**SUPREME COURT OF FLORIDA**

STANLEY CAMPBELL

Petitioner,

v.

CASE NO. 75,873
1st District - No. 88-02599

STATE OF FLORIDA,

Respondent.

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# PETITIONER'S BRIEF ON MERITS

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## PRELIMINARY STATEMENT

Petitioner was the Appellant below and the Defendant at Trial. Respondent was the Appellee below and the Prosecuting authority at trial. The authorities will be referred to as they appear before this Court.

Citations to the record on appeal are designated hereinafter as "R-" with the appropriate page number inserted thereafter. Citations to the trial transcript are designated as "T-" with the appropriate page number inserted thereafter. Citations to the supplemental trial transcript are designated as "ST-", with appropriate page number inserted thereafter.

## STATEMENT OF THE CASE AND OF THE FACTS

Defendant/Appellant, STANLEY CAMPBELL, was convicted of trafficking in cocaine under §893.135(1)(b)(3), Fla.Stat., by a jury in the Circuit Court, for the Fourth Judicial Circuit. Campbell was sentenced to 30 years imprisonment by the Honorable David C. Wiggins.

Campbell appealed his conviction and sentence to the First District Court of Appeal. The Court affirmed Campbell's conviction, but reversed his sentence and remanded for resentencing. The District Court of Appeal certified that its decision directly conflicted with the decision of the Third District on the same point of law. Campbell duly appealed his conviction.

On June 2, 1988, Detective Daniel Locey (hereinafter "Locey"), an undercover detective with the Fort Lauderdale Police Department [T-16] was introduced to Appellant as someone who wanted to purchase cocaine. [T-18]. The introduction was made by a confidential informant who had himself been arrested and was working with the police in order to obtain a reduction of his own prison sentence. [T-52].

Appellant did not want to travel from his home in Savannah, Georgia to Fort Lauderdale to consummate the transaction, so it was agreed that he and Locey would meet in Jacksonville, an intermediary point. Appellant wanted to purchase two kilograms of cocaine. [T-18]. Locey told Appellant that Appellant would have to pay $5,000.00 "good faith and expense money up front to show

that he was serious about doing the cocaine". [T-18]. Appellant said that he would send the money the next day. [T-18]. The transaction was scheduled to transpire on Monday, June 6, 1988. [T-19].

The following day in a second conversation, Appellant called Locey in Fort Lauderdale saying he could not wait for Locey to come to Jacksonville and that he wanted to go to Fort Lauderdale over the weekend to consummate the transaction. However, Locey refused and insisted on the original schedule. [T-19]. It was further agreed during the second conversation that Appellant would send only $3,000.00 in lieu of the original $5,000.00 requested by Locey. [T-19].

Locey made arrangements with the Jacksonville's Sheriffs Office to assist him in the investigation in Jacksonville. [T-20].

Appellant sent $3,000.00 to Locey on June 3, 1988 and Locey then called Appellant to confirm that he had received the money. [T-27-34, 36]. Additionally, at that time the total amount of cocaine requested by Appellant was increased from two to four kilograms. [T-34].

Locey taped his telephone conversations with Appellant and the tape recordings of the conversations were played during the trial and recorded by the court reporter. [T-23-26, 28-33, 35-36].

Locey arrived in Jacksonville and, after several additional telephone calls with Appellant, Locey anticipated meeting Appellant to complete the transaction at 3:30 p.m. on June 6, 1988. [T-38]. However, it was not until approximately 7:50 p.m. that Locey was

able to contact Appellant at a telephone booth in Jacksonville. Locey was waiting at a motel on University Avenue in Jacksonville with 15 to 20 other detectives, but Appellant insisted on doing the deal at Jax Liquor Store at 8th Street off of Route I-95 in Jacksonville. [T-40]. Locey equipped himself with a body bug and proceeded to the Jax Liquor Store to meet Appellant. [T-40, 41].

When Locey arrived he observed Appellant parked at a Chevron Station next to the Jax Liquor Store and approached Appellant's automobile. [T-41]. Locey told Appellant that he wanted to see Appellant's money and Appellant showed Locey a green bank bag containing money. [T-43]. But no money was ever exchanged. [T-63].

After some discussion at Appelllant's car, Appellant drove across the street to the MacDonalds restaurant where other undercover detectives where waiting in an automobile. [T-41]. Locey crossed the street on foot and met Appellant's car at the rear of the MacDonalds, directing him around to the front of the MacDonalds where the police car was situated. [T-42]. Locey and Appellant got out of Appellant's car and got in the back seat of the car in which the other detectives were waiting. [T-43].

Locey then obtained a kilogram of cocaine from one of the other detectives. Locey gave the bag of cocaine to Appellant, who held it in his hand and on his lap, commenting that the bag seemed small for one kilogram, opened the bag, pulled some cocaine out and tasted it. [T-44, 49, 61]. A discussion ensued concerning the quality of the cocaine [T-44] after which Appellant exited the

undercover police car, allegedly to return to his own car to get the money to pay for the cocaine. [T-49, 62]. Locey also exited the car telling the Appellant that he was going to the trunk of the detective's car to get the rest of the cocaine. [T-63]. There was, in fact, no more cocaine in the car [T-61]. Appellant was arrested as he walked across the parking lot. [T-45].

Locey and another State witness, Allen O'Hara, testified that Appellant was never alone with the cocaine and could not have physically left with the cocaine until he had paid the detectives money. [T-63, 72]. Appellant never took the cocaine out of the car, nor did an exchange of money ever occur. [T-71]. After Appellant's arrest, Detective Locey located the bag of money by the driver's seat of Appellant's vehicle. [T-58].

The state's witness Allen O'Hara testified as follows:

> Q Detective O'Hara, at the time the defendant left the car leaving that one kilo that he had tasted in the car, was he to go get money at that time?
>
> A Yes, he was.
>
> Q He had never given you any money before that?
>
> A No, he did not.
>
> Q And no exchange had been made at all, no exchange of cocaine for money?
>
> A Not at that time, no.
>
> * * *
>
> Q Detective O'Hara, you testified in response to one of Mr. Grimm's questions that there was no exchange of cocaine for money at that time. There never was a time when there was an exchange of cocaine for money, was

there?

A No, sir.

[T-73, 74].

Locey testified that a tape recording was made of the transaction from the body bug attached to his person. [T-45]. All or part of the tape recording was played at the trial and recorded by the court reporter. [T-46-48].

The cocaine originated in the police property room and was placed back in the police property room for shipment to the Florida Department of Law Enforcement after Appellant's arrest. [T-85, 86].

After his arrest, Appellant was searched and found to be carrying a .38 caliber small automatic pistol hidden in his pants. [T-64, 78, 79]. None of the detectives was aware that Appellant was armed at any time prior to Appellant's arrest. [T-61].

## SUMMARY OF ARGUMENT

The First District Court of Appeal erred in not applying the holdings of Garces v. State 485 So.2d 847 (Fla. 3d DCA, 1986) and Roberts v. State 505 So.2d 547 (Fla. 3d DCA, 1987) on temporary control and possession of contraband to this case.

Appellant was caught in a reverse sting operation by officers from the Ft. Lauderdale Police Department. The officers required Appellant pay $3,000.00 in advance in order to continue negotiations. Appellant wired the money to unknown persons in Ft. Lauderdale. Three days later Appellant met with undercover agents in Jacksonville. His actions at the meeting mirror the actions of the defendants in Garces and Roberts. Appellant took temporary control of the contraband to check for quality then left the bag in the officers' possession. Under current case law, Appellant never had "possession" of the cocaine. Therefore the District Court erred in not applying Garces to the instant case.

## ARGUMENT

**I. THE FIRST DISTRICT COURT OF APPEAL'S RULING THAT CAMPBELL'S TEMPORARY CONTROL OF COCAINE FOR VERIFICATION PURPOSES CONSTITUTED "POSSESSION" CONFLICTS WITH CONTROLLING FLORIDA LAW ON TRAFFICKING AND POSSESSION ESTABLISHED IN GARCES V. STATE 485 So.2d. 847 (Fla. 3d DCA, 1986), THUS SHOULD BE SET ASIDE.**

The elements of the crime charged were read by the trial court as part of the standard jury instruction on trafficking but the trial court declined to give the special instruction on possession and temporary control requested by the Appellant's counsel. The requested charge was based on controlling state law as defined in Garces v. State 485 So.2d 847 (Fla. 3d DCA, 1986). Garces states that "[t]emporary control of the contraband in the presence of the actual owner, for the purpose of verifying that it is what it purports to be, or to conduct a sensory test for quality, prior to the completed transaction, without more, does not constitute legal possession." Id. at 848. See also, Roberts v. State 505 So.2d 547, 550 (Fla. 3rd DCA, 1987) Failure to give this charge to the jury is a reversible error.

**A. Campbell did not have cocaine on his person or premises when arrested.**

"Actual possession exists where the accused has physical possession of the controlled substance and knowledge of such physical possession." Brooks v. State 501 So.2d 176, 177 (Fla. 4th DCA, 1987) (Quoting Willis v. State 320 So.2d 823, 824 (Fla. 4th DCA, 1975)). Clearly, the Appellant here did not have physical possession of any cocaine when he was arrested in the parking lot.

Therefore, the State was required to prove the Appellant constructively possessed the cocaine in order to sustain the trafficking charge.

**B. The First District Court of Appeal's finding of constructive possession directly conflicts with the current definition of possession as defined by Garces and its progeny.**

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Proof of constructive possession requires that the State establish the Appellant: 1) had dominion and control over the cocaine; 2) knew the substance was within his presence; and 3) knew the illicit nature of the substance. Elias v. State 526 So.2d 1014, 1015 (Fla. 2nd DCA, 1988). *See also*, Roberts 505 So.2d at 549; Hively v. State 336 So.2d 127, 129 (Fla. 4th DCA, 1976). If the premises in which the controlled substance is found is in the exclusive possession of the Appellant, then the State may infer dominion and control, and must only prove the remaining two elements. If however, as with the case at bar, the premises are not in the exclusive possession of the Appellant, the State must prove dominion and control over the contraband, as well as knowledge of it. Maisler v. State 425 So.2d 107, 108 (Fla. 1st DCA, 1983) A passenger in a car is not considered in "possession" of the vehicle. ELS v. State 547 So.2d 298, 299 (Fla. 3d DCA, 1989) (citing Maisler 425 So.2d at 108) In the instant, the cocaine was in the officer's car, and dominion and control may not be inferred from Appellant's brief time in the back seat of the car.

Carter v. State 481 So.2d 1252 (Fla. 3d DCA, 1986), cited in

the First District Court's opinion to sustain an inference of dominion and control by circumstantial evidence, is clearly distinguishable. The defendant in Carter was only a passenger in the vehicle, but the vehicle was registered in her name, she was leaving a known "cocaine-cutting" house and her fingerprints were on the bag of cocaine taken from the trunk upon her arrest. Id. at 1253 The overwhelming circumstantial evidence presented in Carter was not presented in the case here, thus should not be relied upon to establish Appellant's dominion and control over the cocaine.

Garces is the leading case defining possession under §893.135, Fla.Stat. In that case, the parties, including the undercover police officers,met at one defendant's house, discussed the method of exchange, then retrieved the money and cocaine from their vehicles and returned to the house. The defendants proceeded to examine the cocaine but were arrested before money was exchanged. Relying on Sobrino v. State 471 So.2d 1333 (Fla. 3d DCA, 1985), the court held that the circumstances supported no more than attempted trafficking under the applicable statutes, to wit: §893.135(1)(b), §777.04(1), Fla. Stat., but not the completed offense, because the arrest occurred before the defendant had actual or constructive possession. Garces 485 So.2d at 848. The Court concluded that temporary control of the cocaine for verification purposes was not enough to prove legal possession. A year after the Garces decision, the Third District Court of Appeal, in Roberts, followed and extended it's holding on temporary control.

In Roberts the defendant was caught in a sting operation and

was convicted of possession of marijuana. The defendant weighed the sample bale, examined the marijuana, agreed to buy the marijuana, and produced money. Roberts 505 So.2d at 543. The defendant was arrested as the undercover officers were bringing the remaining bales into the house. While noting the differences between that case and Garces, the Court held that the exchange of money without delivery did not establish dominion and control to constitute possession. "Transitory touching of the bale" by Roberts for inspection purposes was not legal possession under Garces. Id. at 549.

The First District Court of Appeal applied the principal of Roberts and Garces to a reverse sting operation of a different nature. In Jefferson v. State 549 So.2d 222 (Fla. 1st DCA, 1989), Jefferson, a deputy sheriff with the Jacksonville Sheriff's Office, was filmed meeting with an undercover agent who presented him with a bag of cocaine. The agent said the bag was already sold, but was a sample of the quality available. After some discussion, Jefferson snorted a small amount of the cocaine to test it, then returned the bag to the table. No sale ever occurred, but Jefferson was arrested based on the evidence from the film. The court held that "Jefferson's actions did not constitute legal possession of all of cocaine in the bag." Id. at 224 The evidence showed that Jefferson took temporary control of the cocaine for the sole purpose of testing its authenticity and quality. "Such temporary control for specific but limited purpose, without consummation of a completed transaction does not constitute legal

possession." Id. at 224. Therefore Jefferson could not be convicted of trafficking more than 28 grams as charged since he did not have dominion and control of the bag. The court did hold though, that the evidence was sufficient to support a conviction of the lesser included offense of possession of cocaine under §893.13(1)(e), Fla. Stat., for the small quantity Jefferson tested.

### C. The Garces holding on temporary control is applicable to the case at bar.

In the case at bar, Appellant and the police arranged the meeting, the quantity and the price of the cocaine through a series of telephone conversations. [T-23-26, 28-33, 35-36, 39-40]. Appellant wired $3,000.00 to Detective Locey, at his request, in order to show "good faith and for expenses" [T-18] days before the meeting in Jacksonville. When the parties finally met, Appellant got into the back seat of the officer's car with Locey and was handed a one kilogram sample of the cocaine to inspect it. [T-43-44]. (Note: The First District Court agreed, Appellant's conduct in wiring the money to a person unknown to him was less than professional, as was his willingness to enter a car occupied by three (3) strangers). After tasting the cocaine, Appellant commented on the quality of the cocaine, then put the bag down on the seat. He and Detective Locey then exited the car ostensibly for Appellant to get money from his car on the far side of the parking lot and for Locey to get the "remaining" three bags from the trunk. Appellant was arrested in the parking lot. [T-63, 72]. Clearly under the holding of Garces and Roberts, Appellant did not

have dominion and control of the cocaine, thus can not be convicted of trafficking under §893.135(1)(b)(3).

Detectives Locey and O'Hara of the Fort Lauderdale Police Department both testified that Appellant approved the sample but could not have left with any cocaine until after the money had been paid. [T-63, 72] As Detective O'Hara testified, Appellant and Locey exited the car to get the money and three kilos respectively to "do the transaction" but no sale was ever consummated. [T-70] There was "never an exchange of cocaine for money" [T-73] *emphasis added*. Thus, the $3,000.00 "good faith" money was not considered by the participants to be a down payment assuring Appellant of at least partial dominion and control of the cocaine. Appellant's actions demonstrate that he did not have dominion and control over the contraband. Appellant placed the bag on the seat of the police car after testing the cocaine for the quality and got out of the car.

The partial payment of money without the owner actually releasing dominion and control does not automatically transfer possession. Roberts 505 So.2d at 550. Roberts agreed to buy marijuana and some money was exchanged, yet the court held that neither the part payment, nor the inspection, nor the agreement to buy marijuana, gave Roberts possession of the sample bale or the unseen bales left in the agent's truck. The Roberts analysis is clearly applicable to the case at bar. Roberts applied Garces to a different fact pattern and further explained the requirements for "possession". Therefore, even if the $3,000.00 Appellant wired to

Detective Locey is considered a partial payment, rather than simply "good faith" money to insure a meeting, then the Roberts analysis states that this alone, without more, does not establish dominion and control.

The District Court noted the similarities between this case and Garces and Roberts, but relied on Carter, 481 So.2d at 1252, to state that the $3,000.00 payment raised the "inference" of dominion and control. Campbell v. State 558 So.2d 34, 38 (Fla. 1st DCA, 1989) This is inappropriate for several reasons: 1) As noted previously, the circumstantial evidence in Carter was particularly strong, including possession of the premises in which the contraband was found. Carter 481 So.2d at 1253. Since Roberts states that a partial payment alone is not enough to prove dominion and control, $3,000.00 payment in advance, will not support an inference of possession; 2) The actions of Appellant and the agents indicate the $3,000.00, whether considered "good faith" money or considered a down payment, did not give Appellant a possessory interest in four kilograms of cocaine. The money simply showed an intent to continue negotiations for a possible sale. Detective O'Hara testified that there was no exchange of cocaine for money [T-73], meaning the $3,000.00 did not buy Appellant even a small amount of cocaine. It was an all-or-nothing proposition which never took place. The police maintained possession of all of the cocaine at all times. After testing, Appellant returned the cocaine and was exiting towards his vehicle, presumably to get money to purchase the alleged four kilograms of cocaine. As in both

Roberts and Garces there was a preliminary agreement to do a deal, but no exchange of goods by the two sides, hence no transfer of possession.

Furthermore, Appellant could not have been said to have gained dominion and control over the cocaine, by advancing the $3,000.00 by wire to unknown and unreliable persons. In Richter v. U.S., 663 F.Supp. 68 (S.D.Fla., 1987), the court stated that checks sent to an unknown person could not be considered a sale in the ordinary course of business. Id. at 70 A request for that type of payment should have put the purchaser on notice of the risk of attempting such a transaction. In the case at bar, as with Richter, the Appellant made payments under questionable circumstances, to potentially gain possession, but both were denied.

Additionally, the advance payment by Appellant before inspection of the goods, as required by Detective Locey, does not constitute acceptance of the goods. §672.512, Fla.Stat. Though this attempted transaction involved illegal goods, the principles of contract law are still applicable here. The buyer has the right to inspect goods before accepting them, §672.513, Fla.Stat. and anything short of full payment does not make the sale absolute Encore, Inc. v. Olivetti Corp. 326 So.2d 161, 164 (Fla. 1976).

**D. This Court must resolve the conflict between the districts presented by the First District Court of Appeal's refusal to apply current case law on possession.**

As indicated by Roberts and Jefferson, there are multiple factual situations to which the Garces analysis is applied. The

narrow distinction the First District Court attempts to draw, inferring possession by Appellant and distinguishing this case from current case law, cannot be sustained. The circumstances here are clearly analogous to those in Garces and Roberts. The defendants, in all three cases, gained temporary control of the contraband from undercover officers for the sole purpose of confirming the quality of the narcotic, but never obtained possession of the contraband since the transaction was prevented by an arrest. Under current Florida Law without the exchange of goods and transfer of possession of the drugs, none of these defendants may be adjudged guilty of the alleged target crime of trafficking in narcotics. *See* Garces 485 So.2d at 848, Roberts 505 So.2d at 549-550, and Jefferson 549 So.2d at 224.

### E. This Court should use its discretion in granting relief to Campbell

(1) **Remand for a new trial with the Garces jury instruction.**

Since the evidence presented at trial supported defense counsel's contention that Garces was controlling, the trial court erred in not giving the requested jury instruction. The Appellant is entitled to have the jury charged on any applicable rule of law, even if only suggested by the testimony at trial. Pope v. State 458 So.2d 327, 329 (Fla. 1st DCA, 1984), Campbell v. State 558 So.2d at 41 (Ervin, J. dissenting). Evidence was presented that raised a question of whether an exchange occurred. So the court's ruling in the charge conference that Garces was factually distinguishable is a reversible error.

The First District Court of Appeal distinguished this case from Garces and Roberts and its prior holding in Jefferson, and upheld the trial court's ruling based on the inference of possession raised by the $3,000.00 payment. However, there were also reasonable inferences that at the time of arrest the transaction did not, and would not have occurred. Appellant certainly had temporary control, but had no money physically with him at that time. He had yet to inspect the three "remaining" kilograms that were said to be in the trunk. The balancing of evidence and inferences from the evidence is clearly a matter of fact for the jury to decide.

(2) **Remand with and order to set aside the trafficking conviction and enter a conviction for attempted trafficking.**

While the court did not give, nor was it requested to give, a charge on attempt under §893.135(1)(b)(3), Fla.Stat. and §777.04(1), Fla.Stat., the obvious similarities between this case and Garces and Roberts may warrant a reversal of the conviction of trafficking and an order to enter a conviction of attempted trafficking. Appellant's behavior may be interpreted as an act toward the commission of the charged trafficking offense, but his arrest prevented him from actually committing the offense.

(3) **Remand for a hearing on possession of limited quantity of cocaine.**

If the $3,000.00 is interpreted to give Appellant "possession" he would only be in possession of $3,000.00 worth of cocaine since Detective O'Hara testified that Appellant could not leave with the

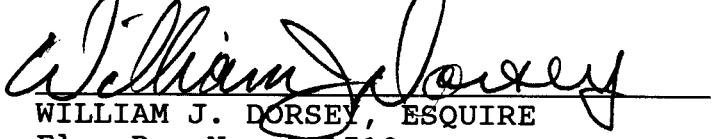
cocaine. [T-72]. Therefore, if that were true, the case should be remanded for further hearings on how much cocaine the $3,000.00, that had already changed hands, actually purchased. §893.135(1)(b) Fla.Stat., on trafficking in cocaine is subdivided, by the quantity involved, for sentencing purposes. Appellant was convicted of trafficking in four kilograms of cocaine and under subsection (3), which sets the penalty for trafficking in 400 grams or more. The minimum term of imprisonment is 15 years. If the hearing ascertains that the $3,000.00 bought less than 400 kilograms but not more than 200 kilograms Campbell's sentence should be reduced under subsection (2). The minimum term of imprisonment is 5 years. With a purchase price of $13,500 per kilogram it appears the maximum amount Campbell's $3,000.00 bought was 220 grams. If the evidence proves "possession", then the conviction under §893.135(1)(b)(3), Fla.Stat. should be overturned and a hearing should be held to determine the applicable subsection and sentence.

## CONCLUSION

For the foregoing reasons, the Supreme Court should exercise its discretion and entertain this case on its merits.

Respectfully submitted,

LAW OFFICES OF WILLIAM J. DORSEY



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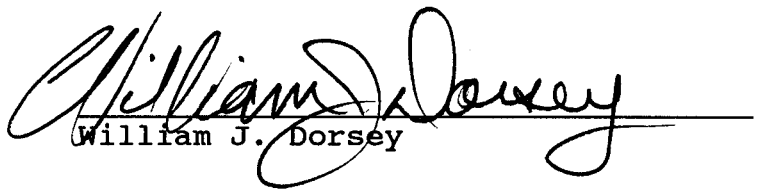
## REQUEST FOR ORAL ARGUMENT

COMES NOW the Appellant, STANLEY CAMPBELL, by and through his undersigned attorney and respectfully requests this court grant him an Oral Argument on all points on appeal.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 13th day of June, 1990, to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050.



William J. Dorsey

**IN THE SUPREME COURT OF FLORIDA**

STANLEY CAMPBELL,

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SUPREME COURT CASE NO. 75,873

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**APPENDIX**

Respectfully submitted,

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