IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner/Appellant,

vs. Case No. 75,975

ANTHONY McCLOUD,

Respondent/Appellee.

_____/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

BRIEF OF RESPONDENT/APPELLEE

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BRAD PERMAR
Assistant Public Defender
Criminal Court Building
5100-144th Avenue North
Clearwater, Florida 34620

COUNSEL FOR RESPONDENT/APPELLEE

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STATEMENT OF THE CASE AND FACTS

Respondent/Appellee Anthony McCloud (hereinafter Respondent), accepts Petitioner/Appellant's (hereinafter Petitioner's) rendition of the case and facts, except to add the following: At the suppression hearing, defense counsel stated, "I don't think the [lower] Court's decision in this matter will make a difference [as to sentencing]." (R40)

SUMMARY OF ARGUMENT

One set of Respondent's sale-and-possession charges occurred prior to July 1, 1988; that underlying possession charge was properly dismissed per State v. Smith, 547 So.2d 613 (Fla. 1989); see also, State v. Burton, 555 So.2d 1210 (Fla. 1989).

Regarding Respondent's set of charges occurring *after* July 1, 1988, the underlying possession is clearly "subsumed" by the greater charge of sale, just as it would be if Respondent had been charged with the *inchoate* crime of possession-with-intent-to-sell, as shown by Florida's Standard Jury Instructions.

(For purposes of brevity the term "sale (etc.)" will encompass sale, possession-with-intent-to-sell, and the two other sets of crimes of manufacture or delivery of a drug.)

The instructions for possession and sale (etc.) both have three elements. Of those three elements, 2 and 3 are precisely identical. Element 1 of each offense has three "sub-elements:" a noun, a verb and an object. Of those three sub-elements, the noun and object "sub-element" of each Element 1 are precisely the same. The *verb* sub-element of Element 1 for "possession" requires possession. The *verb* sub-element of Element 1 for "sale" is proven in one of six different ways.

Three of those verb-sub-elements *expressly* require proof of possession: possession with intent to sell, possession with intent to manufacture, or possession with intent to deliver. Because possession is *expressly* required for the inchoate crimes of possession with intent to sell, possession with intent to

manufacture, or possession with intent to deliver, it is also *impliedly* required for the completed crimes of sale, manufacture or delivery of a controlled substance.

The *completed* crimes of sale, manufacture or delivery cannot occur spontaneously out of thin air; they must, of necessity, have been preceded by the *inchoate* crimes of possession with intent to sell, possession with intent to manufacture, or possession with intent to deliver. Since there is no logical, non-absurd reason to distinguish the two sets of alternate means of proving the verb-sub-element of possession and sale (etc.), there is no lawful reason to presume that the Legislature intended such an absurd distinction.

But Petitioner argues that because the *other* alternate means of proving the verb sub-element of Element 1 in "sale" do not *expressly* require possession, that possession is not implied, and that possession is not "subsumed" by the greater charge of "sale," even though possession would clearly be "subsumed" by the greater charge of possession-with-intent-to-sell.

Because two of three elements of both charges are precisely the same -- as are the noun and object sub-elements, and three of six alternate verb sub-elements -- and because possession is as implicitly required in three of the six verb sub-elements as it is expressly required in the other three verb sub-elements, the lesser charge is "subsumed" by the greater, so that dual convictions for both violates double jeopardy.

CERTIFIED QUESTION:

WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED *AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988)*, IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES. (As stated the Second District Court of Appeals, emphasis added.)

As to Respondent's charges occurring on June 8, 1988, prior to July 1, 1988, this Court has already rejected Petitioner's position in State v. Smith, 547 So.2d 613 (Fla. 1989).

Petitioner expressly recognized that the effective date of Section 775.021, Florida Statutes (Supp. 1988), was July 1, 1988. Petitioner's brief, page 6. But Petitioner, for some unknown reason, argues that Respondent's charges occurring *prior* to that effective date are still subject to dual punishment, Smith notwithstanding: "Under State v. Smith, *infra*, there is no double jeopardy prohibition in imposing separate convictions for both sale and possession of cocaine." Petitioner's brief, page 5.

Petitioner has apparently misread Smith, in which this Court considered Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), in conjunction with the Fourth District's decision in Smith v. State, 524 So.2d 461 (Fla. 4th DCA 1988). In essence, this Court found the Second District's Gordon analysis sound, but *potentially* overridden by the Florida Legislature in Chapter 88-131, section 7, Laws of Florida, effective on July 1, 1988.

According to the certified question in Smith, answered in the affirmative by this Court, it *does* violate double jeopardy to

convict and sentence twice for sale and possession of the same cocaine, at least prior to July 1, 1988. 547 So.2d at 614, 616.

In so holding, this Court recognized that its analysis in Carawan v. State, 515 So.2d 161 (Fla. 1987), had been overridden by chapter 88-131, section 7. But this Court also recognized the *exceptions* to that legislative change, which make it a violation of double-jeopardy to convict or sentence twice for "Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." 547 So.2d at 615, 617. It should also be noted that in Smith, this Court seemed to affirm that in determining such "subsumation," ambiguities in statutory language must also be construed most favorably to the accused. 547 So.2d 815, note 4; see also 775.021(1) (F.S. 1988).

Accordingly, the lower court's dismissal-of-possession-count in CRC 89 - 01185, as well as the Second District's affirmance, are clearly proper. Smith, *supra*. Yet for some reason, as noted, Petitioner insists "there is no double jeopardy prohibition in imposing separate convictions" for offenses occurring on June 8, 1988, prior to the effective date of the legislative amendment.

Petitioner notwithstanding, Respondent's June 8 possession charge was properly dismissed. The sole question for review is whether, on charges occurring *after* July 1, 1988, possession of a single quantum of cocaine is "subsumed" by the greater offense of sale (or possession-with-intent-to-sell) of that same quantum.

Petitioner *is* correct in saying Carawan does not apply to Respondent's August 1 offenses -- Petitioner's brief, page 6 -- a

fact never contested. But Petitioner is quite *in*correct in saying that by amending 775.021(4) "the legislature declared the crimes of possession and sale of an illegal drug separate offenses." Petitioner's brief, page 6.

If the Legislature *had* done so, in clear and unambiguous language, the instant case would be moot. But by making an exception of "subsumed" offenses, the Legislature left open and still-ambiguous the question of whether a possession charge is "subsumed" by a sale charge for the same quantum.

Petitioner is also quite incorrect in saying this Court's decision in State v. Burton, 555 So.2d 1210 (Fla. 1989), held that Smith, *supra*, had held the "amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments." Petitioner's brief, page 6. Again, if either Smith or Burton had so held, this cause would be moot as having been previously decided.

Petitioner's liberal reinterpretation stretches Smith beyond recognition; while Smith holds that Carawan no longer applies to offenses after July 1, 1988, Petitioner expands that language to have this Court affirmatively hold that possession is not subsumed by sale, a question yet to be answered. In the same way, Petitioner liberally reinterpreted Burton beyond recognition.

Burton addressed charges prior to July 1, 1988. In holding that such dual convictions violate double jeopardy, in what the Second District termed "dicta," State v. McCloud, 15 F.L.W. D723, D724 (Fla. 2d DCA March 14, 1990), this Court wrote that Smith,

supra, had held that sale or delivery and possession-with-intent-to-sell the same substance are subject to dual convictions.

But the issue of sale and possession-with-intent-to-sell is neither an issue which is addressed in the instant case, nor one from which it can be said that "sale and possession of the same substance" are subject to dual convictions, as Petitioner so liberally interpolates. Petitioner's brief, page 6.

Petitioner's logic on the question of "subsumation" is as flawed as is Petitioner's reading of Burton which holds that sale and possession-with-intent-to-sell are one and the same as possession and sale of the same quantum of cocaine.

As noted, the sole question now before this Court is whether, as to the offenses occurring after July 1, 1988, the lesser charge of possession is "subsumed" by the greater charge of sale or (in the *inchoate* form of sale), possession with intent to carry through a completed sale.

Smith, supra, held that Carawan had been overridden by Chapter 88-131. But in that Chapter, as noted, the Legislature left intact traditional double-jeopardy prohibitions against "lesser offenses the statutory elements of which are subsumed by the greater offense." F.S. 775.021(4)(b) (1988). Thus, while Carawan may no longer apply after July 1, 1988, the Legislature has not abandoned double-jeopardy: it still violates double-jeopardy to punish twice for lesser crimes "subsumed" by greater.

On analysis then, we must first assume that there *are* such dual crimes, the lesser of which are "subsumed" by the greater.

If that is not true -- if there are no "subsumable" crimes in existence -- the Legislature's carefully-crafted exception is entirely meaningless and "mere surplusage."

Presuming -- as we must presume, trusting that the Legislature was not wasting tax money by creating a nonexistent class of "subsumable" crimes -- that there does exist in Florida a specie of dual crimes which cannot be punished twice, we must then determine whether the dual charges of sale-and-possession (or possession and the inchoate crime of possession-with-intent-to-sell) fit into that extant though shrinking class of dual crimes protected against double jeopardy.

On further analysis, if *any* crime might be said to be "subsumed," it is the crime of possession *vis-a-vis* sale, or alternatively, the inchoate crime of possession with intent to sell, as shown by reference to Florida's Standard Jury Instructions. On the other hand, if "reasonable minds" can differ on the question of whether possession is subsumed by sale, the relevant statutes and instructions are patently ambiguous and must be construed most favorably to the accused. F.S. 775.021(1).

Florida's standard instructions hold that both possession and sale (or possession with intent to sell), have three elements. Of these three elements, 2 and 3 are identical: "The substance was (*specific substance alleged*)," and "(*Defendant*) had knowledge of the presence of the substance." Similarly, element 1 of both offenses has a noun, a verb, and an object. Of these "sub-elements," both noun and object in both offenses are also

identical: "(Defendant)" and "a certain substance."

The *verb* sub-element of possession requires -- obviously -- possession. The verb sub-element of "Sale, Manufacture, Delivery, or Possession with Intent," has six alternative means of proof, three of which *expressly* require possession: possession with intent to sell, possession with intent to manufacture, possession with intent to deliver.

The question then arises whether simple possession is subsumed by possession-with-intent-to-sell.

Again, there *is* (presumably) such a class of subsumable offenses. If any such class of offenses does exist, possession and possession-with-intent-to-sell would seem to fit therein. If this cannot be said of these two crimes, there is little hope that any such subsumable crimes exist. Accordingly, such a "non-presumption" is based on the theory that the Legislature merely "wasted its breath" in carving out this exception to 88 - 131.

Since we must presume that the Legislature intended to recognize to an existing class of "subsumable" crimes, we must also presume that that class encompasses simple possession and possession-with-intent-to-sell. The two crimes are not precisely identical (but simply nearly so), as per 775.021(4)(b)(1), nor are they degrees of the same offense as per 775.021(4)(b)(2).

But reading the plain language of the amendment, we must further presume that in mentioning this class of "subsumable" offenses, the Legislature *intended* to create a class of "subsumable" offenses neither precisely-identical to another

offense, nor simply degrees of the same offense.

By such presumption we must conclude the crime of simple possession is "subsumed" by the greater crime of possession-with-intent-to-sell. The latter couples simple possession with criminal *intent* to sell the drug, as opposed to keeping it for personal use. The Legislature determined that it is a greater crime to transfer from one's own use a quantum of cocaine to the "open market," so to speak, thus increasing the danger that more citizens will succumb to the lure of illicit drugs.

But if *these* two offenses are subsumable, what is the logical distinction between the inchoate crime of possession-with-intent-to-sell and the completed crime of sale? If simple possession is subsumed by possession-with-intent-to-sell, what logical distinction can be made, reading the plain language of the Jury Instructions, between the completed crime and the preliminary, inchoate form from which it sprang?

The sole distinction is that the Instructions *expressly* require proof of possession for possession-with-intent-to-sell, but they do not expressly require proof of possession for sale. From this Petitioner deduces that because the first three alternate means of proving the verb-sub-element of sale (etc.) do not *expressly* require possession, the State need not prove possession to prove a completed sale, even though it must -- of necessity -- prove possession to convict on the intended, inchoate, incomplete or "frustrated" sale.

Petitioner deduces that one may sell, manufacture or deliver

a drug without having either actual or constructive possession of that drug, even though one *must* -- according to the standard jury instructions -- have possession of that same drug in order to possess-with-intent-to-sell, or possess-with-intent-to-manufacture, or possess-with-intent-to-deliver.

But it would seem to follow that since:

(1) both possession and sale (etc.) have identical elements 2 and 3, and

(2) since both possession and sale (etc.) have identical noun and object sub-elements of element 1, and

(3) since possession is *expressly* required to prove the verb sub-element of simple possession, and

(4) since possession is also *expressly* required to prove three of the six alternate means of proving the verb sub-element of element 1 of sale (etc.);

that possession is also *implicitly* required to prove the first three alternates of the verb sub-element of element 1 of sale (etc.), which are, it has been held, simply "alternative ways of violating this particular subsection of the statute." See Wheeler v. State, 549 So.2d 687, 692 (Fla. 1st DCA 1989).

Since possession is expressly required to prove the inchoate crime of possession-with-intent-to-sell, it would violate logic to hold that possession is not implicitly required to prove the completed crime of sale, which is after all only "one step beyond" the inchoate crime of possession-with-intent-to-sell.

Returning to the certified question: If sale (etc.) and

possession with intent to sell are simply "alternative ways of violating this particular subsection of the statute," it strains credulity to hold that while possession is expressly required to prove possession-with-intent-to-sell, it is not implicitly required to prove sale. It would seem that an inchoate possession-with-intent-to-sell *must* precede any actual, completed sale. Thus possession-with-intent-to-sell is simply the intended sale *before* that sale is actually carried through.

But the Legislature has *expressly* mandated that a defendant may not avoid charges of the more-serious crime of a completed sale by showing simply that the intended sale was not successfully completed. The Legislature has *clearly* shown its belief that possessing a drug with the intent to carry through an actual, complete sale is just as bad has having actually *completed* that intended sale. But the same cannot be said of the Legislature's intent regarding dual convictions for sale and possession of the same controlled substance.

According to clear legislative mandate, the inchoate crime of possessing-with-intent-to-sell is just as bad as the final sale completed a split-second later. Accordingly, the legislature made possessing a drug with the intent to carry through an actual sale an "alternative way" of violating the verb sub-element of element 1. The question then arises whether there is any logical reason to distinguish the verb sub-elements of a charge of a completed sale as opposed to an inchoate possession-with-intent-to-sell. Barring absurdity, there is none.

Since all other elements and sub-elements of the crime of possession-with-intent-to-sell are *identical* to the elements and sub-elements of simple possession, and since three of six "verb-alternatives" of sale (etc.) expressly require possession (as does simple possession), it cannot be said that the first three "verb-alternatives" do *not* require possession.

While the Legislature may of course *expressly* render such an absurd distinction as Petitioner now submits -- that possession must be proved for both simple possession and the inchoate crime of possession with intent to sell, but *not* to prove an actual completed sale -- that absurdity cannot be inferred from an ambiguity, as Petitioner requests this Honorable Court to do.

Reasonable persons might conclude that the explicit requirement of possession in the last three verb sub-elements of sale (etc.) is clearly implied in the first three alternatives. Reasonable minds mind further conclude the crime of simple possession is one of those few crimes included in the class of "subsumable" crimes, *vis-a-vis* sale or possession-with-intent-to-sell. (Indeed, that seems to be the rationale behind the holdings of the Second District Court of Appeal which Petitioner now contests.) And if "reasonable minds" can differ on the question of whether simple possession is subsumed by the greater crimes of either sale or possession-with-intent-to-sell, the statutory language creating such a distinct class of "subsumable" crimes is, by definition, *ambiguous*.

Black's Law Dictionary, Fifth Edition, page 73, provides in

pertinent part that the term *ambiguity* encompasses "doubleness of meaning[:] Language in a contract [e.g.] is 'ambiguous' when it is reasonably capable of being understood in more than one sense. [Citation omitted.] Test for determining whether a contract is 'ambiguous' is whether *reasonable persons would find the contract subject to more than one interpretation*." Emphasis added.

If the judges of one District Court can believe that proof of possession is required for both simple possession and for sale, it can be said without fear of contradiction that "reasonable minds" differ on the issue. Further, the Petitioner cannot, of necessity, reasonably argue to this Honorable Court that the judges of the Second District Court of Appeal are *not* reasonable. Presumably the "State" must agree -- since the Second District affirms outright eighty percent of the criminal appeals coming before it -- that the judges of the Second District are *inherently* reasonable.

Since the State has -- in essence -- "accepted the benefits" of the Second District's presumed reasonableness for the great majority of its criminal appellate work, the State cannot now argue --absent still another absurd argument -- that on *only* this question the Second District ("standing alone") is *un*reasonable.

And if, as noted, "reasonable minds" can differ on the question of whether possession is "subsumed" by sale, the statutory wording behind that issue must, of necessity, be ambiguous. Thus, the most Petitioner can argue *is* that patent ambiguity, arising from "split of opinion" between at least one

District Court and the other appellate courts of this State.

Because of this split in opinion between -- as Petitioner alleges, the Second District "stand[ing] alone," Petitioner's brief, page 6 -- and other appellate courts of this State, the best Petitioner can hope for is that this Honorable Court will *find* that the Legislature intended the absurd distinction requested: in other words, that this Honorable Court will find an absurdity based on an ambiguity to punish this particular defendant, and to hold that possession is not subsumed by the greater crimes of sale or possession with intent to sell.

This Honorable Court is of course perfectly free to make such a holding that the Legislature *intended* Petitioner's absurd distinctions: that one may routinely sell something over which one has neither actual nor constructive possession, or that possession is required to prove the inchoate crime of possession-with-intent-to-sell but not to prove the completed sale.

But if this Honorable Court chooses to do so, does it not run the risk of either misinterpreting "clearly" ambiguous legislative intent, or of making public-policy decisions itself, a task left by law to the Legislature itself? Then too, Florida Statute 775.021(1) provides that where statutory language *is* susceptible of differing constructions, "it shall be construed most favorably to the accused." If this Honorable Court makes such a distinction as Petitioner now requests, does it not also run the risk of construing language "susceptible of differing constructions" *against* the accused and more favorably to the

state, contrary to a very clear legislative mandate?

Florida's standard jury instructions -- expressly requiring possession in three alternatives but not the other three --is clearly "susceptible of differing constructions." Respondent would request that this Honorable Court apply the "more favorable" construction found by the Second District. Respondent also requests that this Honorable Court not find an absurdity based on an ambiguity, as Petitioner requests. But if this Honorable Court determines to accept Petitioner's requested interpretation, Respondent would request, at the very least, that that interpretation apply only *after* the effective date of this Honorable Court's forthcoming opinion in the instant cause.

Petitioner's interpretation would require the Standard Jury Instructions to *expressly* hold that in order to prove sale (as opposed to possession-with-intent-to-sell), the state must prove that the defendant "possessed and sold," or "possessed and manufactured," or "possessed and delivered," the drug in question, just as the instructions expressly require that the defendant possessed with the intent to sell, possessed with the intent to manufacture, or possessed with the intent to deliver.

In the absence of such an express requirement, says Petitioner, the state need *not* prove possession to prove sale, even though it must prove possession to prove the inchoate possession with intent to carry through an actual and completed sale. Petitioner's request would both require this Court to rewrite the standard jury instructions, *and* to find clear

legislative intent to punish both sale and possession of the same substance, even though at least one District Court -- which certainly can be said to represent one reasonable point of view -- has found the lesser crime *is* subsumed by the greater.

But because reasonable minds can differ on that point of "subsumation," the wording of the statute -- as interpreted by the Standard Jury Instructions -- is ambiguous and must be construed against the Petitioner.

In further argument for Petitioner's request for extension of an ambiguity to create a punitive absurdity, Petitioner writes that Carawan, *supra*, recognized that the "Sale of drugs can constitute a separate crime from possession . . ." Petitioner's brief, page 7, ellipses in original. But this passage commented -- in passing -- on an issue not then actually before the Court: Carawan dealt with dual convictions for attempted manslaughter and aggravated battery.

(It is interesting that Petitioner can damn Carawan on the one hand while praising it as authority on the other, just as Petitioner can find the judges of the Second District inherently reasonable in over eighty percent of the criminal cases before it while finding them to be patently *un*reasonable in this one isolated instance.)

At any rate, as to Petitioner's quotation from Carawan, Petitioner's ellipses leave much to be desired.

The complete sentence cited by Petitioner reads: "While we agree that sale of drugs can constitute a separate crime from

possession, our analysis in this opinion compels us to conclude that a defendant cannot simultaneously be convicted of both sale and possession *in addition to* trafficking." 515 So.2d, at 170, emphasis in original. For one thing, this Court went on to clarify that comment on the same page:

> Thus, although a defendant may be convicted of both sale and possession *under the appropriate circumstances*, a defendant cannot be convicted of trafficking as well as sale *and/or* possession.

Id, emphasis added. In a footnote this Court distinguished an act from a transaction: "an act is a discrete event arising from a single criminal intent, whereas a transaction is a related series of acts." Id, at footnote 8.

Since this Court took pains to write, "under the appropriate circumstances," "sale *and/or* possession," and to distinguish an act from a transaction, the logical conclusion is that this Court was not holding that in all instances possession is separately-punishable from sale. Rather, this Court seemed to comment that in certain circumstances, as where the possession is a separate act in the same transaction, dual convictions might be appropriate. One might, for example, possess ten quanta of cocaine but sell only nine. In that circumstance, "sale of drugs <u>can</u> constitute a separate crime from possession."

For another thing, in making that comment cited by Petitioner, this Honorable Court was passing on an issue not before it in a "justiciable controversy;" for example, the Court did not have the benefit of briefs and submissions prepared by adverse counsel on the point raised by Petitioner. The same could

be said of this Court's comment in Burton, supra, which Petitioner liberally reinterprets:

> In fact, in State v. Burton, 555 So.2d 1210 (Fla. 1989) this Court noted that Smith (547 So.2d 613), held that the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

Petitioner's brief, page 6. With all due respect to Petitioner, this Court made no such comment.

As previously noted, if either Smith, Burton or the Florida Legislature had so held, the instant parties would not now be considering this certified question. What Burton actually noted was that "We held in State v. Smith * * * that the legislature intended the following to be separate offenses subject to separate convictions and separate punishments: the sale or delivery of a controlled substance; and possession of that substance with intent to sell."

Whether Smith actually did so hold, whether as in Carawan, Petitioner's citation of "authority" was actually *obiter dictum*, or whether this Court was commenting on an issue not before it is irrelevant to the instant case, as is the issue of whether sale and possession-with-intent-to-sell *can* be punished separately. The question now before this Court is whether simple possession is subsumed by sale or possession with intent to sell.

The question arises: what if Petitioner is correct? What if a "prosecutor's dream" comes true from Smith, Burton and the instant case? What if from the possession of a single rock of cocaine a prosecutor *may* -- but not *must* -- charge three separate

crimes: sale, possession-with-intent-to-sell (Burton), and simple possession (the instant case)?

If that "prosecutor's dream" comes true, one person *might* be charged with three separate crimes -- two second-degree felonies and a third-degree felony -- from the sale of a single rock of cocaine. (On the other hand, a person in "similar circumstances" might find himself charged with only one.)

In such a scenario two developments could occur, both of which are bad. First, prosecutors statewide could charge all three felonies in every single possible case. In that instance, sentencing guidelines, statewide, would be "bloated" upward toward even more extended incarcerations, so that more-than-ever small-time rock cocaine dealers would find themselves in prison than ever before, and the already-overburdened prison system would become even worse than it is now.

On the other hand it might develop that, statewide, prosecutors would *not* have to charge all three felonies in every single case, but rather would be free to pick and choose which defendants "deserved" three felonies, which deserved two, and which deserved only one felony charge from his or her single rock of cocaine. Doubtless there are some proper reasons for such unbridled discretion to charge three felonies on one person but only one on another person "similarly situated." But there are just as many -- if not more -- *im*proper reasons which might apply, one of which might well be racial discrimination.

It is debatable whether the rock-cocaine problem is actually

more severe in low-income, high-crime ghetto areas such as that below (*vis-a-vis* the protected haunts of the "yuppie" or well-to-do cocaine abuser), or whether the problem is simply more visible and easily-attacked by police officers in such low-income and predominately black ghetto-areas.

What is beyond a doubt, however, is that if a successful prosecuting attorney were to have a "friend" who found himself the subject of a police sting in which he sold a single rock of cocaine, that "friend" would more likely come from the "yuppie" or well-to-do strata of society than he would from the low-income, predominately black ghetto area. (It would seem highly unlikely that many successful prosecuting attorneys would have "friends" in such areas.)

What could happen in such a case? The prosecutor's "friend" -- if the charges were not dropped altogether -- could find himself charged with only *one* felony (sale, but not the "underlying" possession nor the equally-chargeable possession-with-intent-to-sell), while ghetto-area residents (who might well be far less of a danger to society as a whole) routinely found themselves charged with three felonies on the same facts.

Anticipating Petitioner's umbrance and outrage, this is not to say that *all* state attorneys would routinely charge all three felonies for black ghetto residents while charging only one for those persons whom (white) prosecutor's might be more inclined to "give a break." This is merely to say that such untoward and improper results *could* occur. And that mere possibility of

improper discretion is enough to render the proposed "prosecutor's dream interpretation" void for vagueness.

A statute is improperly vague and imprecise if it might "invite arbitrary and discriminatory enforcement." See Bertens v. Stewart, 453 So.2d 92 (Fla. 2d DCA 1984), and also State v. Deese, 495 So.2d 286 (Fla. 2d DCA 1986): "the statute cannot be so vague as to invite arbitrary and discriminatory enforcement.

If the "prosecutor's dream" comes true as Petitioner now requests, and on the instant facts a prosecutor may -- but not must -- charge all three felonies for a single rock of cocaine, who is to say what defendants will be charged with all three felonies, what defendants will be charged with two, and what defendants will be charged with only one felony?

This Honorable Court *could* make that decision and require that all three felony charges be filed in every single case. But that across-the-board-action would *rob* prosecutors of the very discretion they so ardently court. In addition, it would place an even greater overload on the state's correctional facilities when those facilities are inadequate to meet the present state of overload.

But if this Honorable Court does *not* make such an across-the-board requirement, the decision must then be left to individual prosecutors. While most prosecutors might exercise that greater discretion both wisely and well, there might also be some instances in which that unbridled discretion could lead to arbitrary or discriminatory enforcement:

> Though the law itself be fair on its face, and impartial in its appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

State v. Holmes, 256 So.2d 32, 34 (Fla. 2d DCA 1971), citing Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

It would appear that Respondent is not required to show that the greater number of prosecuting attorneys actually *would* abuse the discretion involved, as by routinely charging all three felonies for ghetto residents while charging only one for personal friends or other non-ghetto-residents whom even the well-meaning prosecutor might feel "deserve a break." It is enough to show the possibility of such arbitrary or discriminatory enforcement or, in the alternative, that the discretion to charge one, two or three felonies for the same rock of cocaine could result in a prosecutor making "unjust and illegal discriminations between persons in similar circumstances."

In addition to the aforementioned dire consequences from the "prosecutor's dream interpretation," it should also be noted that in State v. Smith, *supra*, this Honorable Court found no fault with the Second District's analysis in Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988). Rather, this Court found that Gordon's use of Carawan analysis had been presumptively overridden by the Legislature in 88 - 131.

While that aspect of Gordon does not apply to the instant

case, the Second District's analysis therein -- of whether possession is "subsumed" by sale -- *does* apply, if only to show how "reasonable minds" might differ on the issue of whether simple possession is "subsumed" by a charge of sale, and even if only to show how the Second District came to hold (even if it "stands alone") that "a defendant may not be convicted and sentenced for both possession and sale of the same contraband." Petitioner's brief, pp. 6-7.

On that issue the Gordon court wrote:

> We begin our discussion with the possession element of these two crimes. A defendant cannot be convicted of either crime unless he is deemed, at law, to have *some sort of possession* of the contraband. As to the crime of sale, a defendant need not be the *actual* possessor of the contraband although such *actual* possession will naturally result in criminal sanctions as in the instant case. The possessory element can be shared by others legally responsible for the crime.

528 So.2d, at 912, emphasis added. The court went on to add: "As to the crime of possession-with-intent-to-sell, we need not elaborate on the obvious, to wit, possession is an element of this crime." 528 So.2d, at 912. The court went on to say that "in a case involving a single act with a single defendant, we conclude that *the first element of the crime of sale* of contraband as well as the crime of possession-with-intent-to-sell" is possession. Id, emphasis added.

Thus, "reasonable minds" can differ both on the question of whether simple possession is subsumed by sale, and on the question of whether there is any logical distinction from which the express requirement of possession for the inchoate crime of

possession-with-intent-to-sell may not be implied as well to the completed crime of sale.

By clearly providing that dual punishments are unlawful for "Offenses which are lesser offenses the elements of which are subsumed by the greater offenses," the Legislature intended to *assure* that such dual convictions are not lawfully obtained. But the Legislature did not clearly articulate a desire to render an absurd distinction by requiring possession to prove possession-with-intent-to-sell but *not* requiring possession to prove the completed sale, a sale which must have necessarily been preceded by "some sort of possession," along with a concomitant intent to transfer those possessory rights to another.

Accordingly, because the statute is clearly "susceptible of differing constructions" on whether possession is subsumed by sale, the rule of lenity would appear to apply to this carefully-crafted legislative exception. Although Smith, *supra*, implies that the rule of lenity will not apply to 775.021(4)(b), 547 So.2d at 616, the Legislature *did* leave that rule of lenity intact in the statute. Since the rule of lenity is required neither to determine whether two criminal offenses are "identical" nor "degree offenses," and since the rule of lenity is in the statute for some reason, the only reasonable conclusion is that it should apply to determine the sole remaining "exception" to multiple punishments, whether the lesser of two offenses is "subsumed" by the greater.

If the rule of lenity does not so apply, its specific

inclusion in the amended statute would have to be deemed "mere surplusage." In the same vein, only those dual crimes specifically named as "subsumable" by the legislature are legally effective *vis-a-vis* double jeopardy attack. But since the legislature has failed to create its own specified class of subsumable offenses, the task must -- of necessity -- have been left to the courts. The legislature would not carefully create a class of subsumable offenses only so that the courts could rule that there is no such class of criminal offenses.

Since there must -- of necessity -- *be* a class of such subsumable offenses, this Court's task then becomes to determine whether simple possession is such an offense *vis-a-vis* sale or possession-with-intent-to-sell. As to that question this Court implied in Smith that "subsumable" means the same as "necessarily included" offenses. 547 So.2d at 616, note 6: "Multiple punishment is prohibited for (1) the same, (2) necessarily included, and (3) degree offenses."

In State v. Snowden, 476 So.2d 191 (Fla. 1985), footnote *, this Court affirmed that "when each statutory element of an offense is contained in the statutory elements of a second offense, then the former offense is a lesser included offense of the latter offense."

But the Petitioner argues that there are (admittedly isolated) examples of a drug sale being consummated without there having been any type of possession, actual, constructive or otherwise, citing Daudt v. State, 368 So.2d 52 (Fla. 2d DCA

1979), cert denied 376 So,2d 76 (Fla. 1979). But not only does Daudt not support Petitioner, it is affirmatively counter-productive since, in Daudt, the Second District expressly held that the defendant could *not* be convicted of an underlying possession charge. He could be convicted of sale (as a principle), but he could not be convicted of both simple possession and sale, since he never had any possession: actual, constructive or otherwise. On the other hand, it could easily be argued in this case that the "possessory element [was] shared by others legally responsible for the crime." Gordon, *supra*.

Does this mean that simple possession is neither "necessarily included" nor "subsumed" by a charge of possession-with-intent-to-sell, even if the state must prove the underlying possession for both charges? Of course not, since it is not the "proof adduced at trial" but Florida's Standard Jury Instructions themselves which require the State to prove each "statutory element" of possession, each element of which is "contained in the statutory elements of the second offense," the greater offense of possession-with-intent-to-sell.

As we have seen, elements 2 and 3 of both offenses are precisely the same, as are the noun and object sub-elements of Element 1. As to the charge of possession-with-intent-to-sell, it requires the state to prove possession *coupled with* intent. And it would seem to be a truism that the state cannot prove possession-with-intent-to-sell (according to the standard instructions, not the "proof adduced at trial"), without proving

first the underlying possession.

Thus, simple possession is "necessarily included" in a charge of possession-with-intent-to-sell: not according to the proof adduced at trial, but rather by Florida's Standard Jury Instructions. From this the logical and reasonable conclusion is that the Legislature intended simple possession and possession-with-intent-to-sell to be within the limited class of "subsumable" offenses expressly created or affirmed by statute.

The next question becomes whether current Florida allows the state to prove "sale" without first proving possession, even though such proof of possession is expressly required in three of six alternate means of proving the verb-sub-element of Element 1. To conclude that because the Instructions do not expressly require proof of "possession and sale" that such proof of possession is not necessary is either absurd or ambiguous. To liberally interpret a punitive law in such a way as to create either an absurdity or an ambiguity is to fly in the face of an express legislative mandate to construe the ambiguity more favorably to the accused.

This is not to say that this Court cannot now interpret the law hereunder in such a way as to require proof of possession for possession-with-intent-to-sell but *not* for sale, but only that the interests of justice (as well as the "separation of powers") would seem to foreclose retroactive application of that distinction to those cases in existence before that ambiguity has been clarified. On the other hand, would not the preferable

course be for this Honorable Court to "certify" the question to the Legislature? Since the Legislature created the ambiguity of whether simple possession is "subsumed" by either the inchoate possession-with-intent-to-sell or the completed sale, the Legislature should clarify that question itself.

As we have seen, the "prosecutor's dream interpretation" will lead to even more prison over-crowding, *or* to the creation of statutes which may be arbitrarily or capriciously applied to promote racial discrimination, whether intended or inadvertent. The liberal interpretation of a punitive statute to create either regrettable circumstance is better left to the Legislature itself. If the Legislature *wants* all three felonies to be charged in every single case, across-the-board, then the Legislature can and should fund the money necessary to deal with that ever-greater overload which will befall the Department of Corrections.

Then too, the Legislature is charged with presumptive knowledge of this Court's analysis in Snowden, *supra*, which held that "when each statutory element of an offense is contained in the statutory elements of a second offense, then the former offense is a lesser included offense of the latter offense." Having that constructive knowledge, the Legislature expressly created a limited class of "subsumable" offenses consisting of "lesser offenses the statutory elements of which are subsumed by the greater offense." F.S. 775.021(4)(b) (1988).

Since the Legislature intentionally created this limited class of subsumable crimes yet failed to articulate which crimes

are included therein, that task is left to the Courts of this State, with the proviso -- expressed or implied -- that they not exacerbate an already-overburdened prison system and that they not create a statutory crime susceptible to discriminatory application against small-time ghetto-resident drug-dealers, as opposed to "white-collar" or better-situated small-time drug-dealers with better political or social connections.

Then too, Petitioner's Daudt argument -- that "delivery or sale of an illegal drug can be accomplished without a possession of that drug," Petitioner's brief, page 9 -- is meaningless. In such limited instances the accused is convicted as a "principal" even as he is protected from conviction of simple possession. In the vast majority of cases, though, the state must prove possession both for possession and for the greater offenses of sale or the inchoate crime of possession-with-intent-to-sell. This level of proof is required neither by the "proof adduced at trial," nor by the accusatory pleading. Instead, this level of proof is required by the Standard Jury Instructions themselves.

With the foregoing in mind, this Honorable Court should answer the certified question in the affirmative.

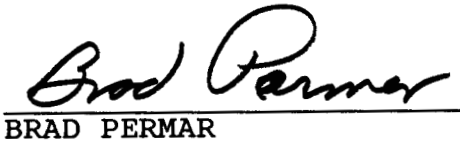
CONCLUSION

In light of the foregoing reasons, arguments and authorities, Respondent respectfully requests that this Honorable Court affirm the order of the Second District Court of Appeals so as to prohibit dual convictions for the sale and possession of the same contraband.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Katherine Banco, Assistant Attorney General, Park Trammel Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, Anthony McCloud #230560, Cross City Correctional, P.O. Box 1500, Cross City, Florida 32628, this 19th day of June, 1990.

Respectfully submitted,



BRAD PERMAR
Assistant Public Defender
Criminal Court Building
5100 - 144th Avenue North
Clearwater, FL 34620
Florida Bar No. 0473014