d DCA

1984) wherein that court permitted depature in an armed robbery case due to excessive use of force, a circumstance surrounding the event. In State v. Villa Lovo, 481 So.2d 1303 (Fla. 3d DCA 1986) the Third District approved a downward departure due to the small amount of contraband involved. In that case the defendant had only one-half gram of cocaine, subjecting him to a five year maximum sentence. However, his prior record increased his points such that his recommended range was 22-27 years. Rather than just impose the five year maximum sentence for possession of cocaine, the judge focused on the small amount of cocaine, cited to Irwin, surpa, and imposed a sentence of five years probation subject to 18 months community control. If a small quantity of cocaine can decrease the severity of the offense such that a lighter sentence is more commensurate with the particular offense, then logically, the converse must be true.

The court below did not ignore this court's decisions in Hendrix v. State, 475 so.2d 1218 (Fla. 1985) and State v. Mischler, 488 So.2d 523 (Fla. 1986). Specifically, petitioner argues that the quantity of the mixture of heroin involved, 12.5 grams is an "inherent component" of the crime of trafficking an presumably already factored into the scoresheet in a trafficking case. In actuality, it is the threshold quantity of four grams that elevates the crime of mere possession of heroin from a second degree felony to a first degree felony thereby elevating the points assessible. Were petitioner guilty of attempted

trafficking of only four grams of heroin mixture, his arguments would probably have merit. However, nowhere does the scoresheet account for amounts in excess of four grams. A defendant who is convicted with four grams of heroin receives the same number of points on the scoresheet as the defendant who is convicted with 12.5 grams of heroin, as the defendant who has 28 grams receives the same number of points as the defendant who has 1000 grams or more of heroin. Although the minimum mandatory sentences required in the trafficking statute can result in a defendant being sentenced in a higher cell range where the quantity he possesses is above 14 grams, this automatic elevation is not accomplished unless the defendant's points on the scoresheet fall below the point totals assigned to the ten and 25 year guidelines cells. The fact that the minimum mandatory sentences take precedence over a lower guidelines range has not prevented this court in the past from allowing departures beyond the minimum mandatory due to aggravating factors. For example, in Vanover, supra, the defendant's aggravated battery conviction when calculated with other points resulted in a recommended range of 30 months. In order to prove aggravated battery and receive points for a second degree felony the state had to prove battery with the use of a deadly weapon. The fact that a weapon was used also mandated that a three year sentence be given. Thus the "use" of a firearm was used once to prove the aggravated battery charge which placed the defendant in the 30 month range and was

used again to increase the defendant's sentence to the three year minimum mandatory term. That situation did not prevent this court from approving as a departure reason supporting the ten year sentence ultimately imposed, the fact that this incident constituted an "extreme" incident of aggravated battery. Vanover, supra at 902. Under the same logic, the fact that a minimum mandatory has been set by the legislature at certain quantities of heroin mixture does not mean that a judge can never departe due to "aggravated" quantities, i.e., an amount of drugs well beyond the quantity required to impose a specific mandatory minimum. In this case, petitioner's points placed him in the non-state sanction guidelines range. Due to the fact that petitioner attempted to traffick in an amount slightly less than 14 grams, petitioner's mandatory would have been only three years had he been successful in carrying out his plan. Because petitioner possessed and attempted to traffic in a heroin mixture significantly greater than the threshold amount of four grams, the court was convinced that petitioner's penalty should be commensurate with the aggravated circumstances surrounding his criminal offense. Consequently, the judge departed from the guidelines of county jail time or county probation in an effort to follow Rule 3.701(b)(3) and attempted to punish petitioner more severly than if he had had in his possession for trafficking only four grams. Fourteen grams would have resulted in a minimum mandatory sentence of ten years-for trafficking but not for

attempted trafficking. Respondent would merely point out that the question certified to this court addresses itself to "the quantity of drugs involved in a crime" (emphasis added). In any case, the scoresheet fails to take into account the amount of heroin involved beyond the nominal quantity of four grams. Thus, the quantity of 12.5 grams is not an inherent component of the crime.

Petitioner makes the additional argument in his brief that quantity is not relevant in grand theft cases, therefore it is not relevant here. In support of this proposition petitioner cites to Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985) and Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985). Neither case involved grand theft. In Dawkins a departure and a possession of cocaine case was held to be invalid where based on the amount of money involved in a cocaine deal. In Knowlton the defendant committed a robbery and took over $10,000. That fact was held not to support a guideline departure. The Knowlton court relied upon the lower court's Mischler opinion. One of the reasons in Mischler was that the grand theft involved sizable funds from a non-wealthy victim. In rejecting that reason this court did not say sizable funds did not increase the severity of the crime. The concern was that the focus was on the economic status of the victim. Committee note (d)(11) allows departures based on factors not in conflict with the purpose of the guidelines. Rule 3.701(b)(1) state that sentencing should be

neutral with respect to social and economic status. Consequently, the impropriety of the departure was due to the fact that the reason violated one of the statements of purpose. Furthermore, even if departures based on "aggravated" or "excessive" grand thefts are impermissible it would not affect departures based on quantity of drugs in the trafficking statute because the legislature has expressly indicated its opinion that the severity of the crime increases as the number of grams of contraband increases. Rule 3.701(b)(3) and committee note (d)(11) allow departures on this basis.

Finally, petitioner suggests that if the legislature had intended that the penalty for trafficking 12.5 grams to be more onerous than for four grams it would have destinguished among the quantities more narrowly. Petitioner's logic even suggests that the Guidelines Commission should come up with extra points if 12.5 grams should be treated differently than four grams. This argument fails to recognize an increased quantity of drugs as directly related to the severity of the trafficking crime and that the legislature had demonstrated as much. The only equal treatment a defendant with four grams must get with a defendant with 12.5 grams is the three year mandatory sentence on the $50,000 fine. The same is true for the 14-28 category and the 28+ category. The difference a defendant with 12.5 grams has with a defendant with four grams is that the former is still able to receive a longer sentence and be eligible for gain time. By

inacting mandatory minimums at the chosen ranges the legislature did not likewise equate the different amounts for all sentencing purposes. Some discretion was left to the sentencing judge.

Petitioner argues that the quantity issue can become to subjective and thwart the purpose of the guidelines. The state notes that "excessive" brutality, "extraordinary" emotional trauma, "extreme" aggravated battery also tend to be more subjective than objective yet this court has not found such departures to be in conflict with the guidelines. To the contrary, Rule 3.701(b)(3) on committee note (d)(11) expressly permit departures based on the individual circumstances surrounding the offense as they pertain to the severity of the offense. Each quantity of drugs departure must be viewed individually.

In the lower court, Judge Joanos concurred in the result, specially and reasoned that although the case before the court did not involve a sentence which carries a minimum mandatory sentence requirement and for that reason is somewhat different from Newton and Atwaters the distinction was not a meaningful one. Judge Joanos went on to say that the crime of attempted trafficking in heroin derives from the crime of trafficking in heroin which has quantity divisions established for a minimum mandatory sentencing purposes. The judge pointed out that the amount over the threshold amount is not taken into account in the

computation of the recommended sentence under the guidelines, therefore, it should be considered when the amount is sufficiently in excess of the threshold, to warrant departure. Similarly, if the amount is very near the threshold level it might be taken into account for downward departure as no mandatory minimum sentence is involved here. Following Judge Joanos' reasoning further, respondent would reiterate that the quantity of heroin does not affect the guidelines sentence so long as there was at least four grams. Certainly it is more serious to attempt to traffic in an amount more than three times the threshold amount. In this regard, the lower court's decision was a correct one.

The third factor relied upon by the trial court was prior convictions wherein the release date was more than ten years earlier. The convictions were not scored into the guidelines calculation but were cited as ground for departure. (R 156, 159). This state's supreme court has held that convictions not scored in guidelines computation because they are remote in time may nonetheless be considered as justification for upward departure and sentencing. Weems v. State, 469 So.2d 128, 130 (Fla. 1985); Brown v. State, 480 So.2d 225 (Fla. 5th DCA 1985). See also Townsend v. State, 458 So.2d 856 (Fla. 2d DCA 1984); Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984). Rule 3.701(d)(11) Fla.R.Crim.P., emphasizes that a departure from the guidelines sentencing range should be made only for "clear and convincing"

reasons. In this case "clear and convincing" reasons for petitioner's sentence were provided by the court and may be ascertained from the record. Albritton v. State, 476 So.2d 158 (Fla. 1985). To hold otherwise, the judicial discretion of the sentencing court would be impermissibly curtailed in a manner not contemplated by this sentencing guidelines. In view of the written reasons for departure and the record in this case, the sentence imposed is neither unreasonable nor excessive and should be affirmed.

## ISSUE II

THE JURY WAS PROPERLY INSTRUCTED (Restated)

Petitioner challenges the instructions to the jury on three grounds. Each will be addressed separately.

### A. DEFENSE REQUESTED INSTRUCTION ON KNOWLEDGE OF THE NATURE OF THE CONTRABAND

Relying upon State v. Medlin, 273 So.2d 394 (Fla. 1973), Rutskin v. State, 260 So.2d 525 (Fla. 1st DCA 1972) and Frank v. State, 199 So.2d 177, 121 (Fla. 1st DCA 1967), the defendant requested the following jury instruction:

> If you find that the defendant did not have actual possession of the substance alleged to be heroin, but you do find that he had constructive possession of the substance, then you must decide whether he knew that the substance was in fact heroin.
>
> The State must prove 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 that convince you that the defendant knew the substance was heroin.

(R 141). Time was afforded for the parties to review State v. Medlin prior to argument on the proposed instruction. (T 448-449). Afterwards the court found the holding in Medlin inapplicable to the instant facts unless petitioner were to interpose a defense similar to Medlin's: i.e., petitioner were to

admit to possession and trafficking, but state he was without knowledge that the substance was a controlled narcotic. (T 462-463); See, Medlin at 396.

Petitioner now advances the same argument premised upon different authority, but the new authority is no more persuasive. In State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982), pet. rev. denied, 421 So.2d 518 (Fla. 1982), petitioner omits the basis for the Fourth District's holding. In State v. Ryan, as in Medlin, the evidence revealed that the defendant's intentions were to traffic in marijuana, not in cocaine as charged. The holding is that where the state charges a defendant with a violation of a specific subsection of s statute, the state cannot prove a violation of a separate subsection. Zaremba v. State, 452 So.2d 1026, 1028 (Fla. 4th DCA 1984). Both State v. Ryan, and Pena v. State, 465 So.2d 1386 (Fla. 2d DCA 1985), involve evidentiary proof at trial, not jury instructions.

Petitioner was charged with trafficking in "morphine, opium, heroin or their derivatives." (R 10). §893.135(1)(c) Fla.Stat. When the heroin was discovered inside the suitcase and the discovery announced during the execution of the search warrant, petitioner stated, "It's mine." (T 189, 246-249). Hence the evidence at trial clearly established petitioner's knowledge of the nature of the substance, State v. Ryan, and "dominion and control" over it. Pena v. State, 465 So.2d 1386 (Fla. 2d DCA

1985) Petitioner can be convicted pursuant to the trafficking statute if he was cognizant of the fact that he was selling a particular substance. Wiesenberg v. State, 455 So.2d 633 (Fla. 5th DCA 1984).

A trial court is not required to repeat a jury charge which is substantially covered by charges already given. Askew v. State, 118 So.2d 21 (Fla. 1960); Mackiewicz v. State, 114 So.2d 684 (Fla. 1959); Sanders v. State, 73 So.2d 292 (Fla. 1954) Petitioner's special jury instruction was unnecessary as the standard jury instruction setting forth the elements to be proven by the state and the standard of proof to be applied was sufficient to advise the jury of its obligation.

The trial court determined that a special instruction concerning petitioner's knowledge that the substance was heroin was not needed. Such a decision is entitled to a presumption of correctness. When the instant instructions are viewed in their entirety as required, it is clear that the jury was properly instructed and petitioner received a fair trial.

B. Circumstantial Evidence Instruction

In the opinion of the Florida Supreme Court, the giving of standard jury instructions on reasonable doubt and the burden of proof render an instruction on circumstantial evidence unnecessary. Matter of Use by Trial Courts of Standard Jury

Instructions in Criminal Cases, et. seq., 431 So.2d 594 (Fla. 1981) modified, 431 So.2d 599. Giving a circumstantial evidence instruction is now within the trial court's discretion. In this case, the trial court consented to give an instruction, but through intent or inadvertence, the instruction was not identical to the one requested and desired by petitioner. (T 455-457, 463, 555-556). The state objected to the giving of any instruction on circumstantial evidence on the ground that petitioner's admission removed the case from the circumstantial evidence category. (T 456).

The instruction given by the court was:

> If the circumstances are susceptible to two equally reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

(T 544) (emphasis added). This is the circumstantial evidence instruction set forth in Fla.Std. Jury Inst., Crim. First Edition, at p. 41. (T 455). Inclusion of the word "equally" does not create a misstatement of law. Petitioner was not prejudiced by the trial court's modification. (T 455, 556).

Inasmuch as the trial court was not compelled to give the circumstantial evidence instruction and the prosecution did not rely solely upon circumstantial evidence, the trial court's modification of petitioner's requested jury instruction was not reversible error. State v. Anderson, 270 So.2d 353, 357 (Fla.

1972); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Miller v. State, supra. In Blackwell v. State, 86 So. 224 (Fla. 1920), this court stated that jury instructions refused should be considered in connection with the charges given; therefore, a conviction should not be reversed because of a refused instruction. We respectfully submit that if error occurred in the instant cause, it was harmless. Section 924.33, Florida Statutes.

C. Flight Instruction

In Proffitt v. State, 315 So.2d 461 (Fla. 1975), this court addressed the propriety of a jury instruction on flight. In a per curiam opinion, the court stated:

> Petitioner next raises the question of whether the court erred in instructing the jury on the question of whether guilt could be inferred from flight. The general rule in Florida as correctly pointed out by the Petitioner is the effect that the defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing alone, no more consistent with guilt than with innocence. Harrison v. State, 104 So.2d 391 (Fla. App. 1958).
>
> However, in the case at bar, there exists significantly more evidence in the record than flight standing alone.

Id. at 465-466.

Petitioner argues the instant facts do not support the instruction for when he attempted to flee, he was "not a suspect", not "formally accused of having committed a crime", nor were his actions when standing alone more consistent with guilt than with innocence. (PB at 25). With due respect to petitioner's interpretation, the facts reveal that he ran from the bedroom in which cocaine and snorting staws were found on a tray in plain view, 22 packets of heroin were found in a suitcase, and petitioner acknowledged the suitcase as "mine". (T 181-184, 246-249, 257-261). When petitioner attempted to flee police officers were pounding on the front door and twice shouted "Police, we have a search warrant, open the door". (T 165). Vice officers had to pry open the burglar bar doors, but were able to see petitioner through the bars as he ran from the only bedroom out the back door. (T 164-165, 166, 216, 214, 234, 265-266, 166-167, 267).

Respondent submits that the facts of this cause, like those of Proffitt, offer significantly more evidence of petitioner's guilt than flight alone. Thus, under the reasoning of this court, the trial judge was correct in instructing the jury on flight. See also, Straight v. State, 397 So.2d 903 (Fla. 1981) and Hernandez v. State, 397 So.2d 435 (Fla. 3d DCA 1981).

## ISSUE III

PETITIONER'S RESPONSE OF "YES" TO THE OFFICER'S QUESTION AS TO WHETHER HE LIVED IN THE HOUSE WAS PROPERLY ADMITTED AT TRIAL FOR THE LIMITED PURPOSE OF FULFILLING THE REQUIREMENTS OF EXECUTING THE SEARCH WARRANT. (Restated).

Petitioner's written motion to suppress statement was delayed until trial where a proffer out of the presence of the jury was conducted during the testimony of vice detective Timothy Bean. (R 98-99; T 168-169, 174, 168-174). Following argument of counsel, the trial court ruled that under the circumstances the officers were required by statute to read the search warrant to the occupant(s) of the premises and the officer's question was not custodial interrogation, but merely an attempt to determine who were the occupants. (T 176-178).

Section 933.11, Fla. Stat. requires that the serving officer deliver a copy of the warrant to the person named or in his absence to some person in charge or living on the premises. Failure to comply with the procedural requirements of executing a warrant is subject to challenge. e.g. State v. Gaunt, 456 So.2d 535 (Fla. 1st DCA 1983); Riley v. State, 448 So.2d 1029 (Fla. 3d DCA 1983), State v. Riley, 462 So.2d 800 (Fla. 1984). Trial counsel acknowledged the statutory requirement. (T 177).

In ruling, the trial court stated:

> . . . Based upon that [statutory language], your requirement that you have to determine who the occupants are, in order to read the warrant to them, I think the question is admissible for that purpose. It may go to something else, of course at the same time, but 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. Consequently I will deny the motion to suppress the oral statements.

(T 177-178). Petitioner neither offered to stipulate to proper execution of the search warrant nor did petitioner seek a limiting instruction. Id.

Petitioner's statement was limited to this context. When the jury returned to the courtroom, the following dialogue occurred:

> **Q:** [The prosecutor:] After you got the defendant back inside the house, did you ask him any questions?
>
> **A:** Yes, I did.
>
> **Q:** What did you ask him?
>
> **A:** I asked him if he live there.
>
> **Q:** And what did he reply?
>
> **A:** He replied yes.
>
> **Q:** Okay, what happened next?
>
> **A:** At that point I read the defendant the search warrant.

> **Q:** All right. What happended after the search warrant was read?
>
> **A:** After that I advised the defendant of his constitutional rights.

(T 179). Other reference to this "statement" was made by petitioner. (T 257).

Petitioner argues he was in "custody" at the time of his statement and should have been afforded the procedural safeguards set forth in Miranda v. Arizona, 384 U.S. 436 (1966). The Miranda procedural safeguards are required only when a suspect is interrogated in a custodial setting. Id. at 477-478. The factors upon which petitioner relies as evidence of being in custody-freedom of action significantly restrained, presence of four officers (one with a crowbar and two with weapons drawn), being taken back inside the premises-are indications of law enforcement efforts to secure the premises and its occupants in order to maintain the status quo and execution of the search warrant. See, PB at 27. "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by" the Supreme Court's holding in Miranda. Id at 477.

The instant "question" was brief and involved a neutral and investigative subject matter. The question was not intended to elicit a confession and did not rise to the level of interrogation. United States v. Menichino, 497 F.2d 935 (5th

Cir. 1974). This was the trial court's ruling. (T 177-178).

In the absence of showing an abuse of discretion, a trial court's evidentiary ruling will not be disturbed. McNamara v. State, 357 So.2d 410 (Fla. 1978); Carter v. State, 370 So.2d 1181 (Fla. 4th DCA 1979). The ruling of a trial court on a motion to suppress is clothed with a presumption of correctness. The reviewing court should interpret the evidence and every reasonable inference in a manner most favorable to sustain the lower court's ruling. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978); Maggard v. State, 399 So.2d 973, 975 (Fla. 1981).

## ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL FOR FAILURE TO PROVE THE ELEMENT OF POSSESSION. (Restated).

Petitioner claims, as he did at the close of the State's case (T 298-306) and at the close of all evidence (T 448), that the prosecution failed to prove actual or constructive possession of a controlled substance or that he had "personal charge or exercised the right of ownership, management or control over the" contraband. (T 298-305). The state relied upon the testimony of the vice detectives executing the warrant, petitioner's acknowledgement of ownership of the suitcase in which the heroin was found, petitioner's attempted flight and the guilty knowledge inferable from other drugs in plain view. (T 305-306). The trial court found a prima facie case had been presented sufficient to place the case before a jury. (T 305-306, 488).

In moving for a judgment of acquittal, a defendant admits all facts adduced into evidence and every reasonable conclusion in favor of the State which is reasonable inferable. Love v. State, 450 So.2d 298, 299 (Fla. 1st DCA 1984); Spinkellink v. State, 313 So.2d 666 (Fla. 1975). The evidence presented below must be viewed from this perspective.

The following testimony was adduced at trial:

1. On April 23, 1985 at 2:45 P.M. vice detectives arrived at 1571 West 32nd

Street to execute a search warrant. (T 164). The police knocked on the door and "hollered, police, we have a search warrant, open the door." (T 164-165). There was no response. The detectives "hollered again." (T 165). At that point, Detective Bean pried "open the lock on the burglar bar door." (T 165, 166, 216).

2. He observed two black females and one black male run from the only bedroom of the duplex apartment. The bedroom was at the back of the apartment. (T 165-166, T 214, 234).

3. Petitioner was identified as the black man. (T 166-167, 267). Detective McNeal testified that petitioner left the room first, before the women. (T 265-266).

4. A tray on the night stand in the bedroom had white powder and four straws. (T 181, 230). Based upon experience as experienced vice officers, the straws were recognized as "snorters" and the white power to be cocaine. (T 181-184, 268). [State's Exhibit 2 is a photo]. (T 194).

5. A tan suitcase was on the bed. (T 184). Inside the suitcase in an attache case. On top the the case was an Eastern Airlines ticket in petitioner's name and inside was $23,000 in cash and 22 packets of heroin. (T 185, 268-269).

6. A second ticket bearing the name of Harry Lewis was found along with boarding passes reflecting side by side seats for Lewis and petitioner. (T 186). Lewis's ticket was found in the bottom of the tan suitcase. (T 233-234).

7. A Remington 30.06 rifle was found on the bed. (T 268, 192-193).

8. A .38 caliber revolver was found behind the dresser in the bedroom. (T 186, 268).

9. A .25 caliber Beretta automatic pistol was found inside a burgundy tote bag in the living room. Id., (T 270).

10. Petitioner stated the burgundy tote bag was his. (T 188, 246-249, 262).

11. In response to Detective Bean's declaration that "a tan suitcase, a gray briefcase and an airline ticket" has been found, Petitioner responded "It's mine." (T 189, 246-249, 257, 261).

12. A purse carrying identification in the name of Cassandra Gillespie was admitted living in the apartment and stated her clothing and purse were in the bedroom. (T 274).

For purposes of §893.13(1)(e), Fla. Stat., actual possession exists where the defendant has physical possession of the controlled substance and knowledge of such physical possession. Constructive possession exists where the accused without physical possession knows of the contraband's presence on or about his premises and his ability to maintain control over it. Hively v. State, 336 So.2d 127, 198 (Fla. 4th DCA 1976).

Possession is defined as having personal charge or exercising right of ownership, management, or control over article. State v. Brider, 386 So.2d 818 (Fla. 2d DCA 1980). There need not be an actual handling of the contraband. Likewise it is unnecessary that the contraband be actually on the person of the

accused. Id. What is required is a conscious and substantial possession as distinguished from mere involuntary or superficial possession. Id. The state proved petitioner's ownership and control in such a manner that the jury could properly infer the accused had knowledge of the presence of the contraband and the ability to control it. Brown v. State, 412 So.2d 420, 422 (Fla. 4th DCA 1982). Dixon v. State, 343 So.2d 1345, 1348 (Fla. 2d DCA 1977), affirmed, 428 So.2d 250 (Fla. 1983).

Petitioner's argument to the contrary is unpersuasive. The factual statements are not dispositive. The property may have been titled in the name of Harry Lewis, but not only was the structure a duplex; petitioner was visiting from New York and was staying there. (T 164, 315-316, 340-341, 369, 352-353, 361). Mrs. Lewis testified that petitioner was living with her and the elder Mrs. Lewis on April 23, 1985. (T 355-357). Yet she also testified that Petitioner carried his belongings in a "little green bag he totes on his shoulder." (T 357). Petitioner brought the bag back and forth with him. (T 358). Petitioner did not stay on a permanent basis at the time of the arrest and had not stayed for about a week. Id., (T 366). "Sandy", Harry Jr's girlfriend lived next door. (T 360), 364-365, 371). Mrs. Lewis wasn't sure (364-365) Harry, Jr. and petitioner lived in New York. (T 363) Petitioner's defense testimony was presented by family members and two workmen all of whom were effectively impeached.

The jury is the appropriate trier of fact. In this case there was sufficient evidence to submit the case to the jury. The weight to be given evidence and the credibility to be accorded to witnesses who testify are jury decisions. Harrison v. State, 254 So.2d 229 (Fla. 1st DCA 1971); Wilson v. State, 208 So.2d 479 (Fla. 3d DCA 1968). A judgment of conviction arrives in the appellate court with a presumption of correctness. Love v. State, at 299; Crum v. State, 172 So.2d 24 (Fla. 3d DCA 1965); Spinkellink v. State. The state submits that the evidence adduced at trial was sufficient to meet all statutory elements.

## ISSUE V

PETITIONER'S MOTION TO COMPEL IDENTITY OF THE CONFIDENTIAL INFORMANT WAS PROPERLY DENIED. (Restated).

It has been long recognized in state and federal courts that the prosecution is not required to disclose the identity of a confidential informant who merely furnishes the probable cause basis for a search or an arrest. McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62, rev. denied, 386 U.S. 1042, 87 S.Ct. 1474, 18 L.Ed.2d 616 (1967); State v. Matney, 236 So.2d 166 (Fla. 1st DCA 1970); State v. Martinez, 381 So.2d 1183 (Fla. 3d DCA 1980); State v. Katz, 295 So.2d 356 (Fla. 4th DCA 1974); Fla.R.Crim.P. 3.220(c)(2). The fact that the informant provided good cause for the defendant's arrest is not enough to overcome the privilege of nondisclosure. State v. Acosta, 439 So.2d 1024 (Fla. 3d DCA 1983); State v. Kirksey, 418 So.2d 1152, 1153 (Fla. 1st DCA 1983).

Even when a confidential informant is integrally involved in a criminal episode, either by purchasing or witnessing a drug transaction, the defense bears a heavy burden to come within an exception to the general rule of nondisclosure. Hawkins v. State, 312 So.2d 229 (Fla. 1st DCA 1975); Treverrow v. State, 194 So.2d 250 (Fla. 1967); Rule 3.220(c)(2), Fla.R.Crim.P. The relevant factors in this regard include: whether the defendant was an active participant in the offense; the possible

significance of the informant's testimony; and whether it is necessary for the prosecutor to refer to the informant in its case in chief.

In the instant case, the informant provided only a tip as to the specific address where a black male from New York was selling large amounts of heroin which the informant had personally observed. A neutral magistrate determined there was sufficient probable cause for issuance of a search warrant. Thus the confidential informant only provided the basis for probable cause and his or her identity is not subject to disclosure. See, McCray v. Illinois; State v. Matney, supra.

Petitioner argues it was necessary to reveal the identity of the informant in order to determine the identity of the black male who the informant observed selling heroin. PB at 39; (T 36-40). What the informant observed at a prior time was of no moment to the state's case against petitioner. Petitioner was charged with trafficking in heroin on a constructive possession theory. (R 10; T 42). The search warrant was issued upon probable cause. Petitioner was present on the premises named when the warrant was executed. Contraband narcotics were found on the premises--in a suitcase containing an airline ticket bearing petitioner's name and of which Petitioner claimed possession. (T 42).

Petitioner's allegation that the identity of the informant had been revealed and comparison to "an identical situation" in Mr. Robbins' case is a reference to State v. Angeloff, 474 So.2d 1 (Fla. 1st DCA 1985). The First District the "disclosure" allegation in Angeloff. Petitioner's contention is equally without merit. (T 45-47).

## ISSUE VI

PETITIONER'S MOTION IN LIMINE WAS MERITLESS AND THEREFORE PROPERLY DENIED. (Restated).

Petitioner sought by pretrial motion to exclude testimony concerning firearms seized during execution of the search warrant. (R 101). A 30.06 rifle was found on the bed next to the suitcase containing $23,000.00 in cash and 22 packets of heroin. (T 268-269, 192-193, 184-185). A .38 caliber revolver was found behind the dresser in the bedroom, (T 186, 268), and a .25 caliber Beretta automatic pistol was found inside a burgundy tote bag. Id., (T 270).

Petitioner argued the evidence was not relevant to any of the charges against him. (R 101, T 54-58).

The trial court did not believe that possession of a weapon was in and of itself prejudicial. (T 56). However, there is no question that the evidence was relevant. As petitioner has argued under Point IV, supra, the State was required to prove possession and scienter to show that petitioner knowingly and intentionally trafficked in heroin. State v. Ryan; State v. Medlin, supra. The presence of firearms, especially in light of the proximity to the heroin, was highly probative evidence of the act as well as the intent to commit the act.

An individual's intent is not usually subject to direct proof, but must be inferred from the acts of the parties and the surrounding circumstances. Booker v. State, 397 So.2d 910, 915 (Fla. 1981); State v. Norris, 384 So.2d 298 (Fla. 4th DCA 1980); O'Brien v. State, 327 So.2d 237 (Fla. 1st DCA 1976); T.G.B. v. State, 405 So.2d 427 (Fla. 3d DCA 1981); Pack v. State, 381 So.2d 1199 (Fla. 2d DCA 1980); Edwards v. State, 302 So.2d 479 (Fla. 3d DCA 1974). Intent, being a state of mind, is a question for the trier of fact. State v. Norris, supra; State v. West, 262 So.2d 457 (Fla. 4th DCA 1972).

Thus the firearm seized at the time of the search and arrest for drug trafficking was obviously relevant and material to what was in the mind of petitioner and his co-conspirators. The state would have been severely hindered in presenting its case had the firearm evidence been excluded. This prejudice is apparent by the defendant's under Point IV. Furthermore, since the jury is the ultimate decider of fact, it would be unrealistic to expect intelligent evaluation of the facts without providing full evidence of what actually transpired.

## ISSUE VII

THE TRIAL COURT NEITHER EXPRESSED A PERSONAL OPINION AS TO PETITIONER'S GUILT NOR COMMENTED ON PETITIONER'S FIFTH AMENDMENT RIGHT NOT TO TESTIFY. (Restated).

It is well settled that a trial court must avoid expression of opinion on the credibility of witnesses or on the guilt of the accused. §90.106, Fla. Stat; See also, Marr v. State, 470 So.2d 703, 712 (Fla. 1st DCA 1985) (on rehearing en banc); Millet v. State, 460 So.2d 489 (Fla. 1st DCA 1984). However, the allegations in brief do not hold up under review of the record for it is equally well-established that a defendant may not invite error and then seek reversal based on that error. Gagnon v. State, 212 So.2d 337 (Fla. 3d DCA 1968); Jackson v. State, 359 So.2d 1190, 1193-1194 (Fla. 1978) cert. denied, 439 U.S. 1102 (1979).

The record reflects that at the time of the comment, the trial court was concerned with clarifying a defense misleading question. Petitioner's request for a mistrial acknowledged the court's comments were "not intended, but could have been interpreted by the jury. . . "in a detrimental manner." (T 93-94). Speculation is never an appropriate ground upon which to base a mistrial. A mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); Perry v. State, 146 Fla. 187, 200 So. 25 (1941).

Moreover, Florida law clearly states that a motion for mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 366 So.2d 745, 750 (Fla. 1979). Also well established and relied upon is the rule that the power to declare a mistrial and discharge a jury should be exercised with great care and caution and should occur only in cases of absolute necessity. Id. at 750. Flowers v. State, 351 So.2d 764 (Fla. 3d DCA 1977). Fundamental prejudicial error to defendant's right to a fair trial must be clearly evident to warrant declaration of a new trial at a latter date. Sykes v. State, 329 So.2d 356, 359 (Fla. 1st DCA 1976), Preston v. State, 342 So.2d 852 (Fla. 2d DCA 1977).

The state submits that the portions of the record challenged herein did not warrant a mistrial. At none of these challenged points, did petitioner request a cautionary instruction for the jury. Under these circumstances, a mistrial, the most extreme remedy possible, was not required.

Petitioner is incorrect in stating that the harmless error doctrine does not apply to comments "fairly susceptible" of interpretation as comments on a defendant's right to silence. First, the state submits that the instant comment is not so susceptible. State v. Rowell, 476 So.2d 149 (Fla. 1985). Second, the state submits, the harmless error doctrine applies. State v. DiGuilio, 451 So.2d 487 (Fla. 5th DCA 1984), approved

and remanded, 491 So.2d 1129 (Fla. 1986) State v. Kinchen, 432 So.2d 586 (Fla. 4th DCA 1983), quashed, 490 So.2d 21 (Fla. 1985) State v. Marshall, 476 So.2d 149 (Fla. 1985)

## ISSUE VIII

THE TRIAL JUDGE DID NOT ERR IN REFUSING TO DISMISS JUROR ZIPPERER FOR CAUSE.

The issue presented is whether the trial court committed reversible error by not excusing a juror for cause. §913.03(10), Fla. Stat., permits a challenge of a prospective juror for cause where the juror's state of mind, impression or opinion would prevent his acting with impartiality. The constitutional standard of fairness requires that a defendant have a "panel of impartial, 'indifferent' jurors" Irwin v. Dowd, 366 U.S. 717, 722 (1961).

The test to be utilized by the judge in determining whether a juror is competent is not whether he or she will be able to control any bias or prejudice, but rather, whether the juror may lay aside those considerations and render a verdict solely upon the evidence presented and the instructions on the law given by the trial court. Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981) rehearing denied; Singer v. State, 109 So.2d 7 (Fla. 1959). McCullers v. State, 145 So.2d 909 (Fla. 1st DCA 1962) cert. dismissed, 155 So.2d 696 (Fla. 1963).

In Singer v. State, this court held that where there is any reasonable doubt as to a juror possessing the requisite state of mind required to render an impartial verdict, the juror should be

excused. Leon v. State; Singer v. State, supra. Petitioner maintains that the responses of the juror were not sufficient to alleviate doubt as to her ability to fairly weigh the testimony of witnesses presented at trial. The trial judge did not agree.

In Singer, this court specifically stated:

> We think the true test to be applied should be not whether the juror will yield his opinion, bias or prejudice to the evidence, but should be that whether he is free of such opinion, prejudice or bias or whether he is infected by opinion, bias or prejudice, he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon evidence given at the trial.

Id. at 24. The Supreme Court of the United States revisited exclusion of jurors opposed to capital punishment, stating the proper standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his oath". Wainwright v. Witt, 469 U.S. 412 (1985) quoting Adams v. Texas, 448 U.S. 38 (1980). The new standard does not require that a juror's bias be proved with "unmistakable clarity". Further it does not require that determinations of juror bias be reduced to question and answer sessions which obtain results in the manner of a catechism. Id.

In Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981), the court held that the question of whether to excuse a prospective juror for cause is a mixed question of law and

fact. See also Singer, supra at 22; Blackwell v. State, 132 So. 468 (1931). As such, the decision is within the discretion of the trial judge and his ruling will not be set aside unless error is manifest. Hawthorne, supra at 1089; Singer. supra at 22; Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979). Deference must be paid to the trial judge who sees and hears the juror. Wainwright v. Witt, supra.

In concluding that juror Zipperer was not biased, the trial court relied upon it's own questioning of the juror, concerning her statement:

> MR. WILLIAMS: You would give their [police officers] testimony greater weight than testimony of ordinary citizens?
>
> THE COURT: I think we need to clarify that, because you said some people.
>
> Jurors are required to evaluate, in their own minds, 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 and you might have bankers or judges, or you might have lawyers that are testifying. You might have anybody testifying. Okay?
>
> Is it your statement that you would tend to believe a police officer more or attach greater credibility to their

testimony only because he is a police officer?
A VENIREMAN: No.

THE COURT: In other words, the mere fact that he is a police officer, you would tend to believe him more than anybody else?

A VENIREMAN: No.

(T 86).

Conduct of a juror is a responsibility of the trial judge and discretion is allowed in dealing with any problems which arise. The overriding duty of the court is to insure that a defendant receives a fair and impartial trial. Orosz v. State, 389 So.2d 1199, 1200 (Fla. 1st DCA 1980). Here, there was ample indication that the juror did not have a state of mind which would prevent her from acting impartially. The trial judge acted properly in ensuring the fairest and most impartial trial possible. Petitioner has not met his burden of showing an abuse of judicial discretion. William v. State, 386 So.2d 538 (Fla. 1980). (T 76).

Alternatively, we submit that if error occurred it was harmless. Juror Zipperer was struck by the defense with its third peremptory challenge. (T 106, 105-107). Petitioner did request additional challenges, but it is obvious from the discussion on the record that the rapid use of all defense peremptory challenges was attributable to the decisions being made by petitioner, not counsel. (T 110, 105-111). Accordingly, reversible error has not been demonstrated and petitioner's conviction should be affirmed.

## ISSUE IX

THE PROSECUTOR'S COMMENTS IN CLOSING WERE NOT IMPROPER, AND A MISTRIAL WAS NOT REQUIRED. (Restated).

Petitioner's last point seeks reversal based upon certain comments of the prosecutor in closing which allegedly voice personal opinion and comment upon the accused's right to silence. PB at 47. Considerable latitude is allowed a prosecutor in closing argument and logical inferences based on the record are permissible. Thomas v. State, 326 So.2d 413 (Fla. 1975); Paramore v. State, 229 So.2d 885 (Fla. 1969) modified, 408 U.S. 935 (1972); Gosney v. State, 382 So.2d 413 (Fla. 5th DCA 1976). Furthermore, it is a well-established legal principle that isolated portions of argument cannot be reviewed except within the total context. Wingate v. State, 232 So.2d 44, 45 (Fla. 3d DCA 1974).

The prosecutor's comment concerning the "big time" operation was directly related to the evidence presented at trial: $23,000, 22 packets of heroin, 3 firearms, tickets to New York and other drugs, as well as in response to comments of defense counsel concerning ineffective investigation to police. The defense cannot invite error and then seek reversal based on that error. Jackson v. State, supra; Holmes v. State, 374 So.2d 944 (Fla. 1979). It is apparent from review of the record that the prosecutor's reference were invited by defense counsel. When

this concept is considered in conjunction with the latitude afforded counsel in argument, the state submits that reversible error did not occur. See, State v. Melton, 424 So.2d 137, 138 (Fla. 1st DCA 1982).

The foregoing is equally true of the comments allegedly suceptible as comments upon the defendant's failure to testify which were instead comments emphasizing the testimony of the detectives which petitioner attempts to interpret as comments on silence. (T 532). The state defers to the record and submits that error did not occur. State v. Shepard, 479 So.2d 106 (Fla. 1985). Alternatively, if error occurred, it certainly did not approach the egregious level which would entitle reversal.

> Juries are composed of men of sound judgment and intelligence. At least so the law requires, and it is not to be presumed that they are led astray to wrongful verdicts by impassioned eloquence and illogical pathos of counsel.

Johnson v. State, 449 So.2d 921 (Fla. 1st DCA 1984) quoting Tyson v. State, 87 Fla. 392, 100 So. 254, 255 (1924). The state submits that any error present is harmless and reversal is not required. Melton v. State, 420 So.2d 30 (Fla. 1st DCA 1981).

## CONCLUSION

Based upon the foregoing, the respondent respectfully requests this Honorable Court affirm the lower court's opinion in the matter sub judice.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to J. Craig Williams, Esq., 211 Liberty Street, Jacksonville, Florida 32202, on this 12th day of August, 1987.

ROYALL P. TERRY, JR.
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR APPELLEE