

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

BEN SMITH, JR., TYRONE BYRD,
EDUARDO CIANELLI TAYLOR,
TERRY JOE JACKSON, JIMMY LEE
CATER, TERRY LEON TAYLOR,
DONALD LEROY ANDERSON, IVAN
GARRISON GRIFFIN and
JAMES WIGGINS,

Respondents.

FILED

SID J. WHITE

JUL 1 1988

CLERK, SUPREME COURT

By

Deputy Clerk

CASE NO.

72,633

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
LIST OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENTS OF THE CASE AND FACTS	2
POINT INVOLVED	3
SUMMARY OF ARGUMENT	4
ARGUMENT	
PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN A DECISION OF THE SECOND DISTRICT COURT OF APPEAL AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE, WHICH HELD THAT DOUBLE JEOPARDY PRECLUDES CONVICTIONS AND SENTENCES FOR BOTH SALE AND POSSESSION WITH INTENT TO SELL THE SAME COCAINE	5-7
CONCLUSION	8
CERTIFICATE OF SERVICE	8

LIST OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Carawan v. State,</u> 515 So.2d 161 (Fla. 1987)	6
<u>Dukes v. States,</u> 464 So.2d 582 (Fla. 2nd DCA 1985)	4, 5, 6, 7
<u>Gordon v. State,</u> 13 F.L.W. 1286 (Fla. 2nd DCA, June 3, 1988)	4, 6, 7
<u>Jollie v. State,</u> 405 So.2d 418 (Fla. 1981)	6
<u>Mancini v. State,</u> 312 So.2d 732, 733 (Fla. 1975)	5
 <u>OTHER AUTHORITIES</u>	
<u>Fla.R.App.P. 9.220</u>	1
<u>Fla.R.App.P. 9.030(a)(2)(A)(iv)</u>	5
Art. V §3(b)(3), <u>Fla. Const.</u> (1980)	5

PRELIMINARY STATEMENT

The Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the Appellant and the defendant, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

Pursuant to Fla.R.App.P. 9.220, conformed copies of the appellate courts' opinions, plus the State's notice invoking this Court's jurisdiction, are appended to this brief.

All emphasis will be supplied by the State.

STATEMENTS OF THE CASE AND FACTS

Respondents were convicted of both sale and possession with intent to sell cocaine.

On appeal, the Fourth District Court of Appeal vacated Appellants'/Respondents' convictions and sentences for possession of cocaine with intent to sell.

POINT INVOLVED

WHETHER PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN A DECISION OF THE SECOND DISTRICT COURT OF APPEAL AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE, WHICH HELD THAT DOUBLE JEOPARDY PRECLUDED CONVICTIONS AND SENTENCES FOR BOTH SALE AND POSSESSION WITH INTENT TO SELL THE SAME COCAINE?

SUMMARY OF ARGUMENT

The rule of law set forth in the instant case sets forth a rule of law contrary to the rule of law set forth in Dukes v. State, 464 So.2d 582 (Fla. 2nd DCA 1985). Furthermore, the Second District Court of Appeal certified a question of great public importance involving this exact point in Gordon v. State, 13 F.L.W. 1286 (Fla. 2nd DCA, June 3, 1988).

ARGUMENT

PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN A DECISION OF THE SECOND DISTRICT COURT OF APPEAL AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE, WHICH HELD THAT DOUBLE JEOPARDY PRECLUDES CONVICTIONS AND SENTENCES FOR BOTH SALE AND POSSESSION WITH INTENT TO SELL THE SAME COCAINE.

Petitioner seeks to establish this Court's "conflict" jurisdiction under Art. V §3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv). Conflict exists between the instant decision and the decision of the Second District Court of Appeal in Dukes v. State, 464 So.2d 582 (Fla. 2nd DCA 1985).

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the Supreme Court or another district, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). The court below has created conflict by announcing a rule of law contrary to that announced in Dukes v. State, supra.

In Dukes, the Second District Court of Appeal held:

Under Blockburger, possession with intent to sell and sale are separate criminal offenses because each requires proof of an element which the other does not. It is immaterial to this Blockburger analysis that both offenses are deferred in one statute.

464 So.2d, at 584.

The Fourth District Court of Appeal, in its opinion in the instant case, stated:

Under the facts of this case we do not believe the Appellants could properly be convicted and sentenced for both the sale and possession with intent to sell of the same cocaine sold to undercover police We acknowledge that the Fletcher decision and our holding herein are in direct conflict with the holding in Dukes v. State, 464 So.2d 582 (Fla. 2nd DCA 1985), so that the parties may have this issue resolved by the Florida Supreme Court.

13 F.L.W., at 925 (Fla. 4th DCA, April 13, 1988).

The Second District Court of Appeal has revised this issue in Gordon v. State, 13 F.L.W. 1286 (Fla. 2nd DCA, June 3, 1988). The Court relying on Carawan v. State, 515 So.2d 161 (Fla. 1987), has receded from its previous holding in Dukes, supra. 13 F.L.W., at 1288. However, in doing so the Second District Court of Appeal has certified a question to be one of great public importance:

IN APPLYING CARAWAN v. STATE, 515 So.2d 161 (Fla. 1987) TO THE FACTS OF THIS CASE, DO CONVICTIONS AND SENTENCES FOR THE CRIMES OF SALE OF ONE ROCK OF COCAINE AND POSSESSION WITH INTENT TO SELL THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY THE STATE AND FEDERAL CONSTITUTIONS?

13 F.L.W., at 1284.

Petitioner maintains that conflict still exists as Gordon, supra, is pending review in this Honorable Court via the certified question.

Jollie v. State, 405 So.2d 418 (Fla. 1981).

Petitioner has confirmed that the State will be seeking a review of the certified question in Gordon within the appropriate

time constraint.

Since the opinion in the instant case announces a rule of law contrary to the rule set forth in Dukes, supra and certified as a question in Gordon, supra, this Honorable Court has discretionary jurisdiction to hear this case.

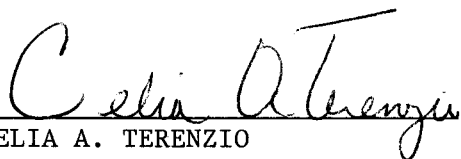
Further, this issue is a recurring legal problem, and this Honorable Court needs to resolve the issue so that appellate and trial courts will have a well-defined and workable rule of law to guide them. Petitioner therefore respectfully requests this Honorable Court accept jurisdiction in this case.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court accept discretionary jurisdiction in the instant case.

Respectfully submitted,

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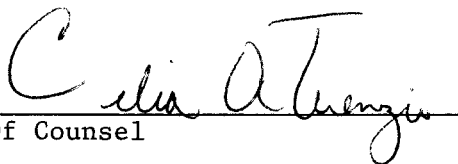


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished, by courier, to GARY CALDWELL, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 29th day of June, 1988.



Of Counsel