THE SUPREME COURT OF FLORIDA

MICHAEL FREDERICK MORROW,
ET AL.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 74,582

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The certified question before this honorable Court arose from a consolidated appeal from the judgment and sentence in twelve cases. It is based on issues which are not affected by factual distinctions among the cases, and so, following the practice of the Petitioners, the Respondent will omit citations to the various records, in that the arguments are based on aspects common to all the cases.

Because the Petitioners have included in their Brief on the Merits a point in addition to their argument on the question certified by the Fifth District Court of Appeal, the Respondent will include in this brief the substance of the argument it presented to the Fifth District on that double jeopardy issue.

The Petitioners will be referred to as the appellants, as they were below, and the respondent will be referred to as the appellee.

STATEMENT OF THE CASE AND FACTS

For purposes of the arguments herein, the Respondent accepts the Petitioners' statement of the case and facts, taking exception, however, to the assertion that the record below showed unequivocally that the cocaine which the petitioners were convicted of purchasing was precisely and only the same cocaine which they were convicted of possessing.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly determined that Chapter 87-243, Laws of Florida, is constitutional. The law does not violate the Florida Constitution's "one subject" rule because all matters covered in the enactment are within the scope of the subject expressed in the title of the act ("crime prevention and control"), or at the very least are properly connected therewith.

This Court has long held that the subject of a legislative enactment can be broad and comprehensive. Recently in particular this Court has upheld bills containing many diverse topics, as well as endorsing the principle that the subject of an act can be extremely general. Thus the Petitioners' central and virtually only argument is contradicted.

The Petitioners' brief lacks specificity as to what portions of the act supposedly violate the one subject rule, but an examination of the legislation shows that it meets the standards of "one subject" constitutionality which are regularly applied by Florida courts. Nothing in the act is without logical or natural connection to the subject, and the subject itself is acceptable.

Particularly in view of the strong presumption of constitutionality in a case such as this, the law in question is valid beyond doubt.

As for the Petitioners' double jeopardy argument under the second point, it is not even clear from the record whether the Petitioners were arrested for possessing exactly the same cocaine that they had purchased.

Even granting for purposes of argument that it was the same cocaine which the Petitioners purchased and possessed, it can be said that they committed separate acts in purchasing and possessing the cocaine. Even if only one act were involved, each of the two offenses for which the Petitioners were convicted requires proof of an element the other does not, and so there was no double jeopardy. Carawan v. State should not be applied to this case, but if it is, there is still no showing of double jeopardy.

ARGUMENT

POINT ONE

THE FIFTH DISTRICT WAS CORRECT IN HOLDING THAT CHAPTER 87-243, LAWS OF FLORIDA (1987) DOES NOT VIOLATE THE "ONE SUBJECT RULE" OF THE FLORIDA CONSTITUTION.

1. Introduction

The law whose constitutionality the appellants attack complies with the requirement of Article III, Section 6 of the Florida Constitution that, "Every law shall embrace but one subject and matter properly connected therewith..." The appellants' restrictive approach to the "one subject rule" is unsupported by case law generally and is specifically contradicted by recent decisions of this Supreme Court.

The central fallacy of the appellants' position lies in their assertion that the subject of a bill cannot be broad and general -- as, in this case, "crime prevention and control". The issue is not whether the subject is broad -- which Florida courts have repeatedly held that it may be -- but instead whether it contains matter so lacking any rational connection with other matter in the same enactment that it must be considered an entirely unrelated subject.

Obviously the question is to some extent semantic and the answer arbitrary, like the answer to the question whether an article on the cultivation of radishes, lettuce, and squash is on four different subjects or on the single subject of vegetable gardening. One can almost always move to a more general category

which will encompass as a "single subject" an expanded group of matters. For that reason no fixed limits can be defined, and the flexible common sense test expressed in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) is the only viable one.

Particularly in recent years this Court has unambiguously favored the constitutionality of bills based on general subjects and matters broadly related thereto, rather than demanding that the Legislature pass a multiplicity of small bills. The purpose of the one subject rule is not to satisfy a compulsion for compartmentalization, but rather to prevent deception and unfairness. Nothing about the bill which is under consideration by this Court was misleading or unfair.

2. **There is a presumption favoring constitutionality, and any doubts should be resolved in favor of upholding the constitutionality of the law.**

There is a strong presumption that any legislative act is constitutional, and courts should resolve doubts in favor of constitutionality. State v. Canova, 94 So.2d 181, 184 (Fla. 1957); Bunnell v. State, 453 So.2d 808 ('Fla.1984). Because a "one subject" issue cannot be resolved by a clear-cut rule, it is particularly important for this Court to give full effect to the presumption of constitutionality.

In determining whether provisions in an act are embraced in one subject and matter properly connected therewith, the subject to be considered is the one expressed in the title of the act, and every reasonable doubt should be yielded in favor of the validity of the provision. Ex parte Knight, 52 Fla. 144, 41 So. 786 (1906).

One who assails an act of the Legislature as unconstitutional has the burden of showing beyond a reasonable doubt that the act is unconstitutional; there is a presumption of constitutionality and that the Legislature intended a valid enactment. Spencer v. Hunt, 109 Fla. 248, 147 So. 282, 284 (1933). "There must be a plain violation of the requirements of the [one subject] constitutional section and article ... before the court will nullify statutes as not being within the subject embraced in the title and of 'matter properly connected therewith.'" Id. at 285. The appellants in the case at bar, generalizing about breadth of subject, have fallen far short of showing a "plain violation" of the one subject rule.

State v. Canova, 94 So.2d 181, 184 (Fla. 1957) approves a very early comment that the general disposition of courts was to construe the "one subject" provision liberally, "rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted."

In the case sub judice the appellants have merely shown, in a general way, that the Crime Prevention and Control Act is long and contains a diversity of matters related to the subject. Such a presentation is not enough to overcome the strong presumption of constitutionality. The appellants have failed to sustain their burden of proving that Ch. 87-243 violates the single subject rule.

3. The Legislature can make the subject of an act broad and comprehensive, and can additionally include widely divergent matters connected to the subject.

The enactment under consideration has a broad subject and includes matters which are connected in various ways with that subject, but, contrary to the appellants' assertions, that does not make the law unconstitutional.

The bill is supported at the outset not only by the presumption of constitutionality, but also by the pronouncements of Florida courts over many decades that the Legislature has great latitude in deciding which matters are sufficiently related to be included in the same act, and that only in plain cases of complete absence of any rational relationship will the contents of a law be held to violate the one subject rule.

This Court, dealing with the constitutionality of the Florida Insurance and Tort Reform Act of 1977 (Ch. 77-468, Laws of Florida), held that the act did not violate the one subject rule even through it was "a broad and comprehensive legislative enactment," and noted that the rule was "not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation." State v. Lee, 356 So.2d 276, 282 (Fla. 1978).

> This Court has consistently held that wide latitude must be accorded the legislature in the enactment of laws, and this Court will strike down a statute only when there is a plain violation of the constitutional [one subject] requirement...
>
> The subject of a law ... may be as broad as the legislature

> chooses provided the matters included in the law have a natural and logical connection. ... Prior comprehensive enactments by the legislature demonstrate that widely divergent rights and requirements can be included without challenge in statutes covering a single subject matter. ... With the presumption of validity that Chapter 77-468 carries with it, we must give the legislature the benefit of the doubt.

Id. at 282-283.

At least as far back as 1926 this Court was stating that the subject of an enactment "may be as broad or as restrictive as the Legislature may determine, in the absence of controlling organic provisions," and that "a wide latitude must of necessity be accorded to the Legislature in its enactments of law..." Smith v. Chase, 91 Fla. 1044, 109 So. 94, 96-97 (Fla. 1926).

The appellants' argument that in Florida a law cannot be broad and comprehensive, and that divergent matters may not be brought under the umbrella of a general subject -- is clearly inaccurate.

It was stated in Williams v. State, 459 So.2d 319, 321 (Fla. 5th DCA 1984):

> The Florida Supreme Court has interpreted this provision [the single subject rule] liberally, and has upheld laws which apparently contain many different subjects. ... Very comprehensive law revisions have been sustained in the face of challenge by the one subject limitation for laws.

(Emphasis supplied).

The same case recognized the legitimacy of "a comprehensive law or code type of statute." Id. at 321. Nothing could make clearer the validity of the subject of the act now before this Court.

In Smith v. Department of Insurance, 507 So.2d 1080, 1085 (Fla. 1987), this Court said that it has "taken a broad view of this legislative restriction."

In re Advisory Opinion to the Governor, 509 So.2d 292, 313 (Fla. 1987) stated that "the fact that the scope of a legislative enactment is broad and comprehensive is not fatal under the single subject rule as long as the matters included in the enactment have a natural or logical connection." The same opinion discussed dicta from a much earlier case which implied a more restrictive approach, and then said:

> Although we acknowledge that the instant act does seem to contravene this dicta, we point out that case law interpreting Florida's single subject rule has progressed since 1947 and that this Court has significantly refined the requirements necessary for a legislative enactment to satisfy the single subject requirement.

Id.

4. The Crime Prevention and Control Act easily meets "one subject" standards.

In addition to repeating again and again that the Legislature has wide latitude in delineating the subject of an act and in deciding what matters are properly connected therewith, Florida courts have long agreed on standards for judging conformity of a law to the one subject rule which are not very demanding. Those standards, which appear in various forms in the following cases, readily indicate that the Crime Prevention and Control Act does not violate the one subject rule.

The subject is the one expressed in the title, and the matters in the act must have a natural, logical, or intrinsic connection to that subject. Colonial Investment Co. v. Nolan, 100 Fla. 1349, 131 So. 178, 180-181 (Fla. 1930). Only if there are "separate, distinct subjects, having no common ingredient," is an act invalid. Id. at 180.

The subject of the act under consideration by this Court is made clear in the first words of the title: "An act relating to crime prevention and control..." Additionally, the legislative history of the act shows the clear focus of the subject. The legislative staff analysis states in its summary section:

> This act is known as the "Crime Prevention and Control Act." It is designed to deal in a comprehensive manner with Florida's crime problem by incorporating numerous changes in various areas of Florida's criminal code. The act not only increases penalties and creates new offenses in some areas, it also attempts to deal with the causes of crime

> by providing for comprehensive K-12 substance abuse education, the creation and maintenance of "Safe Neighborhoods," and the creation of study commissions to study the causes of crime and methods of coordinating and integrating criminal justice information systems.

Florida House of Representatives Committee on Criminal Justice, Staff Analysis of CS/HB **1467** (June **22, 1987).**

It is significant that in the Colonial Investment decision as in many others, this Court uses absolute terms such as "no common ingredient" (Id.) and "nothing in common between the two [subjects]''(Id. at **181)** (emphasis supplied), strongly indicating that as long as there is any rational connection, however tenuous, matters can be considered connected to a single subject.

> All the provisions contained in an act must be of such a nature as to be fairly included within the subject expressed in the title of the act, or be matters properly connected with the subject expressed in the title **...**
>
> Provisions that are necessary incidents to, or that tend to make effective or to promote, the object and purpose of the legislation that is included in the subject expressed in the title of the act, may be regarded as matter properly connected with the subject of the act **...**

Smith v. Chase, supra, **109** So. **94, 96-97** (Fla. **1926).** (Emphasis supplied).

The preceding makes a clear distinction (blurred by the appellants in the instant case) between the subject of an act and matters connected therewith. The matters connected to the subject do not have to be identical'with it, as the appellants seem to suggest, or even to be included within it; they merely have to show a tendency to make effective or promote the purpose of the legislation, or to be necessary or advisable as a side effect of the legislation.

> The test to determine whether legislation meets the single-subject requirement is based on common sense. It requires examining the act to determine if the provisions "are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to promote the objects and purposes of the legislation included in the subject."

Smith v. Department of Insurance, 507 So.2d 1080, 1087 (Fla. 1987).

The same liberal criteria were recognized in Williams v. State, supra, to the effect that all the matters passed in one bill must simply be "germane and logically related in some way to each other..." 459 So.2d at 321. As already noted, Williams acknowledged that this honorable Court has interpreted the one subject rule liberally, sustaining "very comprehensive" laws which "apparently contain may different subjects." Id. at 320.

Williams v. State is one of only two cases which the appellants cite in an effort to support their incorrect assertion that Florida prohibits a "broad general subject area" such as

"crime prevention and control" in a single legislative enactment (Initial Brief, p. 9).[1] Williams, in fact, differentiated between the law it was dealing with, Chapter 82-150, Laws of Florida), and a comprehensive statute.

> The bill in question in this case is not a comprehensive law or code type of statute. It is very simply a law that contains two different subjects or matters. One section creates a new crime and the other section amends the operation and membership of the Florida Criminal Justice Council.

Williams v. State, 459 So.2d 319, 321 (Fla. 5th DCA 1984).

The beginning of the title of Chapter 82-150 illustrates the problem presented in Williams v. State:

> An act relating to the Florida Council on Criminal Justice; creating s. 843.185, Florida Statutes, prohibiting the obstruction of justice by false information...

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[1] All the other cases relied upon in the Initial Brief simply discuss the purposes of the one subject rule -- to prevent deception, fraud, surprise, ignorant voting, "cloaking", and so forth. It is revealing that the appellant attacks the bill under consideration as an alleged example of "logrolling," but finds nothing lacking in the title of the bill, which is extremely detailed. State v. Canova, 94 So.2d 181, 184 (Fla. 1957), contained the statement that, "The evil of 'log rolling' is of course lesser [than a title which does not give proper notice of a bill's contents], in that it is easier to detect, for the title is notice, per se, of the evil involved." In short, the appellant is making a merly technical objection to the scope of the bill, which does not exceed the scope acknowledged to be proper by the Florida Supreme Court, without being able to point to evidence that anyone who bothered to read even the title could have been deceived as to the act's contents. Thus the prime aim of the one subject rule -- to prevent deception -- has obviously not been defeated by the bill under consideration.

Id. at 320.

The appearance is of two distinct subjects. There is not, as in the title of the instant case, any statement of a general subject which includes the subtopics -- i.e. "An act relating to crime prevention and control." Appropriately, Williams relied on two cases which had found similar limited, non-comprehensive "two subject" laws unconstitutional. The acts in question involved narrow, restricted subject matter. Each enactment contained a few provisions relating directly to one restricted subject, and another provision unrelated to that provision.[2]

The second case relied upon by the appellants is Bunnell v. State, 453 So.2d 808 (Fla. 1984), which also found Chapter 82-150 unconstitutional. There was "no cogent relationship" between the two disassociated subjects. Id. at 809.

The Fifth District, at the time of Williams v. State, did not have the benefit of two important Florida Supreme Court cases which contradict any argument that Williams can be construed broadly to forbid a general subject such as "crime prevention and

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[2] The subject of Chapter 7736, Acts of 1918, was the enforcement of the constitutional provision against the manufacture of or traffic in liquor. A provision making it unlawful for an individual to get drunk was held to extend the bill beyond a single subject. The scope of the bill was defined by another enactment. The title of the bill stated that it was "An act to make effective the nineteenth article of the Florida Constitution," which did not deal with consumption of alcohol. Albritton v. State, 82 Fla. 20, 89 So. 360 (Fla. 1921).

Similarly, Colonial Investment Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (Fla. 1930), struck down an act which contained two separate subjects expressed in the title and the body. One required sworn tax returns; the other prohibited recording deeds or bills of sale without the post office address of the grantee.

control." In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987), discussing the enactment of a comprehensive taxation scheme for services, contains the statement quoted supra that an earlier, more restrictive, interpretation of the one subject rule was, in effect, obsolete, because of progress in case law interpreting that rule. Id. at 312-313. That the scope of a legislative enactment is broad and comprehensive is not fatal. Id. at 313.

Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), found that the extensive Tort Reform and Insurance Act of 1986 (Chapter 86-160, Laws of Florida) did not violate the single subject rule. "We have addressed and rejected single subject challenges to similar legislative acts in State v. Lee, 356 So.2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981)." Id. at 1085.[3]

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[3] The roll of Florida laws with broad subjects and a variety of associated matters which have been held not to violate the one subject rule is extensive. Included are State v. Canova, 94 So.2d 181 (Fla. 1957) ("Florida Pharmacy Act", including many aspects of regulation of both retail drug stores and pharmacists: the supreme court said that even though the matters had previously been treated by the Legislature as separate subjects, they were sufficiently related to come under one "general subject"); State v. Lee, 356 So.2d 276 (Fla. 1978) ("Insurance and Tort Reform Act of 1977"; "[W]e cannot say that tort law and automobile insurance have no logical connection." Id. at 282); Chenoweth v.f Kempt, 396 So.2d 1122 (Fla. 1981) (Ch. 76-260, Laws of Florida, covering "a broad range of statutory provisions dealing with medical malpractice and insurance"; tort litigation and insurance reform have a natural or logical connection -- Id. at 1124); Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) ("Rort Reform and Insurance Act of 1986", the "legislative solution to a commercial insurance liability crisis" -- Id. at1083-1084; "Civil litigation does have an effect on insurance and there is no reasonable way that we can say they are not properly connected." Id. at 1087): In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987) (comprehensive sales and use tax on services, Chapter 87-6, Laws of Florida).

This Court reiterated that it took a broad view of the single subject rule, in part because there was opportunity for legislative debate and public hearing. Id. The Lee and Chenoweth cases did not mark the outer limits of permissible subject matter inclusion. Id. The goal of "the availability of affordable liability insurance," or "the single goal of creating a stable market for liability insurance in this state" were acceptable delineations of a single subject -- Id. at 1087 -- certainly at least as broad and general as "crime prevention and control."

Smith v. Department of Insurance unequivocally stands for the proposition that a law can be very broad indeed, and that a great diversity of matters can constitutionally be included under the umbrella of a general legislative goal. [4] "Crime prevention and control" is a perfectly acceptable subject, a determination given additional force by the necessity of deference to the Legislature and the presumption of constitutionality.

A look beyond the appellants' discredited assertion that the subject of an act may not be general reveals that their brief lacks specificity as to exactly what provisions of Chapter 87-243 allegedly constitute separate subjects. Their complaint seems to

[4] The courts and the Legislature so frequently blur or entirely ignore any distinction between the "subject" and "object" of an act that it seems pointless to dwell on definitions. Spencer v. Hunt, 109 Fla. 248, 127 So. 282, 284 (1933), stated that the two terms are held to be equivalent by some authorities, but that "subejct" meant the matter to which an act relates and was a broader term than "object," the general purpose of the act. Nevertheless, the courts tend to use the terms interchangeably: "Crime prevention and control" can legitimately be seen as both goal and subject.

be simply that the enactment is long and contains many different sections, and not that there is any particular section which has no rational connection with crime prevention and control.

To single out a provision of the act whose connection may not immediately be obvious, Section 73 provides that rights-of-way rendered untrave led when a portion of a road is made a cul-de-sac shall not be deemed abandoned absent affirmative government action. Taken in context, the relevance of the provision becomes quickly apparent: One of the means of crime prevention and control covered by the enactment is the modification of environmental factors within individual neighborhoods. In section 56(2) the Legislature finds that safe neighborhoods are the product of implementation of environmental design concepts. Such concepts include redirection of automobile traffic, reduction of opportunities for the commission of crime, and other environmental modifications which makes a neighborhood more defensible against crime (sec. 56(3). Section 62 begins, "Crime prevention through environmental design functions of neighborhood improvement districts," and section 62(2) requires analysis of crimes related to land use and environmental and physical conditions, with particular attention to factors which, inter alia, "encourage free circulation through the district." The same section states that factors relevant to the crime-to-environment relationship include streets, alleys, traffic flow patterns, and barriers.

Section 62(3) refers to "areas within the district where modification or closing of, or restriction of access to, certain

streets would assist crime prevention." Section 63(13) gives districts the power to "privatize, close, vacate, plan or replan streets, roads, sidewalks and alleys." Because cul-de-sacs might well be created under such crime prevention schemes, it follows logically that the Legislature should provide for governmental retention of rights-of-way left unused as a result [section 73, creating section 177.086, Fla. Stat. (1987)]. The statutory section immediately preceding section 177. 086, section 177.085, Fla. Stat. (1987), deals with reversionary clauses vis-a-vis dedication of streets and roads in plats. Considering the possibility for reversion of unused roads if deemed abandoned, the creation of section 177.086 is a necessary incident to the crime prevention and control legislation. The new section is not an unrelated matter which was slipped into the bill in an effort at camouflage. It grew naturally out of other provisions of the bill, was made necessary by them, and is logically connected with them.

All of the provisions of Chapter 87-243 are either directly within the subject of crime prevention and control or are matters properly connected therewith according to the standards discussed in this brief. The Legislature's inclusion of a number of naturally and rationally related matters within this one bill, thus focusing attention on them with a single bright spotlight, undoubtedly served better to <u>prevent</u> the evils of deception and ignorant voting than a swarm of separate bills would have done.

Chapter 87-243 does not violate the single subject rule.

POINT II

THE APPELLANTS WERE CORRECTLY ADJUDICATED GUILTY OF BOTH PURCHASE OF COCAINE AND POSSESSION OF COCAINE.

1. Introduction

The issue posed by the appellants is whether their conviction and sentencing on two charges -- purchase of cocaine and possession of cocaine -- constitutes a double jeopardy problem, where the cocaine possessed was apparently the same cocaine he had just purchased.

2. The record fails to show with certainty that the Cocaine which the appellants were convicted of possessing was the same cocaine, and only the cocaine, which they were convicted of purchasing.

The appellee points out initially that while the Arrest Affidavits suggest that the cocaine which the appellants were charged with possessing was the same that they had purchased in each case, that fact is not definitely established by the record. If the appellants, when arrested, were in possession of more cocaine than they had just purchased, then there is no basis at all for an argument that each appellant committed only one offense.

For obvious reasons, a reviewing court should not base the reversal of a conviction on speculation or guesswork, even to a small degree, about the determinative facts of a case. The appellants's double jeopardy argument should be rejected at the outset because he has failed to produce a record which unambiguously gives factual support to that argument.

3. Section 775.021(4), Fla. Stat. (1988), as amended, should control in this case, but even under Carawan v. State there would be no double jeopardy violation.

The appellants' double jeopardy argument is based entirely on Carawan v. State, 515 So.2d 161 (Fla. 1987), which interpreted a version of section 775.021(4), Fla. Stat. (1987) which was subsequently amended by Chapter 88.131, section 7, Laws of Florida, effective July 1, 1988.[5]

The Legislature's swift remedial action in amending the statute indicates that Carawan was never in accord with legislative intent. As the Fifth District said regarding the amendment, "the legislature has spoken to make clear [not change] its intent..." Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988). (Emphasis supplied.) Justice Shaw, concurring specially in result only in State v. Barritt, 531 So.2d 338 (Fla. 1988), stated that it is clear from the amendment that the legislature intends, "and previously intended," that separate offenses, as defined by the legislature, are subject to separate convictions and sentences. Id. at 341. Justice Shaw said that the amended section did not change the substantive meaning of the statute, but rather simply explained the meaning of section 775.021(4)(a). Id.

In Clark v. State, supra, the Fifth District indicated that Carawan is not the law now because of the amendment of section 775.021(4). The appellee urges that more weight should be given

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[5] The appellants committed the offenses prior to July 1, 1988.

to the true intent of the Leg slature than to the shortlived reign of Carawan.

It is undeniable that Carawan was a controversial decision and that the amendment was a swift response to it. "When an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985). An amendment of a statute may be seen as an expression of prior and continuing legislative intent. Id. And legislative intent "must be the polestar of judicial construction." Id. at 1249.

In State v. Lanier, 464 So.2d 1192 (Fla. 1985), this Court, though stating that it was not bound by statements of legislative intent made after either the enactment of a statute or after actions which allegedly violate the statute, stated, "we will show great deference to such statements, especially in a case such as this, when the enactment of an amendment to a statute is passed merely to clarify existing law." 464 So.2d at 1193. Referring to a "misguided" appellate interpretation of the statute in question prior to its amendment, the Lanier decision held that the amended statute should, in effect, be given retroactive application to defeat an erroneous judicial construction of the pre-amendment statute. That principle should be applied by this Court in the case at bar.[6]

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[6] A different view is expressed in Heath v. State, 13 F.L.W. 2325 (Fla. 1st DCA, October 21, 1988).

The amended version of section 775.021(4), Fla. Stat. (1988) reads, with changes underlined:

(4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Even if the ambiguous facts of the instant case are construed to mean that the appellants were in possession only of the cocaine which they had just purchased, the legislative intent is clearly that they can be convicted of two statutorily defined offenses arising from the same act if each requires proof of an element the other does not, taking into account the exceptions of subsection (b). The constitutional prohibition is against being placed twice in jeopardy because of a single offense, and not because of a single act. Art. I, Sec. 9, Fla. Const. and U.S. Const. amend. V; Carawan v. State, 515 So.2d 161, 163 (Fla. 1987).

Of course, if two separate acts were involved, the appellants could be convicted even of identical offenses, and it can be argued that their act of purchasing and their act of

possessing are two separate acts, even though one was made possible by the other, and for that reason alone there was no double jeopardy violation in this case. The appellants paid money and purchased cocaine. They then took possession of cocaine (which one can do without purchasing it), and continued the act of possessing it (the act of purchase having been completed previously) until they were arrested.

If this Court does not consider purchase and possession separate acts, the question is then whether each offense requires proof of an element that the other does not. Obviously one can possess without purchasing, so the offense of purchasing cocaine requires proof of an element which is not required to prove possession.

One can also purchase without possessing, as where A gives B (say an innocent party) money and asks B to go to a foreign country and pay someone there for future delivery of a shipment to A; A has purchased the shipment (of cocaine), but he has not yet possessed it. Arguably, he has committed the offense of purchasing cocaine, but not the separate offense of possession of cocaine. The distinction is brought out in Roberts v. State, 505 So.2d 547 (Fla. 3rd DCA 1987), which held that defendants who had paid money for marijuana in a reverse sting operation could not be convicted of possession of marijuana because the marijuana had not been released into their actual or constructive possession when they were arrested. Brown v. State, 483 So.2d 743 (Fla. 5th DCA 1986), explained that actual possession requires physical possession of a controlled substance and knowledge of its illicit

nature, while constructive possession means that the accused had dominion and control over the contraband, knew the contraband was within his presence, and knew of the illicit nature of the substance. The appellee strongly urges this Court to acknowledge that the offense of purchase of contraband can take place without the contraband being within the presence of the purchaser. If that principle is granted, then it is clear that the offenses of purchase of cocaine and possession of cocaine each require proof of an element which the other does not.

Even if this Court were to apply Carawan v. State, supra, to the case sub judice, Carawan merely prescribes a method for determining legislative intent if, and only if, criminal statutes are ambiguous as to whether the Legislature intended to create more than one offense based on a single act. If legislative intent is clear on the face of the statute, then the Carawan analysis ends. If it is unclear, then Carawan requires (1) the assumption that the legislature ordinarily does not intend to punish the same offense (act?) under two different statutes, and (2) the application of the "Blockburger test" (as was done in the preceding paragraph of this brief) for determining by the elements of offenses whether they are separate offenses. Then, even if each of the offenses is shown to require proof of an element the other does not, a court, under Carawan, must additionally determine whether there was nevertheless a legislative intent that the offenses not be separate; one means of determining such contrary intent is to find that the offenses "manifestly address the same evil." 515 So.2d at 168. The "rule

of lenity" would then come into play to settle the ambiguity in favor of the convicted person.

In the instant case, the Carawan analysis should be abandoned immediately because there is no ambiguity in the statute. Section 893.13(1)(a), Fla. Stat. (1987), as amended, makes the purchase of a controlled substance a crime. A different paragraph, Section 893.13(1)(f), makes it unlawful for a person to be in actual or constructive possession of a controlled substance. There is no reason to struggle through a complex and highly subjective analysis in order to resolve a nonexistent ambiguity, particularly when the next step in the analysis would call for the now thoroughly discredited assumption that the Legislature ordinarily does not intend to punish the same act under more than one statute. Finally, even if one went through the entire analysis to the last stages, it would be as easy to say that two separate evils are addressed by the statutes as that they are not.[7]

[7] The appellee would of course argue that involvement in commercial transactions in cocaine is a different evil from merely having some cocaine in one's possession.

CONCLUSION

WHEREFORE, the Respondent, the State of Florida, respectfully prays that this honorable Court answer the certified question in the affirmative, holding that section 893.13(1)(e) Florida Statutes (1987) -- Chapter 87-243, Laws of Florida -- is constitutional, and that this Court approve the decision of the Fifth District Court of Appeal in this cause in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by mail to: Glen P. Gifford, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL, 32114 on this 9th day of October, 1989.

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