IN THE SUPREME COURT OF FLORIDA

JOHN SAVARY DAME,

Petitioner,

v. CASE NO. 74,617

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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JOHN SAVARY DAME,	:	
Petitioner,	:	
VS.	:	CASE NO. 74,617
STATE OF FLORIDA,	:	
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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal of the decision of the First District Court of Appeal in Dame v. State, ____ So.2d ____, 14 FLW 1963 (Fla. 1st DCA Aug. 22, 1989). The district court affirmed petitioner's convictions, but certified the question that has previously been certified in Blankenship and Burch, infra.

Petitioner was convicted at jury trial of conspiracy to sell LSD and a "merged" count of delivery to or use/hire of a juvenile and not guilty of possession with intent to sell. Before trial, petitioner moved to dismiss the merged delivery/use/hire of a juvenile count, and the motion was denied.

The record on appeal will be referred to as "R" and the trial transcript as "T."

II STATEMENT OF THE CASE

Petitioner was charged by a 16-count information filed November 5, 1987, and amended November 10, 11 counts of which related only to his codefendant, Ariel Esrig, with possession of a controlled substance (LSD), delivery to a juvenile, use or hire of a juvenile in sale or delivery, possession with intent to sell, and conspiracy to sell or deliver (R-5-7).

January 27, 1988, petitioner moved to dismiss two counts on double jeopardy grounds, because 1) the possession and possession with intent to sell counts both involved the exact same contraband, and 2) the delivery to a juvenile and use/hire of juvenile in sale/delivery both involved the exact same act (R-20-21). The motion was granted February 15. The court struck the possession count and merged Counts X and XI, concerning delivery to or use or hire of a juvenile (R-22).

March 22, petitioner moved to dismiss the use/hire of a juvenile count on the ground the statute was unconstitutional for violating the "one subject rule" (R-43). The motion was denied without argument or comment (R-65,T-5-6).

At trial March 23, petitioner moved for judgment of acquittal on possession with intent on the ground there was no proof of intent to sell, and on the use of a juvenile offense on the ground there was no proof petitioner knew Esrig's age. The court ruled it was a strict liability offense of which knowledge was not an element. The motions were denied (T-159-64,185-86). The court ruled Esrig's testimony was sufficient to send the conspiracy count to the jury (T-167).

The jury found petitioner guilty of conspiracy to sell and the merged delivery/use/hire of a juvenile count, and not guilty of possession with intent to sell **(R-64).**

April 18, petitioner was sentenced to one year in jail on the misdemeanor conspiracy count and placed on 15 years probation for the felony delivery/use/hire of juvenile count with a condition that he serve **12** months in jail **(R-68-70).** His presumptive guidelines sentence was nonstate prison **(R-72).**

Notice of appeal was timely filed April **19, 1988 (R-74).**

The district court affirmed the convictions, but certified a question to the supreme court.

III STATEMENT OF THE FACTS

Gainesville police officer Dan Mesa received information that Ariel Esrig was selling LSD, and his source was John, "the Freak." Mesa chose Det. Rouse to buy LSD from Ariel because he looked like a college student. They intended for Rouse to buy a large amount, so Ariel would have to go to his source to get it (T-28-30). They put a bodybug transmitter on the undercover officer and record the serial numbers from the bills they use if they expect an immediate arrest.

Det. Rouse met Ariel September 29, 1987, "at a location where he and I were introduced." They discussed things they did in their lives and stuff like that. Rouse said, "yeah, I was going to party," and stuff like that. Ariel said, "well, I could probably set you up or do something for you or help you out." Ariel made a phone call and asked for someone called the Freak, then he said, come on, we'll go over and meet him (T-69-70).

They went to the Salty Dog Saloon, where Ariel brought a person to the car, whom Rouse identified as petitioner, John Dame. John did not have what Rouse was looking for. The only thing they had to sell was some marijuana. Rouse wasn't interested in that and did not buy any drugs that evening (T-70-72).

On each day, October 12, 14, 26 and 27, Rouse bought four or five hits of LSD from Ariel for about $5 per hit. There was no mention of John Dame in connection with any of these transactions. On October 26, Rouse began to talk about purchasing larger quantities. Ariel said, that's great, man. No problem.

As much as you can move or get rid of, we can do it. On October 27, Rouse told Ariel he had washed his jeans, which destroyed the acid he had bought the day before, and he needed some more (T-34-39,72-77).

October 28, Rouse called Ariel. Ariel asked if he were still interested in a large order. Ariel said, he had to get with his guy anyway because he was running low. Ariel called him back a short time later, said he had spoken to this guy's girlfriend, and the deal would probably go down later that night or tomorrow. The price would be between $3.50 and $3.75 a hit (T-78).

Rouse picked up Ariel the next night. Ariel went to an apartment, then came back and said the guy was about to take a shower, and it would cost $375. Rouse gave him the money. A short time later, Ariel came out with John. John gave directions to a place. When they arrived, John told them to stay in the car, and John entered a doorway which appeared to lead into a courtyard. John came back a short time later with a sheet of 100 hits of LSD. The sheet had little pigs on it, the same as what Rouse had purchased previously from Ariel. John passed the sheet to Ariel, who looked at it for a while, then handed it to Rouse (T-79-81).

A tape recording taken from the bodybug during this time was played for the jury but was not transcribed, and the court ruled it was unintelligible except in parts (T-96-133).

According to Rouse, John did not appear drunk, but did appear tired. John said he had fallen from a tree and had had

a rough day. Rouse saw no money change hands between Ariel and John. The only money which changed hands was between Rouse and Ariel **(T-140-43).**

After dropping off John, Rouse drove Ariel to a restaurant parking lot and arrested him. They found **73** hits on Ariel and **$150** in his pocket that matched the serial numbers they had recorded. Ariel's date of birth is May, **1970,** which would make him **17** at the time **(T-41-44).** John was **34 (T-47).** When he was arrested **40** minutes later, John had **50** hits of LSD, but none of the marked money **(T-45,55-56).**

Detective Drayton McDaniel arrested John at his house. John looked extremely tired and not too happy, but outside of that, McDaniel couldn't say whether he was intoxicated or not **(T-150).**

Ariel entered a plea the Monday before John's trial began on Wednesday. He initially refused to testify, then was granted use and derivative use immunity and ordered to testify (T-**107-13).** Defense counsel alleged a discovery violation on the ground Ariel was not listed as a witness and was permitted to depose him before trial continued **(T-114-22).** Defense counsel moved for mistrial and continuance, both of which were denied **(T-119-27).**

Ariel said he got the LSD from John. His birthday was May **18, 1970 (T-150-53).** On cross, Ariel said he never told John his age. John did not want to go with him the day of this incident, because he was too tired and didn't have transportation. John did not mention he had been drinking, but he wanted

to shower because he had an accident at the tree service place and scraped up his back rather badly (T-153-56).

John Myers used to date Ariel's mother, and stayed at her house off and on. Myers had introduced Ariel and John about two months before this incident. John gives large parties, and Myers and Ariel's mother went to one. Ariel asked if he could come along, so they took Ariel and his brother, Aaron. There was a keg at the party, and John was concerned whether the kids were old enough to be there. Myers thought you could be in a bar in Florida at 19, but could not drink until you were 21. Myers told John Ariel was old enough. Myers said John's concern was actually for Ariel's brother who was 19, but looks younger. Myers did not consider himself Ariel's guardian, and did not know Ariel's age, but knew he was in school (T-170-73).

Sandra Wasdin, John's girlfriend, said the party was a benefit for battered women. John was concerned about Ariel's age because alcohol was being served. Myers said Ariel was at least 18 and it was OK to be at the party (T-174-77).

John said he met Ariel at one of his benefits, for Phoenix, a battered women's shelter. He asked Myers, what are those kids doing here, and Myers said, it's OK, they're of age, and introduced him to Ariel and Aaron. Ariel did not state his age, but said he was taking a pre-college course at Santa Fe Community College. John assumed if he was going to the community college, he must be 18 or 19 (T-178-79).

John works four 10-hour days per week, and the day of this incident was his last workday of the week. He climbs trees and

services power lines for the county. After work, he got a six-pack of tall-boy Bud beer and drank all six (T-180-81).

On cross, John admitted he sold 100 hits of LSD. In the car, he talked about how LSD is made, but he does not make it. The tape was too unintelligible and he was too intoxicated to remember exactly what he said. He did not know if Ariel got LSD from other sources (T-182-84).

IV SUMMARY OF ARGUMENT

Petitioner was convicted of one count which "merged" two offenses that were initially charged separately. The merged count alleged the offenses of delivery to a juvenile, or the use or hire of a juvenile as an agent or employee in the sale or delivery of a controlled substance. The delivery portion of the merged count is a valid basis for conviction, but the use/hire portion is invalid as the statute which created the offense violated the one-subject rule of the Florida Constitution.

A general verdict must be set aside if 1) the jury was instructed that it could rely on any of two or more independent grounds, and 2) one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

Chapter 87-243, Laws of Florida, contains 76 sections that relate to approximately 16 different subject areas. Since these 16 different subjects are not naturally or logically connected, chapter 87-243 violates article 111, section 6, of the Florida Constitution, which provides that "every law shall embrace but one subject and matter properly connected therewith." Petitioner was prosecuted under a portion of section 893.13(1)(c) which was amended by chapter 87-243. As the amendment was unconstitutional, his conviction is void and must be discharged.

V ARGUMENT

ISSUE PRESENTED

A) BECAUSE THE STATUTE VIOLATED THE ONE-SUBJECT RULE OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS THE USE/HIRE OF JUVENILE COUNT; B) CONSEQUENTLY, THE GENERAL VERDICT ON THE "MERGED" OFFENSE MUST BE SET ASIDE BECAUSE IT COULD HAVE BEEN BASED ON THE OFFENSE WHICH SHOULD HAVE BEEN DISMISSED.

When several different crimes are presented in a single count, a general verdict makes it impossible to tell which crime the jury relied on for conviction. In Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 ALR 1484 (1931), the United States Supreme Court said:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses ... was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.

283 U.S. at 367-68. In Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the court said:

> One rule derived from the Stromberg case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881. In Adjmi v. State, 154 So.2d 812 (Fla. 1963), the Florida Supreme Court said:

> No one can delve into the minds of the jurors and conclude with certainty that it was not one or both of the transactions which took place in Pennsylvania upon which the jury found the petitioners to be [guilty]."

Id. at 816.

In the instant case, petitioner was originally charged with separate counts of delivery to a juvenile, and use or hire of a juvenile as an agent or employee in the sale or delivery of a controlled substance. In response to a motion to dismiss one count on double jeopardy grounds, the court merged the two counts as "alternative methods of proving a single allegation" (R-22). Petitioner was convicted of the "merged" count. While the delivery to a juvenile portion of the merged count is a valid basis for conviction, the use or hire of a juvenile portion is an invalid basis for conviction, because the legislation which created the offense violated the one-subject rule of the Florida Constitution.

The instant case is not the first case addressing this issue to reach the supreme court. Although they reached different results, both the Second and Fourth Districts have previously certified the question. State V. Burch, 545 So.2d 279 (Fla. 4th DCA 1989); Blankenship V. State, 545 So.2d 908 (Fla. 2d DCA 1989).

The offense of use or hire of a juvenile in the sale or delivery of a controlled substance was added to section 893.13(1)(c) by chapter 87-243, Laws of Florida. The trial court, and now this court, had the benefit of a Memorandum in

Support of Motion to Dismiss **(R-46-63).** Undersigned counsel has reviewed this memo and is of the opinion that it is a well-written and articulate presentation of the various arguments in support of the view that the laws affected by chapter **87-243** are unconstitutional. Accordingly, for his argument before the court here, petitioner incorporates by reference as if fully set forth herein the Memorandum in Support of Motion to Dismiss found in the record herein.

Contrary to the decision of the First District Court of Appeal below, the memorandum of law in support of the motion to dismiss amply demonstrates that chapter **87-243** violates the single-subject rule, and petitioner's conviction thereunder must be discharged.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the holding of the First District Court of Appeal and discharge his conviction of delivery to or use/hire of a juvenile.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to A. E. Pooser IV, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. John Dame, c/o 10324 35th Ave. NE, Seattle, WA 98125, this 19 day of September, 1989.

KATHLEEN STOVER