IN THE SUPREME COURT
STATE OF FLORIDA

MANDELL C. MCGEE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

Case No. 69,340

BRIEF OF RESPONDENT ON MERITS

APPEAL FROM THE CIRCUIT COURT
IN THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, FLORIDA

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SUMMARY OF ARGUMENT

Franklin v. State, infra, resulted in an erroneous interpretation of Sections 893.13(1)(a) and (1)(f). The Second District Court of Appeal correctly rejected the reading espoused in Franklin in deciding State v. McGee, infra.

There are several indicia within the words of the statute itself that show the legislative intent was to make the possession of any amount of a controlled substance, with intent to sell, a felony.

The Court in Franklin ignored the obvious intentional difference between "possession" and "possession with intent to sell". The Court in McGee carefully analyzed the statute, and bolstered by this Court's interpretation in Stewart, infra, correctly reversed the lower court's dismissal of Mr. McGee's information that did not include an amount of cannabis possessed.

The Second District Court of Appeal's finding in McGee should therefore be upheld.

ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF PETITIONER'S INFORMATION

The First District Court of Appeals, in Franklin v. State, 346 So.2d 137 (Fla. 1st DCA 1977), held that possession of less than a threshhold amount (then five grams, now twenty grams) of cannabis, even with intent to sell it, was a misdemeanor. The Second District Court of Appeal has recently held in State v. McGee, (Fla. 2d DCA, Sept. 3, 1986) [11 F.L.W. 1924] that possession of any amount of cannabis with intent to sell it is a felony.

Respondent contends that Franklin results in an erroneous reading of Sections 893.13(1)(a) and (1)(f) and that McGee correctly interprets the statute and should be affirmed by this Court.

Legislative intent has long been the polestar by which courts are guided when called upon to interpret statutes. Parker v. State, 406 So.2d 1089 (Fla. 1981). To determine intent, the court must consider the act as a whole, the evil to be corrected, the language of the act, including its title, the history of its enactment and the state of the law already in existence bearing on the subject. State v. Webb, 398 So.2d 820 (Fla. 1981)

The Florida Comprehensive Drug Abuse Prevention and Control Act, Chapter 893, Fla. Stat. (1985) shows, as a whole, an

overwhelming ability on the part of the legislature to demarcate, delineate and describe. See, for instance the meticulous definitions and categorizations in Section 893.03 and the multitudinous references to different degrees of punishment for abuse of different substances in Section 893.13. Also reference the explicit demarcations in the trafficking Section 893.135. It is inconsistent to think the legislature would become less definitive in the drafting of Section 893.13(1)(f). Section (1)(f) lessens the penalty only for possession or delivery without consideration - not for possession with intent to sell. Section 893.13(1)(a), Fla. Stat. (1985) makes it a felony to:

> "Sell, manufacture, or deliver, or possess with intent to sell, manufacture or deliver, a controlled substance".

This section does not proscribe mere possession without the intent to sell, manufacture or deliver. It proscribes commercial activity or intent. Mere possession of a controlled substance is proscribed by Section 893.13(1)(e).

The legislature saw fit to create a separate section which imposes a lesser punishment for the mere possession or making a gift of less than 20 grams of cannabis for first time offenders. It is clear from their language that they did not intend to reduce the sentence for possession of any amount if the cannabis was intended for sale. These sections 893.13(1)(a), (1)(e) and (1)(f) were created at the same time (see Ch. 73-331 Laws of Florida, General Laws (1973)). The legislature clearly could have

framed the statute as suggested by the petitioner. They did not.

Legislative intent must be determined primarily from the language of the statue as the legislature must be presumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statute. S.R.G. Corp. v. Dept. of Revenue, 365 So.2d 687 (Fla. 1978).

Note that Section 893.13(1)(f) follows the sections proscribing mere possession ((1)(e)), not the section proscribing possession with intent to sell ((1)(a)).

Chapter 893 is designed to correct the evil of drug abuse. As stated by the Second District Court of Appeal in McGee, it is obvious that one who possesses cannabis with the intent to sell it, thereby spreading the evil and gaining from such action, is more culpable than one who merely possesses for personal use or one who delivers drugs, but not for profit.

Chapter 73-331, encoded as Chapter 893, Fla. Stat. (1973) replaced Chapters 398 and 404. Section 398.03, Fla. Stat. (1971) proscribed the manufacture, possession, control and selling of narcotic drugs. Section 404.02(1), (4) and (5), Fla. Stat. (1971) proscribed delivery and actual or constructive possession of barbituates, central nervous system stimulants or hallucinogens. Possession with intent to sell, manufacture or deliver, as an offense, was "coined" with the new act. Introduction of this new terminology evinces an intent to proscribe possession with intent to disseminate controlled substances. Courts are bound by the definite phraseology in statutes, Phil's Yellow Taxi Co. v. Carter, 134 So.2d 230 (Fla. 1961).

In McGee, the Second District Court of Appeal considered these indicia of legislative intent as well as the assignation of punishment to different violations to correctly find that possession, with intent to sell, any amount of a controlled substance is a felony.

> "The mere possession of a 'controlled substance' is a crime. Section 893.13 (1)(e), Fla. Stat. (1985). Cannabis is a controlled substance. Section 893.03(1) (c)3, Fla. Stat. (1985). One who possesses 20 grams or more is guilty of a third degree felony. Section 893.13(1)(e), Fla. Stat. (1985). Possession of 'not more than 20 grams' is a first degree misdemeanor. Section 893.13(1)(f), Fla. Stat. (1985). On the other hand, possession with intent to sell cannabis is a third degree felony. Sections 893.13(1)(a); 893.03(1)(c)3, and 893.13(1)(a)2 Fla. Stat. (1985)".

It is clear theat the interpretation in Franklin v. State, supra, is erroneous. The court in Franklin ignored the difference between "possession" and "possession with intent to sell", whereas the McGee court carefully considered the difference. As illustrated above, not only did the legislature intend a difference, but the plain meaning of the words indicates a difference.

The appellate court deciding Franklin did not have benefit of this Court's statutory analysis in State v. Stewart, 374 So.2d 1381 (Fla. 1979).

> From the plain language of Section 893.13, the intent of the legislature is clear -- the sale of any amount of marijuana is a felony.

An attempt to sell less than 20 grams of cannabis is therefore not a misdemeanor. It would follow that possession with intent

to sell less than 20 grams would not be a misdemeanor either.

The petitioner relies on Fike v. State, 474 So.2d 1192 (Fla. 1985), Fike v. State, 455 So.2d 628 (Fla. 5th DCA 1984), and Carty v. State, 471 So.2d 676 (Fla. 1st DCA 1985) for the proposition that informations charging delivery of cannabis without specifying the quantity or consideration charges only a misdemeanor. The respondent agrees with the statement, but finds it interesting to note that these courts recognized a difference between "delivery" and "delivery without consideration" as delineated in the statute. The Second DCA was obviously correct in reading an intentional difference between "possession" and "possession with intent to sell" in McGee.

Petitioner's argument that deeming the words "with intent to sell" when appended to possession as surplusage is necessary to give meaning to Section 893.13(1)(f) fails. For one thing, section (1)(f) need not refer back to section (1)(a). Reference back to section (1)(e) gives it meaning. The argument that (1)(a) refers to cannabis but that (1)(e) does not, is belied by the language of the statute. Section (1)(a), in the numbered paragraphs, refers to all controlled substances listed in section 893.03; section (1)(e) proscribes possession of all controlled substances. For another thing, it is well established that words in a statute should not be construed as surplusage if reasonable construction which will give them some force and meaning is possible. 82 C.J.S. Statutes Section 343.

Petitioner's argument that an acquiescence by the State that the weight of the cannabis was less than twenty grams puts the

information into the subsection (f) exception ignores the obvious difference in possession and possession with intent to sell.

The Second District Court of Appeal's interpretation of the statute, that the possession of any amount of cannabis with intent to sell is a felony, is clearly the interpretation intended by the legislature. It is supported by this Court's interpretation in Stewart. McGee's information correctly charged him with a felony. Therefore the reversal of the trial court's dismissal of McGee's information should be affirmed.

CONCLUSION

Based on the foregoing argument and authorities, respondent respectfully asks this Honorable Court to uphold the Second District Court of Appeal's reversal of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Hall of Justice Building, P.O. Box 1640, Bartow, Florida on this 30th day of October, 1986.

Lauren Hafner Sewell
Of Counsel for Respondent