OA 4-7-98

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

VS. CASE NO. 91,352

MOMPOINT VOLTAIRE,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, but supplies the following additional facts to facilitate this Court's review of the merits of the issue on appeal, both in substance and on the question of harmless error:

Respondent and co-defendant Michelle Bazelais were charged with trafficking in cocaine and conspiracy to traffic in cocaine (R 570-571). Respondent was found not guilty on Count I, but guilty in Count II, after a jury trial (R 558-559, 583-585). Prior to trial, the defense filed a motion to suppress a statement made by Respondent to Oakland Park Police Officer Kips Poliard (R 8, 13, 575-576). Testimony on this motion was taken prior to jury selection (R 2).

Ghalib Carmichael, an undercover narcotics detective, conducted an investigation in December, 1994, resulting in Respondent's arrest on December 15, 1994 (R 23, 26, 36-37). Immediately after his arrest, Respondent refused to speak with police (R 45-46). As a result, Kips Poliard was contacted, then sent into Respondent's jail cell in an undercover capacity to "see if [Respondent] would speak to [Poliard] about the case" (R 9-10, 46, 48). At the time, only Respondent and Poliard occupied the cell (R 11). Since Poliard spoke both English and Creole, he spoke with Respondent in both languages (R 11). In response to a question by Poliard as to "what [he] was in for," Respondent said "cocaine" (R 12). When Respondent asked Poliard why he was incarcerated, Poliard told Respondent a false story about being arrested for possession of cocaine after a traffic stop; Poliard told Respondent he faced five years imprisonment for his arrest (R 13, 16, 18). Respondent stated that police told him he was likely to do "ten years" (R 13). When Poliard asked Respondent "why," Respondent said that he "set up a deal for two kilos of cocaine" with an undercover police officer (R13). Respondent denied to Poliard ever touching or delivering cocaine,

insisting he "only set up the deal" (R 13-14).

Poliard admitting never identifying himself to Respondent as a police officer, and thus not mirandizing Respondent prior to questioning (R15). Poliard was aware that other law enforcement officers had attempted to question Respondent about the facts underlying Respondent's arrest, but that Respondent had refused to speak to those officers (R 17). Thus, Poliard admitted, his actions were designed to elicit an incriminating statement from Respondent (R 17). Poliard also admitted initiating his conversation with Respondent, asking him "what are you in for?" (R 17). Finally, Poliard acknowledged, the details he sought came after he questioned Respondent; that is, Respondent volunteered no incriminating information without questions by Poliard (R 1 S).

Although Petitioner and Respondent entered into a stipulation at the suppression hearing that Respondent was mirandized by other law enforcement officers, and then invoked his right to silence, prior to entering his jail cell, and although the trial court initially twice accepted this stipulation for purposes of the hearing , the trial court ultimately "found" as a "fact" that "no evidence" existed that Respondent did not wish to speak with police, or was mirandized prior to speaking with Poliard (R 20, 48, 59-60, 63-66, 68). Thereafter, the trial court denied the defense's motion to suppress, relying on Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (R. 69). Defense counsel responded that whether or not Respondent was mirandized prior to speaking with Poliard was irrelevant, as Respondent clearly indicated his refusal to speak with police after arrest, thus invoking his constitutional right to silence (R 69-70). Finally, the defense argued, the questioning of Respondent by an undercover police officer after Respondent had invoked his right to silence violated his right to due process (R 57). Nonetheless, the trial court maintained its decision denying the defense's motion to suppress (R 69, 577-578). Thereafter, during opening statement the trial

prosecutor referred to Respondent's statement to Poliard as evidence from which the jury could infer that Respondent had admitted his guilt as to Count II, conspiracy to traffick in cocaine (R 220-221). The case then proceeded to trial.

Ghalib Carmichael testified at trial that he received a tip from a confidential informant on December 9, 1994, that "Peter" wanted to sell "kilos of powder cocaine" (R 229). In response, Carmichael told the informant to give "Peter" Carmichael's beeper number (R 230). That same day, Carmichael was "beeped," then discussed purchasing two kilograms of crack cocaine from the caller (R 230). Carmichael suggested to "Peter" that they meet at a Miami Subs restaurant on Sunrise Boulevard on December 13, 1994 (R 23 1).

As a result, on that date Carmichael and Fort Lauderdale police detective Jeffrey Alexander met the informant, as well as a man Carmichael identified as Respondent, with Respondent quoting the price of $21 ,000.00 per kilogram of powdered cocaine (R 23 1-233, 323, 325-326). According to Carmichael, Respondent offered to "cook" the powder cocaine into crack cocaine for an additional $500.00 (R 233). Since Carmichael was wearing an electronic recording device during this meeting with Respondent, their conversationwas taped; these tapes are subsequentlyplayed for Respondent's jury (R 234-235, 335). On this tape, Carmichael requests "fifty ten-packs" of cocaine; the other voice on the tape responds "I can do that", and, then offers to charge "ten" to "cook it" (R 337-338). Also on this tape, Carmichael discusses all specific arrangements for the cocaine transaction; the other voice responds "yeah," including when Carmichael said "you bring the rock" (R 338-341). When Carmichael asked how much the cocaine would cost, the other voice said "21, 21" (R 342). Thereafter, the Miami Subs tape, State Exhibit 2, ended (R 335,345).

On December 15, 1994, Respondent telephoned Carmichael, telling him to "pick up"

Respondent so that they could complete the cocaine transactionat Misha Fashions, a store in Wilton Manors, where "Michelle" worked (R 235-236). Instead, Carmichael dialed the number for "Michelle" given him by Respondent (R 337). Carmichael informed Michelle that he would pick up the cocaine; she responded that Carmichael need not bring "Peter" with him at that time (R 237-238). Sometime later that day, Carmichael began telephoning "Michelle" to ask about the possible purchase of a second kilogram of cocaine; at that time Michelle was unavailable (R 239-240). Since Carmichael continued wearing an electronic broadcasting device during his contacts with the co-defendant, the tapes of his telephone conversations with "Michelle" were also played for the jury (R 345, 35 1-352). During one conversation, Carmichael tells Bazelais that he'll " be by [at]" 3:30 and wanted "one pin" for "21," to which the co-defendant said "yeah" (R 346, 348, 352).

When Carmichael arrived at Misha Fashions, he was greeted by the co-defendant, who directed him to a rear storeroom where she gave Carmichael a package containing cocaine (R 240-141). As a result, Bazelais was arrested (R 241). Carmichael then phoned Respondent, asking for a second kilogram of cocaine (R 242). When Respondent arrived, he was subsequently arrested (R 242,269). Carmichael's conversation with Respondent at the arrest scene was likewise recorded, then played for Respondent's jury as state exhibit six (R 355):

> . . . [Respondent]: How's it going?
>
> Detective Carmichael: What's going on?
>
> [Respondent]: All right.
>
> Detective Carmichael: You bring the stuff with you?
>
> Respondent: No, I'm going to -- [unintelligible]
>
> Detective Carmichael: Great, you told me you were going to bring me

that little -- you said you were going to bring me another key with you.

[Respondent]: No, I --

Detective Carmichael: You bring one key, You told you was going to bring another key.

[Respondent]: You don't have it,

Detective Carmichael: She gave me one. She said you was going to bring me another one.

[Respondent]: Oh, I don't -- (unintelligible).

Detective Carmichael: Who you got to call?

[Respondent]: I don't know.

Detective Carmichael: You don't have another key?

[Respondent]: (unintelligible).

Detective Carmichael: That's what I said on the phone. I said yo, man--

[Respondent]: (unintelligible).

Detective Carmichael: Damn, how much?

[Respondent]: (unintelligible).

Detective Carmichael: Twenty? Oh, shit you got ten? (unintelligible). Hold up. , , hey, man, you telling me -- you told me you was going to bring --

[Respondent]: I didn't even know. You know, my drive in -- (unintelligible). Maybe. So what 's funny?

Detective Carmichael: (unintelligible).

[Respondent]: Yeah.

Detective Carmichael: He aint' got it. I don't' know if we can try him on

conspiracy or what? I thought you told me he gave you the key. . , so he is acting like he didn't give it to you then?

[Respondent]: (unintelligible).

Detective Carmichael: Peter.

[Respondent]: Yeah.

Detective Carmichael: When I was on the phone, I said you can bring me another one.

[Respondent]: No, I don't -- you want to tell him. Somebody.

Detective Carmichael: Oh, you had to call someone else?

[Respondent]: Knew we ought to find somebody. Just --

Detective Carmichael: Where you got the first one from ?

[Respondent]: The first one.

Detective Carmichael: Yeah, where did you get the first one from?

[Respondent]: First one.

Detective Carmichael: Yeah, first key, yeah.

[Respondent]: Got -- (unintelligible)

Detective Carmichael: So Billy got you the key?

[Respondent]: Give me.

Detective Carmichael: Yeah.

[Respondent]: Billy Harden.

Detective Carmichael: Did Billy give it to you?

[Respondent]: Billy.

Detective Carmichael: Yeah.

[Respondent]: (unintelligible)

Detective Carmichael: Yeah, Peter. Come on, man where did you get the key from, man? I want another key.

[Respondent]: Let me find out for you because don't have. Let me try to call somebody. Some have and I try to call them.

Detective Carmichael: You have somebody you got to call somebody.

[Respondent] : Huh?

Detective Carmichael: You got to call somebody?

[Respondent]: Because I'm getting too much friend to you ask me for that I want to try that for . . . what?

Detective Carmichael: Yes, I understand that. I thought you were going to. I thought --

[Respondent]: I don't' have it. . .

Detective Carmichael: Where did you get the first one from?

[Respondent]: The first.

Detective Carmichael: The first one. Yeah.

[Respondent]: (unintelligible) . . . .

(R 355-359). After Respondent's arrest, another law enforcement officer contacted Officer Poliard, who spoke Creole, to enter Respondent's jail cell and seek an incriminating statement from Respondent (R 244-245). According to Carmichael, Michelle Bazelais had pled guilty to the charges against her, and was awaiting sentencing at the time of trial (R 248). Carmichael admitted that Bazelais was doing "substantial assistance" with the Fort Lauderdalepolice department (R 249). Although Carmichael admitted that the confidential informant in Respondent's case was paid money for his efforts, both in this case and previously, Carmichael denied paying the informant more money

for larger amounts of cocaine trafficking identified by the informant (R 25 1-253). Carmichael admitted that Respondent was not on the scene when Michelle Bazelais handed Carmichael a package of cocaine (R 266-267).

Jeffrey Alexander, an undercover Fort Lauderdale police officer, worked with Ghalib Carmichael; as a result, Alexander was involved in Carmichael's meeting with Respondent and the confrdentialinformant at Miami Subs on December 13, 1994 (R 323,325"326). Alexander recalled that Respondent and Carmichael spoke about the purchase of cocaine (R 326). Alexander testified that Respondent offered to "cook" the cocaine for Carmichael for $500.00 (R 330). Alexander acknowledged that Respondent and the confidential informant occasionally spoke Creole, which neither Carmichael or Alexander understood (R 333).

Kips Poliard testified during trial, restating the same facts as he testified to during the motion to suppress hearing (R 361-362, 365-366). Defense counsel's renewed motion to suppress prior to Poliard's incriminating testimony was overruled by the trial court (R 364). According to Poliard, Respondent admitted getting paid to "set up" this "deal" after speaking with "people [he] knew in the business" (R 367).

After the State rested, Respondent testified on his own behalf, admitting that he knew co-defendant Michelle Bazelais and the confidential informant, Billy Harden (R 410-411). However, Respondent denied ever speaking with Billy Harden concerning cocaine. Respondent did admit meeting Officer Carmichael at the Miami Subs Restaurant on December 13, 1994, as the result of an introduction by Billy Harden (R 413). According to Respondent, the informant promised him $500.00 to "stand next to him" while a cocaine deal was being discussed (R 414). During this meeting, Harden spoke to Respondent in Creole, telling him to tell police he would "cook" the

cocaine for them, although in reality Billy Harden would perform that task (R 414). Respondent could not remember telling Bazelais on the telephone that he would get Carmichael cocaine; nevertheless, Respondent admitted giving Carmichael his telephone number (R 415). Respondent denied speaking with Michelle Bazelais about cocaine, or "setting up" any "deal" with anyone (R 415). According to Respondent, he received a telephone call at home from Detective Carmichael on December 15, 1994; at that time, Respondent told Carmichael that he possessed no cocaine, money, or vehicle (R 416). Nonetheless, Respondent admitted being in a cab with Billy Harden on the way to Misha Fashions that same day; however, Harden "'jumped out" of the cab prior to arrival at the arrest scene (R 416).

Respondent admitted speaking to Officer Poliard in jail, and admitting informing Poliard that he faced ten years imprisonment; Respondent explained that this was what he was told by the officers who arrested him (R 418-419). Respondent told Poliard he never possessed cocaine that day (R 419). Respondent denied telling Poliard that he "set up" any "deal" (R 419).

On cross-examination, Respondent claimed that Billy Harden "made him" telephone Carmichael on December 9, 1994, telling Respondent what to say to police during Respondent's discussion about cocaine (R 422, 424-425, 427-428, 431-432). Respondent admitted that he was known as "Peter" in December, 1994 (R. 437). Respondent claimed that he went to the arrest scene at the behest of Billy Harden, who was going to involve himself in the co-defendant's action with Detective Carmichael (R 443).

During closing argument, the prosecutor informed Respondent's jury that Respondent's statement to Officer Poliard was evidence of his guilt on both counts of the information (R 505). During deliberations,the jury requested a transcript of the conversations recorded by police at Miami

Subs and just prior to Respondent's arrest (R 550 554, 587, 588). Without objection, the jury was furnished with the tapes in question (R 553). Additionally, the jury requested a translation of Respondent's Creole conversation with Billy Harden at the Miami Subs (R 554). Thereafter, Respondent was acquittedon Count I, but convictedon Count II (R 558-559, 583-585). This appeal follows.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

The Fourth District Court of Appeal (DCA) correctly resolved the issue raised by this appeal in Voltaire v. State, 697 So.2d 1002, 1005 (Fla. 4th DCA 1997), since the trial court erred in denying trial counsel's motion to suppress Respondent's statement to an undercover law enforcement officer made while incarcerated, Although Federal constitutional law allows for the use of such deception in securing incriminating statements from criminal defendants, the Florida Constitution embodies a due process limitation on the methods police can use to elicit such statements. Here, Respondent was both "in custody" and subject to "interrogation," as those terms are defined by both Federal and Florida law, thus implicating Respondent's right to silence. Specifically, Respondent was incarcerated when Poliard asked him "why" he faced ten years imprisonment, a question reasonably likely to secure an incriminating response. Under these circumstances, the State's use of an undercover law enforcement officer actively soliciting incriminating information from Respondent after Respondent's right to silence attached violated his right to due process. Finally, this error was not harmless under the facts of this case, as Respondent's jury possessed evidence suggesting both inculpatory and exculpatory explanations for Respondent's contact with police. Here, the jury could have used the inadmissible testimony concerning Respondent's statement to Poliard to adopt an inculpatory interpretation of Respondent's words and deeds as to Count II. Since this issue was properly preserved for appellate review, and the trial court's refusal to accept the factual stipulation of the parties was improper, this Court must approve the Fourth DCA's decision in Voltaire in its entirety.

ARGUMENT

POINT ON APPEAL

THIS COURT MUST APPROVE VOLTAIRE V. STATE, 697 So. 2d 1002 (Fla. 4th DCA 1997).

Initially, Respondent would resubmit that this Court lacks jurisdiction to review the Fourth DCA's resolution of his appeal, Voltaire v. State, 697 So.2d 1002 (Fla. 4th DCA 1997), since his case is not in "express" and/or "direct" conflict with the material facts of any other reported Florida decision. In support of this notion, Respondent relies on the arguments and authorities recited in his Brief on Jurisdiction, pp. 4-7. Nonetheless, Petitioner's claims to this Court are equally unpersuasive on the merits.

For example, Petitioner asserts that Respondent's trial counsel failed to preserve the suppression issue litigated in the Fourth DCA, disentitling Respondent to approval on the merits in this Court. However, a close review of relevant case law quickly shows this claim to be unsound. Of course, Petitioner is correct that appellate review is triggered only when the trial-level objection pursued on appeal is sufficiently specific to give a trial court both notice and an opportunity to correctthe error, see generally Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); see also Hamilton v. State, 458 So. 2d 863, 865 (Fla. 4th DCA 1984) (objection "specific" where trial court can "appreciate the problem being presented"). An issue is considered to have been "specifically"raised when the claim is identified and legal argument made below on the basis presented to the appellate court, Thomas v. State, 645 So. 2d 185,186 (Fla. 3d DCA 1994); Tolbert v. State, 679 So. 2d 816, 818 (Fla. 4th DCA 1996). Finally, specificity in a trial objection is also recognized where the trial court responds with a discussion, followed by a ruling, based on the same subject matter raised by

the objecting party, see and compare Pacheco v. State, 698 So. 2d 593,595 (Fla. 2d DCA 1997) with Dinkins v. State, 566 So. 2d 859, 860 (Fla. 1st DCA 1990) review denied 576 So. 2d 286 (Fla. 1990).

A case embodying the result Respondent suggests is appropriate in his case is Williams v. State, 414 So. 2d 509 (Fla. 1982), where this Court faced the question of whether a retention of jurisdiction over sentencing statute created an ex post facto violation; there, as here, the state claimed the issue was not preserved with specificity. Trial counsel in Williams had raised concerns at sentencing as to whether or not the statute involved applied to a defendant charged prior to the statute's effective date; however, counsel did not use the terminology "ex post facto" in describing his claim, 414 So. 2d at 5 11. Noting that "magic words are not needed to make a proper objection," this Court found that issue preserved because (1) that trial court noted the defense's objection, and (2) given an opportunity to rule on the issue, the trial court overruled the defense objection, id. at 512.

In this case, trial counsel for Respondent outlined the defense's argument for suppression as follows:

> . . . . it is a Fifth Amendment right to remain silent when you're arrested for a criminal offense. It's our position that [Respondent] doesn't have to actually formally be advised of the constitutional rights he holds to therefore be able to invoke those rights. That those are fundamental rights by him just knowing that the police officers and taking the point in time that he chooses no longer to talk to them that is in effect invokes his rights. The police officers looked at it as such. . . the defense's position would be that [Respondent] did invoke his rights, and that's how the police officer looked at it, and that's why they specifically put another officer in the jail cell because they knew he invoked his right and that he wasn't going to speak to any police officers and that's why they attempted to put a police officer in to get the statement from him, and that's what happened

> in this case. . . he invoked his right, and he wanted to remain silent. Once a police heard he wanted to remain silent, they placed the police officer into the jail cell and according to Officer Poliard, he acts as not as if this information was just volunteered it was pursuant to questioning. Once [Respondent] invoked his right to remain silent, all type of activity should have ceased at that point. In reference to trying to elicit further statements, it's our position that its a due process violation under the Fourteenth Amendment and it's a violation to admit these statements when [Respondent] previously invoked his rights under these particular charges.

(R 56-57, 69-70). In response, the trial court attempted to avoid the full force of Respondent's argument by "finding" that Respondent could not have invoked his right to silence, because neither testifying police witness recalled whether Respondent was mirandized subsequent to his arrest, rendering Poliard's interrogationof Respondentappropriateunder Illinois vs. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L.Ed.2d 243 (1990) (R 66-68, 70-71).

However, under the rationale of Williams, 414 So. 2d at 5 11-5 12, trial counsel's failure to specifically reference Walls v .State, 580 So. 2d 13 1 (Fla. 1991) appeal after review 641 So. 2d 381 (Fla. 1994) certiorari denied ____ U.S. ____ 115 S.Ct. 943,130 L.Ed.2d 887 (1994) in submitting her due process challenge to Respondent's statement to Poliard is not fatal, since the trial court's articulation of his ultimate ruling on the issue shows that the court understood, yet rejected, the defense's position (R. 66-71). Accordingly, Respondent now turns to the merits of Petitioner's appeal.

Petitioner first notes that Illinois v. Perkins held that the federal constitutiondoes not prohibit on Fifth Amendent grounds an undercover policeman from questioning a criminal defendant, based on the theory that the defendant's failure to realize his interrogator was a law enforcement officer prevents such questioning from being characterized as "coerced,"496 U.S. at 296-299, 110 S.Ct. at

2397-2398. Petitioner then acknowledges that this Court in Walls v. State, 580 So. 2d 131 (Fla. 1991) placed due process limits of the police's use of "gross deception" to elicit incriminating responses from a criminal defendant, based on Article I, Section 9 of the Florida Constitution, 580 So. 2d at 133-134. Petitioner argues that the facts of Respondent's case did not constitute "gross deception," claiming that no "elaborate scheme" to trick Respondent occurred, and that police must be allowed to use "trickery" to solve crimes, which itself constitutes an "important public policy," Petitioner's Brief on the Merits, pp. 9-13. More specifically, Petitioner relies on the trial court's factual "finding" that Respondent never invoked his right to silence to contend this Court must follow Illinois vs. Perkins "in this area of the law," Petitioner's Brief on the Merits, pp. 15-16, based on State v. Owen, 696 So. 2d 7 15 (Fla. 1997). Although Petitioner's arguments have surface appeal, each claim collapses upon inspection.

In Walls this Court did indeed embed due process limits on to jurisprudence in this State, based on Article I, Section 9 of the Florida Constitution, id. at 133. Specifically, the Court recited with approval of Justice Brennan's concurring opinion in Illinois v. Perkins, which found that the factual scenario of that case was open to due process challenge concerning the "particular methods used to extract [that] confession" citing Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 465 (1985). The Walls opinion further defined "due process" as follows:

> The term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. . . "fairness" is nearly the equivalent of the concept of "good faith" which imposes a standard of conduct requiring both fairness and honesty. . . "due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections". . . . we find that the due process provision of the Florida Constitution embodies the principles of fundamental fairness elaborated by Justice

> Brennan in Perkins, Article I, Section 9 Florida Constitution. Due process contemplates that the police and other state agents act in an accusatorial, not an inquisitorial, manner. Gross deception used as a means of evading constitutionalrights has no place in such a system. . . when the state employs an illegal subterfuge, the Florida Constitution forbids it from using the fruits of that subterfuge for any purpose that will work to the detriment of the defense's case. . . any other conclusion would encourage the use of such subterfuge and run against every basic conception of fairness embodied within Article I, Section 9 of our Constitution.

580 So. 2d at 133-134. Respondent would suggest the language quoted above fully supports the Fourth DCA's ruling in Voltaire, based on the indisputed fact that Appellant's arrest and incarcerational status rendered him "in custody," and the fully-supported fact (as recited by the Fourth DCA, 697 So.2d at 1005) that Poliard, not Appellant, initiated the conversation that resulted in Poliard's asking Respondent "why" Respondent faced ten years imprisonment (R. 12, 15, 17- 19) see generally Travlor v. State, 596 So. 2d 957, 966, n.16-17 (Fla. 1992). Respondent invoked his right to silence after his arrest on these charges, Poliard was not allowed to directly solicit incriminating statements from Respondent; Poliard was forbid to do indirectly, via "subterfuge" or "deception," what he could not do directly (question Respondent about the charges without first reciting miranda warnings), see e.g. McCubben v. State, 675 P.2d 461,465 (Okl. Cr. 1984):

> [a]ll will agree that had the officer entered the cell, identified himself, and asked questions which produced incriminating information, such information would not been admissible. The law will not permit law enforcement officers to do by ruse, trickery, deceit, [or] deception that which it [sic] does not permit it to do openly and honestly, [citing: State v. Berry, 552 S.W. 2d 553,560 (Term. 1980) certiorari denied 449 U.S. 887, 101 S.Ct. 241, 66 L.Ed.2d 112 (1980)].

accord United States v. Brown, 466 F.2d 493,495 (10th Cir. 1972) (defendant invokes his right to

silence; police then used friend to elicit statements from Brown; suppression required by miranda); see also State v. Perkins, 753 S. W. 2d 567, 571-572 (MO. App.1988) (police used defendant's brother to question defendant after defendant invoked right to silence; use of "trickery" to get defendant to unknowingly relinquish constitutional right forbidden).

Analogous authority for the result Respondent seeks, approval of Voltaire, exists in other jurisdictions, rendering Respondent's claim less idiosyncratic than Illinois v. Perkins suggests. Thus, for example, in State v. Travis, 360 A.2d 548, 551 (R.I. 1976), as in Respondent's case, an undercover policeman was placed on Travis' cell after Travis invoked his right to silence; also like Voltaire, the officer wore "scruffy" civilian clothing, and was deceptively unhandcuffedupon entry (R 10-11), id. at 549. Thereafter, the officer "made conversation" with that defendant, who soon incriminated himselfto the officer, 360 A.2d at 549-550. Noting that the police conduct in that case amounted to an attempt to "circumvent" Travis' rights to silence via a police '"masquerade" to "obtain further information with regard to the [charged] crime," the Rhode Island Supreme Court had no trouble finding the undercover agent's " ruse" effectively "nullified [that] defendant's privilege against compelled self-incrimination as guaranteed by the constitution of Rhode Island," 360 A.2d at 550-551. State v. Osborn, 720 P. 2d 891 (Or. App. 1986) review denied 733 P.2d 449 (Or. 1987) likewise involved an appeal based on that state's constitutional protection against self-incrimination, 720 P.2d at 893. In Osborn, that defendant's co-defendant was placed by police in Osborn's cell after Osborn invoked his right to silence. The Court in Osborn found the police conduct in using an agent to circumvent that defendant's constitutional right to silence improper, then ordered the defendant's statement suppressed, 728 P.2d at 893, accord Boehm v. State, 944 P.2d 269,271, n.1 (Nev. 1997) (incarcerated defendant invokes rights to silence; police used jail

inmate to question Boehm about charged crime; evidence suppressed as violation of state constitutional right to silence). Based on the authoritiesjust described, Voltaire fully comports with the rationale of Walls as to the "ruse" used by Poliard to induce Respondent to give up his right to silence, which does not comport with the "fair play" or "good faith" concept of due process described in Wallsd, the police actions below had the clear impact of evading Appellant's asserted constitutional rights; forbidding the use of the state's ill-gotten fruits is the only effective method of assuring that Respondent suffers no harm from the police lawlessness herein exposed.

Petitioner mainly attempts to avoid the jurisprudential impact of Walls on this case by positing that the trial court correctly found as matters of "fact" that Respondent was not "interrogated" by Poliard, and that Respondent never invoked his right to silence (R 66-67, 7 1). As to the concept of interrogation, Traylor v. State, 596 So. 2d 957,966, n.17 (Fla. 1992) held that:

> Interrogationtakes place for Section nine purposes when a person is subjected to express questions, or words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response, compare Rhode Island vs. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 1689, 1690, 64 L.Ed.2d 297 (1980).

In this case, Poliard and Respondent were discussing, as a result of Poliard-initiated conversation (R. 12, 15, 17-18), what charges each man faced, as well as potential penalties. Poliard told Respondent he could receive five years in prison due to the presence of cocaine in Poliard's vehicle (of course, Poliard's statement was a lie); when Respondent noted that he "faced ten years," Poliard's query "why," in this context, was reasonably likely to produce an incriminating response by Respondent, see State v, Spain, 602 N.E. 2d 775, 776-777 (Ohio App. 3 Dist. 1992) (question to jailed person "do you know why you are here?' constitutes "interrogation"); United States v. Hanks, 821 F. Supp. 1425, 1429-1430 (D.Kan. 1993) appeal dismissed 24 F.3d 1235 (10th Cir. 1994)

(question "why" defendant walking away from officer likely to illicit response incriminating defendant regarding a resisting arrest charge). Accordingly, the trial court's legal conclusion that Poliard did not "interrogate" Respondent was clearly erroneous, and hence was appropriately reversed by the Fourth DCA in Voltaire.

Respondent's invocation of his right to silence was subject to a pre-hearing stipulation by the defense and state which was read into the record in open court by the trial prosecutor (R20). At first, the trial court twice stated its intent to follow this stipulation in resolving the issue raised for suppression (R 48, 59-60). However, the trial court eventually sought additional information on the subject; as a result, the prosecutor informed the trial court ore tenus that no police officer involved in Respondent's arrest could recall reading Respondent his miranda warnings (R 63-65). Defense counsel argued that respondent's silence in the presence of police post-arrest, combined with his arrest, constituted an "invocation" for purposes of this case (R 65-66, 69-70). In eventually ruling on the defense motion to suppress, the trial court ultimately failed to follow the stipulation (R 66). This, however, was error.

In Cunningham v. Standard Guaranty Insurance Company, 630 So. 2d 179,182 (Fla. 1994) on remand 632 So. 2d 237 (Fla. 1 st DCA 1994) review denied 639 So. 2d 98 1 (Fla. 1994), this Court held that:

> Stipulations designed to simplify. . , litigation should be enforced if entered into in good faith, not obtained by fraud, misrepresentation, or mistake, and [are] not [themselves] against public policy.

The parties to a stipulation based on a mistake of fact remain bound by the stipulation if the mistake was the result of a failure to use due diligence, Sunshine Utilities v. Public Service Commission, 624 So. 2d 306, 3 10 (Fla. 1 st DCA 1993). On the other hand, a properly entered into

stipulation, relating to a matter appropriate for such resolution, is binding upon both the parties and the court hearing the case, Gunn Plumbing. Inc. v. Dania Bank, 252 So. 2d 1, 4 (Fla. 1971); Dunscombe v. Smith, 190 So. 2d 796,799 (Fla. 1939). Finally, a prosecutor has the authority to enter into stipulations with a criminal defendant for the resolution of evidentiary points, and such agreements must be forced by a trial court, James v. State, 305 So, 2d 829,830 (Fla. 1 st DCA 1975).

In Respondent's case, the trial prosecutor clearly had no objection to use of the stipulation described above (R 20). Although the trial court may have impliedly felt the stipulation was entered into despite a mistake of fact, the prosecutor's in-court response that a review of all trial depositions and requestioning of the officers involved with Respondent after his arrest disclosed no one with clear knowledge that Respondent was mirandized was not relevant proof that Respondent did not invoke his right to silence. Instead, as defense counsel argued below, Respondent's silence after arrest can properly be construed as a effective invocation, see State v. Bohuk, 636 A.2d 105, 110 (N.J. Supper. A. D. 1994) (refusal to respond to police questions constitutes invokation of right to silence); see also State v. Warner, 889 P.2d 479,482 (Wash. 1995) (requirement that right to silence be formally invoked doesn't apply when custodial interrogation occurs); accord Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095 (1969). In any event, nothing presented in this record shows that the stipulation below was the product of any mistake of fact or, if it was, that this mistake was not the result of a lack of due diligence by the prosecutor, who had full legal authority to enter into the stipulation, James. supra. at 830. As a consequence, the trial court in Respondent'scase should have held the state to its factual agreement below, and ruled in favor of Respondent based on that stipulated fact involving invocationof the right to silence, see and compare Kuhn v. State, 439 So.2d 291, 293 (Fla. 3d DCA 1983) (stipulations regarding facts concerning sworn motion to dismiss

precluded consideration of state's traverse not covered by agreements); State v. Holliday, 431 So. 2d 309, 311 (Fla. 1st DCA 1983) approved 465 So. 2d 524 (Fla. 1985) review denied 473 US. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985) (same); Johnson v. Johnson, 663 So. 2d 663,665 (Fla. 2d DCA 1995) (stipulationon temporary attorney's fees in dissolution action -- where opposing party doesn't seek relief from stipulation, which not shown to be product of mistake or violative of public policy, stipulation must be enforced by trial court).

Lastly, this error cannot be considered harmless under the standards set forth in State v. DiGuillio, 491 So. 2d 1129 (Fla. 1986): whether or not the error had a "reasonable possibility" of contributing to the verdict against Respondent. In applying this standard, this Court in State v. Diguillio noted that a reviewing Court must closely examine both "the permissible evidence on which the jury could have legitimately relied" and "the impermissible evidence which might have possibly influenced the jury verdict," id. at 1138. Explaining itself further, this Court in Ciccarelli v. State, 531 So. 2d 129, 131-132 (Fla. 1988) noted that:

> The examination of a record for the purpose of evaluating harmless error necessarily involves more than a resolution of contested facts. The function of an examination for this purpose is to take account of what the error meant to [the jury,] not singled out and standing alone, but in relation to all else that happened [at trial]. . . this requires . . , an evaluation of the impact of the erroneously admitted evidence relied on and of the overall strength of the case and the defense asserted.

(Citations omitted).

In this case, the permissible evidence against Respondent was inconclusive on the issue of guilt or innocence: although police testified that Respondent explicitly discussed providing the officers with cocaine in exchange for monies, responded unquestionably had no demonstrated

contact with the co-defendant, who was the only person involved below who actually provided cocaine to police. More importantly, the evidence concerning Respondent's intent to participate in a cocaine transaction was inconsistent; the tape-recorded conversation between Respondent and Officer Carmichael just prior to Respondent's arrest suggests Respondent's lack of knowledge concerning same (R. 355-359). In said circumstances, where inconsistences in the state's evidence are combined with a dearth of physical evidence linking Respondent to the possession and delivery of cocaine, the admission into evidence of Respondent's statement to Officer Poliard could have "erased any reasonable doubts previously entertained [by the jury]," Avila v. State, 545 So. 2d 450, 45 1 (Fla. 3d DCA 1989); see also Johnson v. State, 537 So. 2d 1116, 1118 (Fla. 4th DCA 1989) (possession of cocaine prosecution; admission of defense statement admitting "dominion and control" constitutes reversible error, since it "could not be said beyond a reasonable doubt that evidence out of a defendant's own mouth . . . . would not reasonably have any effect on bury] in determining guilt") see also Owen v. State, 560 So. 2d 207, 211 (Fla. 1990) (error in admitting defendant's incriminating statement not harmless where, although corroborating evidence existed, the statement was "essence of case" against defendant). Unquestionably, Respondent's statement to Poliard admitting that he "set up a deal" in this case could have been used by Respondent's jury to resolve any doubts they had about his guilt as to Count II. Lastly, that Respondent's jury had doubts about his guilt was conclusively established below, by both his acquittal on Count I, and because the jury requested during deliberations a transcript of Respondent's recorded statement to Officer Carmichael, both initially and just prior to arrest. More importantly, the jury specifically requested a transcript of Respondent's conversation in Creole with the confidential informant, Billy Harden; Respondent testified during trial that his incriminating statement to Officer

Carmichael at the Miami Subs was at the request of Harden, who spoke with Respondent in Creole (R 413-414, 554).

In sum, Petitioner has not shown that Voltaire represents an improper application of this Court's previous decision in Walls. In such circumstances, Voltaire must be approved by this Court. Alternatively, Respondent requests this Court dismiss the Writ of Certiorari granted in this case as improperly issued based on a lack of "conflict" jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Sarah B. Mayer, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, this 31st day of January, 1998

JOSEPH R. CHLOUPEK