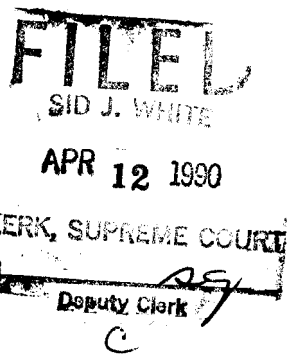
IN THE SUPREME COURT OF FLORIDA'



HARRISON PORTERFIELD,

Petitioner,

vs. CASE NO. 75,505

STATE OF FLORIDA,

Respondent.
_____/

WILLIE FRED POLLARD,

Petitioner,

vs. CASE NO. 75,223

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF, CRIMINAL APPEALS
ASSISTANT ATTORNEY GENERAL
FLA. BAR #325791

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
904/488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

This Court has consolidated Porterfield v. State, Case No. 75,505 and Pollard v. State, Case No. 75,223 for appellate purposes. Petitioners Porterfield and Pollard were defendants in the trial court and appellants in the First District Court of Appeal.

The attached appendix contains copies of the opinions under review and of Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), the state's petition for clarification in Wheeler, and of St. Fabre v. State, 548 So.2d 797 (Fla. 1st DCA 1989).

STATEMENT OF THE CASE AND FACTS

The state accepts petitioners' statement of the case and facts but for brevity and clarity in presenting its brief notes the following.

The criminal episode in Pollard's case occurred on 18 September 1987. Pollard was convicted on separate counts of possession of cocaine and sale or delivery of cocaine contrary to, respectively, sections 893.13(1)(e) and 893.13(1)(a), Florida Statutes (1989). The district court below affirmed on the authority of Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989) and Smith v. State, 430 So.2d 448 (Fla. 1983).

The criminal episode in Porterfield's case occurred on 14 March 1986. Porterfield was also convicted on separate counts of possession of cocaine and sale of cocaine contrary to, respectively, section 893.13(1)(e) and 893.13(1)(a), Florida Statutes (1985). The district court below affirmed on the authority of Wheeler v. State, and Smith v. State. The district court also certified a question of great public importance concerning the applicability of section 775.021(4)(b), Florida Statutes (Supp. 1988) to sections 893.13(1)(a) and 893.13(1)(e), Florida Statutes (1985).

SUMMARY OF ARGUMENT

The method of analysis set forth in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989) and its corollary, St. Fabre, 548 So.2d 797 (Fla. 1st DCA 1989), conflicts with Carawan v. State, 515 So.2d 161 (Fla. 1987) and State v. Smith, 547 So.2d 613 (Fla. 1989). Both criminal episodes occurred prior to 1 July 1988 and thus both cases are controlled by Carawan and State v. Smith. The decisions below should be quashed and remanded for application of Carawan and State v. Smith.

ARGUMENT

The issues presented by these cases are controlled by Carawan v. State, 515 So.2d 161 (Fla. 1987) and State v. Smith, 547 So.2d 613 (Fla. 1989). It is first necessary to understand Carawan and Smith and the applicability of their relationship to the issues and cases at hand.

In Carawan this Court held that the legislature did not intend multiple convictions and punishment for separate statutory offenses, as defined under section 775.021(4), Florida Statutes (1987), if the commission of the offenses was "predicated on one single underlying act." Id. at 170.[1] In the Court's view section 775.021(4) was merely an aid to construction and was not a clear statement of legislative intent that all separate statutory offenses committed in a single episode be subject to multiple convictions and punishment.

At the time Carawan issued, section 775.021(4) read as follows:

> Whoever, in the course of one criminal transaction or episode, commits 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

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[1] The Court apparently overlooked the rule codified as section 1.01(1), Florida Statutes (1987) that in construing statutes "the singular includes the plural and vice versa."

> requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

In its next session, the legislature enacted chapter 88-131, section seven, Laws of Florida which substantively amended section 775.021(4) to override the Carawan interpretation. As amended, effective 1 July 1988, section 775.021(4), Florida Statutes (Supp. 1988) reads:

> (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 pleadings 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.

In State v. Smith, 547 So.2d 613 (Fla. 1989), this Court revisited Carawan in light of the legislative action in order to

answer a certified question of great public importance [2] and to determine whether the legislature intended that sale or delivery of a controlled substance and possession of that same substance with intent to sell, both prohibited by section 893.13(1)(a), be subject to multiple convictions and punishments. The state argued that (1) chapter 88-131, section seven overrode Carawan and (2) the legislative override should be applied retroactively and this Court should recede from Carawan. This Court refused to recede from Carawan but agreed that section 775.021(4), as amended effective 1 July 1988, overrode Carawan.

> It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in Carawan. More specifically:
>
> (1) The legislature rejects the distinction we drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved.
>
> (2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an "aid" in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of legislative intent referred to in Carawan as the controlling polestar. Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, all criminal offenses containing unique

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[2] The question read: "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?" Smith 547 So.2d at 614.

> statutory elements shall be separately punished.
>
> (3) Section 775.021(4)(a) should be strictly applied without judicial gloss.
>
> (4) By its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test shall be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.

Smith, 547 So.2d at 615-616 (footnotes omitted).

This Court in State v. Smith, rejected the state and Justice Shaw's view that Carawan should be receded from on the authority of Chapter 88-131, section seven. Subsequently, however, this Court held that Carawan itself would not be retroactively applied in post-conviction proceedings to final convictions. State v. Glenn, 15 F.L.W. 69 (Fla. February 15, 1990). The net effect of Carawan, State v. Smith and Glenn is that Carawan is applicable only on direct appeal to cases where the crimes occurred prior to 1 July 1988; the rule of law in section 775.021(4), Florida Statutes (Supp. 1988) and State v. Smith applies in all post conviction proceedings and to cases on direct appeal where the offenses occurred on 1 July 1988 or

thereafter. With this controlling law in mind, the state now turns to the method of analysis adopted by the court below.

The seminal case illustrating the method of analysis adopted by the court below is Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989). Wheeler was charged and convicted on two counts of violation of section 893.13(1)(a), Florida Statutes (1985), possession of cocaine with intent to sell and sale of cocaine. At the time of trial, prior to Carawan, dual convictions and punishment were appropriate under Smith v. State, 430 So.2d 448 (Fla. 1983). Although the First District Court of Appeal had the benefit of Carawan, State v. Smith, and chapter 88-131, section seven by the time it rendered its decision, a closely divided en banc court adopted an entirely new method of analysis which focused on whether the offenses were contained in the same or different subsections. Under the analysis adopted over a stinging dissent by Judge Nimmons, the First District reasoned that the inclusion of both charged offenses in subsection 893.13(1)(a) indicated that the "legislature intended by this subsection to punish either the completed sale, manufacture or delivery of an illegal drug, or the frustrated sale, manufacture or delivery of the drug (by charging possession of the drug with the intent to sell, manufacture or deliver it), but not both when the same drug and the same transaction are involved.'' Wheeler, 549 So.2d at 689-690. Wheeler's offenses fell into the time period where Carawan was applicable. Thus, although the state disagreed with Carawan and continue to consider it erroneous, the result in Wheeler was correct in the

state's view in that it was mandated by Carawan and State v. Smith. However, recognizing that the reasoning of Wheeler was contrary to both Carawan and State v. Smith and would needlessly prolong and expand the confusion created by Carawan, the state petitioned for clarification arguing that Judge Nimmons' special concurrence correctly analyzed and stated the law and should be adopted. See state's petition for clarification in appendix A.

The necessary corollary to the Wheeler holding that inclusion of offenses in the same subsection signifies legislative intent not to punish both offenses is that the placement of offenses in different subsections signifies legislative intent that there be dual convictions and punishment for both offenses. The First District so held in the companion case of St. Fabre v. State, 548 So.2d 797 (Fla. 1st DCA 1989).

St. Fabre was convicted of both the sale of cocaine and of simple possession, contrary to, respectively, sections 893.13(1)(a) and 893.13(1)(e), Florida Statutes (1985). Because the offenses were committed in the time period when Carawan controlled, St. Fabre should not have been convicted of both offenses under the single act rationale of Carawan.

As can be seen from the analysis above, St. Fabre is simply an application of Wheeler to a different set of facts. The two are inseparable and either stand or fall together because they both rely on the proposition that placement of offenses in the same or different subsections of a statute controls whether dual or single convictions are permitted. For offenses committed

prior to 1 July 1988, this proposition directly conflicts with Carawan and, as in the St. Fabre scenario, works to the disadvantage of the criminal defendant. For offenses committed on or after 1 July 1988, the same proposition directly conflicts with State v. Smith and section 775.021(4), Florida Statutes (Supp. 1988) and, as in the Wheeler scenario, works to the disadvantage of the state.

It will come as no surprise to the Court that the state remains convinced that Carawan was wrongly decided and should, even at this late date, be receded from. However, Glenn did limit the damage and with chapter 88-131, section seven and State v. Smith, it was possible to look forward to a time when the law would be certain and clear. Unfortunately, the method of analysis adopted in Wheeler and St. Fabre elevating the mere placement of offenses in the same or different subsections to a clear and specific statement of legislative intent superior to Carawan, State v. Smith, and section 775.021(4), Florida Statutes (Supp. 1988) has extended and compounded the uncertainty created by Carawan in the First District.

The state agrees with petitioner that the dichotomy between "same subsection" and "different subsection" is a false one which should be speedily rejected by this Court. Whatever significance there may be in the inclusion of offenses in the same or different subsections, the state submits that Carawan, State v. Smith, and section 775.021(4), Florida Statutes (Supp. 1988) are so specifically and strongly worded as to 'utterly

obliterate any significance there may be in the same or different subsection dichotomy.

Accordingly, the state agrees with appellant that Wheeler, and its corollary St. Fabre, rest on an incorrect dichotomy and that both Pollard and Porterfield, resting as they do on Wheeler, should be quashed and remanded with an opinion reaffirming State v. Smith. Namely, Carawan applies only on direct appeal where the offenses occurred prior to 1 July 1988; State v. Smith and section 775.021(4), Florida Statutes (Supp. 1988) apply to offenses committed on or after 1 July 1988.

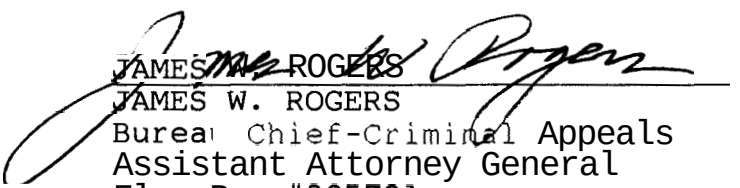
The Court should decline to answer the certified question in Porterfield because it is irrelevant to the case at hand and rests on the erroneous inclusion of criminal statutes from 1985, which are controlled by Carawan, and section 775.021(4)(b), which is post-Carawan.

CONCLUSION

The state agrees that the decisions below were in error.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



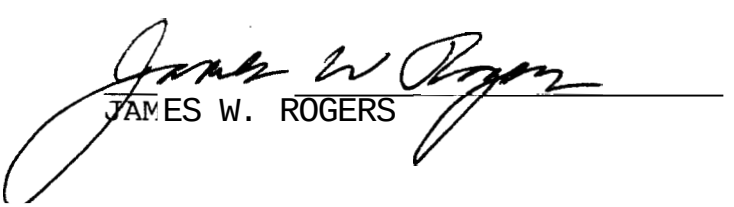
JAMES W. ROGERS
Bureau Chief-Criminal Appeals
Assistant Attorney General
Fla. Bar #325791

Department of Legal Affairs
The Capitol
Tallahassee, Florida **32399-1050**
904/488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida **32301**, this **12th** day of April, **1990.**



JAMES W. ROGERS