IN THE SUPREME COURT OF FLORIDA

DAVID CAUTHEN,

Petitioner,

vs. CASE NO. 71,472

STATE OF FLORIDA,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGES
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	
ARGUMENT	
ISSUE I CERTIFIED QUESTION	
MAY THE QUANTITY OF DRUGS INVOLVED IN A CRIME BE A PROPER REASON TO SUPPORT DEPARTURE FROM THE SENTENCING GUIDELINES?	4
CONCLUSION	16
CERTIFICATE OF SERVICE	16

TABLE OF CITATIONS

CASES	PAGES
Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986)	8, 15
Casteel v. State, 498 So.2d 1249 (Fla. 1986)	12
Eutsey v. State, 383 So.2d 219 (Fla. 1980)	6
Flournoy v. State, 507 So.2d 668 (Fla. 1st DCA 1987)	15
Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985)	13
Lerma v. State, 497 So.2d 136 (Fla. 1986)	12
MacNamara v. State, 357 So.2d 410 (1978)	7
Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985)	13,15
Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984)	13
State v. Villalovo, 481 So.2d 1303 (Fla. 3d DCA 1986)	13

TABLE OF CITATIONS
(CONT)

CASES	PAGES
The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311 (Fla. 1985)	10
Vanover v. State, 498 So.2d 899 (Fla. 1986)	10
OTHER AUTHORITY	
Fla.R.Crim.P. 3.701(b)(3)	10
Fla.R.Crim.P. 3.701(d)(9)	11
Fla.R.Crim.P 3.701(d)(11)	9
Section 784.045, Fla. Stat.	11
Section 893.135(1)(a), Fla. Stat.	14

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PRELIMINARY STATEMENT

Petitioner, the defendant in the trial court, will be referred to as "Petitioner". The Respondent, the State of Florida, will be referred to as "the State". The two volume record on appeal will be referred to as "ROA", followed by the volume and page number.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's assessment of the case and facts to be accurate to the extent stated. Additional facts relevant to the issue on appeal will be included in the argument portion of the State's brief.

SUMMARY OF ARGUMENT

The trial court did not commit error by determining that the weight of the cannabis in this case was 50 pounds. The court's finding was proven by the Pre-Sentence Investigation report and testimony heard at the time the Petitioner was sentenced, and its determination must be upheld.

The Petitioner also argues that even if the weight of the drugs was accurate, it was still improper for the trial court to depart above the recommended guidelines range based upon the fact that the Petitioner had 50 pounds of marijuana in his possession. The Petitioner's argument must fail, since the quantity of drugs in the case sub judice justified a one-cell departure from the guidelines and the sentencing guidelines do not preclude departure based upon quantity of narcotics.

ARGUMENT

ISSUE

CERTIFIED QUESTION

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

The Petitioner first contends that the trial court had an insufficient basis for determining that the amount of marijuana the Petitioner possessed weighed 50 pounds. The State disagrees. The trial court's ruling as to weight is supported by the Presentence Investigation Report (hereinafter PSI report) which is undisputed by the Petitioner as to its findings regarding the weight of the marijuana. Also, the findings of the PSI report are corroborated by the transcript of the sentencing hearing.

Pages one and seven of the PSI report clearly set forth that the Petitioner possessed fifty pounds of marijuana. (See, Appendix A, PSI report attached). Also, aside from the failure to object to the PSI report, at only one point in the sentencing hearing did the Petitioner's lawyer ever object to departure based upon weight, and in so doing he did not object to the PSI report. He simply stated that he had never stipulated to the weight of the marijuana and objected to the court considering it as no evidence had been presented as to weight. (ROA, II at 19). Yet the Petitioner never questioned the statements as to

weight contained in the PSI report. In fact, the Petitioner's attorney accepted the PSI report almost in its entirety, and only challenged its accuracy as it related to the Petitioner's prior record:

> **Mr. Ellis:** (Petitioner's trial attorney) Your Honor, I have reviewed the Presentence Investigation Report with David and find it to be essentially accurate. However, when we get down to sentencing guidelines scoresheet, they have in error, in my opinion, scored him for two prior felonies when he only has one prior felony. So, he still would score out any non-state prison sanction, but the score would be, in fact, 70 points minus the additional seven points. So, that would be 63, of course, by my calculation and legal opinion.
>
> **MR. PAGE:** (Prosecutor) The State agrees, Your Honor. Apparently, the preparer scored a pretrial intervention disposition as a conviction, and if pretrial intervention in Tampa is like it is here and it has been successfully completed as Mr. Cauthen apparently was, then Mr. Cauthen would have been dismissed at the conclusion of that intervention period. So, I'll agree with Mr. Ellis on that point.
>
> **MR. ELLIS:** And the other thing is, Your Honor, in summary or circumstance section on Page One of the document, I believe that Mr. David Cauthen's involvement has been misstated to a degree in the Presentence Investigation Report because after listening to the tapes and taking depositions and talking to David, I believe he was what was called a driver in a drug transaction. He was a person that separates the buyer or the kingpen from the actual work involved in transporting illicit drugs. He is part of the

> operation, I don't deny that. But on the other hand to say that he was one of the ones that handed over money and he was one of the ones that set up his contact here in Live Oak would be untruthful and incorrect. His involvement was less than those other two defendants.
>
> So, yes, he is a co-defendant, but, no his involvement is not the same as the others. He did not have the capital. He did not have the contacts. And I ask the Court to see him in the proper light, and I think that the State's plea bears that out. He is not one of the conspirators.

The above transcript shows that the Petitioner never challenged the facts set forth on page one of the PSI report. In Eutsey v. State, 383 So.2d 219 (Fla. 1980) this court held that in order to dispute the truth of PSI hearsay the Petitioner must do so in a timely manner. Id. at 225. In addition the Petitioner is also required to "expressly dispute the truth of any matters contained within the report". Id. at 223. In this case the Petitioner did not, and in fact expressly found the report to be "substantially accurate" with only two clarifications. Since the Petitioner failed to challenge the weight reports contained in the PSI report, the trial court acted properly in considering the statements contained therein as evidence in support of its factual finding.

In addition to the contents of the PSI report, which by itself proves the weight of the marijuana beyond any reasonable doubt, the trial court also had for its benefit the transcript of

the sentencing hearing. The following statement by the Petitioner corroborates the factual basis upon which the trial court based its finding:

> **THE PETITIONER:** And I'm facing five more years on my violation of probation. If that is run back to back, I'm looking for ten years and not for just driving a car with a trunk full of pot. That is only the tip of the iceburg, you know? (ROA, II at 12)

In addition, the following transcribed questions and answers supported the trial court's finding:

> **THE COURT:** What is the proof of the amount of marijuana involved in this transaction?
>
> **MR. PAGE:** (Assistant State Attorney) Your Honor, the officer who bought the marijuana, a Robin McDaniel who filed the sworn complaint in this case states that it was 50 pounds that was sold to them. And I don't think Mr. Cauthen would deny that.
>
> **THE PETITIONER:** I never weighed it to be honest with you. I don't know exactly how much was in there.
>
> **THE COURT:** Well, you did say awhile ago that you would ride around with a bale in your car?
>
> **THE DEFENDANT:** I knew it was a bunch in there. I'm not trying to say I went up there for no bag. I'm not trying to deny that at all, and I'm not going to deny it, and I'm not going to try to lie my way out of this.

The ruling of a trial court on questions of fact comes to the reviewing court with a presumption of correctness. In

MacNamara v. State, 357 So.2d 410 (1978) this Court held that this presumption will not be disturbed absent a showing that the trial court ruling demonstrates a clear abuse of its discretion. The facts cited by the State above show that the trial court was correct in finding that the weight of the marijuana had been proven beyond a reasonable doubt, and that the facts here demonstrate no abuse of discretion.

As the Petitioner notes, the dispute among various district courts of appeal in Florida as to the propriety of departures based upon quantity of drugs will be resolved when this Court decides Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986) review pending, Case No. 69,555. The Petitioner argues that except for a situation where the quantity of drugs exceeds the "outer limits of the statute" departure is never permissible based upon quantity. Petitioner's argument further urges that if the legislature wants to draw finer distinctions between varying quantities of drugs it is within their province to do so, but not a trial court's. Petitioner's argument must be rejected as the sentencing guidelines do not devest the trial court of its authority to sentence above the guidelines based upon quantity of narcotics. It is a third-degree felony to possess more than 20 grams of cannabis in the State of Florida. Twenty grams of cannabis is .044 of a pound. The Petitioner had 50 pounds. Certainly the guidelines do not require that the Petitioner, with his 50 pounds of cannabis, must be treated to the same non-state

prison sentence is a defendant who has 21 grams of cannabis in his hip pocket! The Petitioner sub judice had the equivalent of 22.73 Kilograms of cannabis in the trunk of his car. Contrary to the Petitioner's argument, the guidelines do not factor in as an inherent component the fact that the Petitioner had far more than 20 grams of cannabis in his possession. Adoption of the Petitioner's mode of thought would reduce trial judges to simple score keepers and point adders and the end result would be to rob them of all discretion in narcotics cases to treat defendants differently based upon the individualized circumstances presented in each case. This was not the intent behind establishment of the sentencing guidelines, particularly as they have been construed by this Court in non-narcotics cases. Instead, the trial judge's decison to depart sub judice finds support in the guidelines and applicable case law. First, the trial judge's decision to depart finds support in the committee note to Rule 3.701(d)(11) Fla.R.Crim.P. 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 that committee note has perhaps been inadvertantly overlooked, yet it is no less significant than any other provision in the committee notes. That last sentence provides:

> Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentenced 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 is applicable to the instant case. In fact, in December of 1985, this Court expressly made all of the provisions of the committee notes a part of the rules. The Florida Bar Re: Rules of Criminal Procredure, 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)(11) expressly approves consideration of and utilization of that factor in departing from the guidelines sentence. The State submits possessing an amount of cannabis amounting to 22.73 kilograms, which exceeds the threshold amount necessary to classify the offense as a third degree felony by 22,730 grams, is an appropriate departure factor that 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 of 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 this appeal. For

example, in Vanover v. State, 498 So.2d 899 (Fla. 1986) the defendant, Vanover, was convicted of aggravated battery for shooting a visitor to his home in the arm. Vanover was found not guilty of shooting the visitor's brother in the mouth. Both victims apparently lived. To convict Vanover of the aggravated battery the State had to prove that Vanover, in committing the battery: **(1)** knowingly or intentionally caused great bodily harm, permanent disability or permanent disfigurement or **(2)** used a deadly weapon. §784.045, Fla. Stat. (1985). Aggravated battery is a second-degree felony punishable by a maximum of 15 years. 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 minimum mandatory 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 3 year minimum mandatory and imposed a sentence of 10 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 this Court's ability to "flesh out factual support" for this reason in the record, this Court upheld this reason on the following rationale:

> Noting that Florida Rule of Criminal Procedure 3.701(b)(3) allows departure based on "the circumstances 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 reason for departure in this case. Id. at 615.

In a sexual battery context, this Court held that excessive brutality could be a valid reason for departure as well as the fact that the defendant committed two separate acts of sexual battery: intercourse and fellatio. Lerma v. State, 497 So.2d 136 (Fla. 1986). This Court's rationale in approving those reasons for departure in Lerma v. State, 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. This Court also 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 the "normal" emotional trauma associated with sexual offenses.

The very sentencing guideline rule which has recently persuaded 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 one cell departure from the recommended guidelines where the quantity of drugs is so much more than the minimum required to constitute a third-degree felony. 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 battery cases. In fact, the district courts have relied on the principles in Rule 3.701(b)(3) to approve upward departures based on possession of a large quantity of drugs. See, for example, Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984) (The guidelines treat 1 dose and 2,000 dosages of LSD the same, thus due to Rule 3.701(b)(3) and comment following (d)(1), departure is proper where defendant has 2,000 hits of LSD); 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 departure in an armed robbery case due to excessive use of force). Interestingly, Petitioner fails to acknowledge in his brief one of the cases the First District Court of Appeal cited to in its opinion where a downward departure was approved due to the small amount of contraband. In State v. Villalovo, 481 So.2d 1303 (Fla. 3d DCA 1986) the defendant had only 1/2 gram of cocaine, subjecting him to a five year maximum, however, his prior record increased his points such that his recommended guidelines 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, supra, 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.

That the legislature intended for possession of increasing amounts of narcotics to be punished commensurately is evidence by the fact that there are increasingly more severe penalties as the amount of drugs possessed becomes higher. Yet it does not follow from that fact that trial courts are constrained from differentiating between offenders except as is permitted by the trafficking statute, §893.135(1)(a), Fla. Stat. The Petitioner argues that the trial court is so constrained, suggesting that absent legislative action to draw finer distinctions between quantities of cannabis the trial courts are prohibited from drawing any distinctions beyond that which the statute itself set forth. The flaw in the Petitioner's reasoning is that it presupposes that the guidelines and the trafficking statute robs the trial judge of all discretion in sentencing. It is the position of the State that the Petitioner's argument is not compelling as it is ludicrous to suggest, for example, that a woman with 30 grams of cannabis tucked in her purse is similarly situated with the Petitioner who was toting 50 pounds of cannabis

in his trunk. It is even more absurd to imagine that the sentencing guidelines require that both offenders be sentenced to any non-state prison sentence. The trial court acted properly in departing one cell and sentencing the Petitioner to 18 months state prison. The sentence was in accord with the intent and purpose of the sentencing guidelines.

Based upon the reasoning used by the First District in Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985); Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986); and the district court's most recent enbanc pronouncement in Flournoy v. State, 507 So.2d 668 (Fla. 1st DCA 1987) it is the State's position that the trial court properly exercised its discretion in departing from the guidelines based upon the large quantity of drugs involved in this case, and that its decision was consistent with the intent of the guidelines and must be upheld.

CONCLUSION

The trial court acted properly in departing from the recommended guidelines range of any non-state prison sentence.

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 P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 17th day of December, 1987.

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