Original

IN THE SUPREME COURT OF FLORIDA

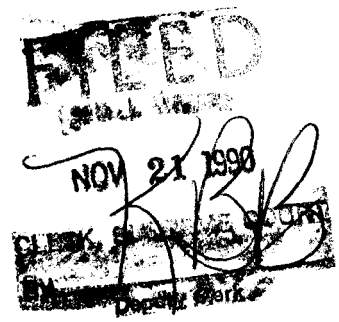
STEVE ANTON DAVIS,

Appellant,

vs. CASE NO. 76,043

STATE OF FLORIDA,

Appellee.
_____/



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PRELIMINARY STATEMENT

Throughout this Brief the Appellant, STEVE ANTON DAVIS, will be referred to either as the Defendant or Davis. The Appellee will be referred to as the State. The following symbols will be used to refer to the Record on Appeal:

R - Pleadings and trial transcript.

S - Transcript of sentencing hearing held April 24, 1989.

STATEMENT OF THE CASE

By an Information filed October 19, 1988, the Defendant was charged with one count of Possession of Cocaine, in violation of Fla. Stat. §893.13(1)(f) (1987); and a second count of Delivery of Cocaine in violation of Fla. Stat. §893.13(1)(a)(1) (1987). (R-288) Both charges arose from the alleged August 25, 1988 act of selling a single "twenty-cent" i.e., Twenty Dollars ($20.00) piece of crack cocaine to an undercover officer named Julia Chatman. (R-101, 105, 288)

The cause was tried before Orange County Circuit Judge Gary L. Formet, Sr. on January 17, 1989. (R-1) During jury selection the trial court responded to a juror who posed to defense counsel the double-edged question of whether it was counsel's job to defend a client known to be guilty and the prosecutor's converse responsibility to prosecute someone known to be innocent. (R-57) After giving the explanation that the prosecutor's duty was to seek justice, while defense counsel's duty was to ensure that accused receive a fair trial--the Court went on to state:

> [I]f the state knew beyond any reasonable doubt that the defendant was innocent, they would not bring those charges. But the state's job is to evaluate the evidence that they have available. Based upon that, present that evidence that they believe or that they think will indicate or will convince the jury that the defendant is guilty.

(R-57, 58) Defense counsel immediately approached the bench and moved to strike the jury panel. (R-59, 60) The trial court denied Defendant's Motion to Strike, but granted Defendant's fall-back request that a curative instruction be given. (R-60)

Subsequently, the Defendant accepted the jury panel, in the sense of making it clear he had no <u>further</u> objection to the panel, while stressing he was not waiving his prior objection represented by the Motion to Strike or his related contention that the comment was so prejudicial that a curative instruction was insufficient to preserve his ability to receive a fair trial before an impartial jury. (R-63) Additionally, he renewed his objection and Motion to Strike at the close of all the evidence. (R-217)

The State's case consisted entirely of testimony from crime lab analyst Nanette J. Rudolph, and from Officer Julia Chatman. Following their testimony, the Defendant moved for a judgment of acquittal on the basis that the State's evidence was legally insufficient to identify him as the perpetrator. (R-147) This motion was denied. (R-147)

After the defense presented its case, which consisted of testimony from the Defendant and from James Robinson, the Court denied Defendant's renewed Motion for Judgment of Acquittal which likewise challenged the sufficiency of the State's identification evidence. (R-217, 218)

Although no objections or mistrial motions were made during closing argument, the prosecutor made a number of grossly impermissible comments suggesting the jury should do its part to respond to society's "drug problem" by convicting the Defendant (R-223, 224); that Deputy Chatman (who was doing her part to combat drugs) doesn't make mistakes and <u>knows</u> Defendant to be guilty (R-

224-229, 230, 233, 255); and that the Defendant wouldn't have been prosecuted if he was innocent. (R-253).

On January 18, 1989, the jury returned verdicts finding Defendant guilty as charged on both counts of the Information. (R-301, 302) He was then adjudicated guilty of simple possession of cocaine and delivery of cocaine. (R-303, 304)

On January 20, 1989, a timely Motion for New Trial was filed by Defendant. (R-306) The Court denied this motion. (R-307)

On April 24, 1989, the Defendant appeared before Judge Formet for sentencing. At that time he was again adjudicated guilty of both counts and placed on four (4) year terms of concurrent probation. (R-310, 311, 317; S-7) Jail credit of 98 days was recognized. (R-312; S-5)

On May 23, 1989, the Defendant filed a timely Notice of Appeal from his judgments and sentences. (R-313) This appeal was duly prosecuted and resulted in the Fifth District Court of Appeal issuing an opinion in Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990) holding that the Defendant's separate convictions and sentences for the crime of possession of one rock of cocaine and for the crime of delivery of that same rock of cocaine did not violate his right to protection for double jeopardy provided by either the Fifth Amendment to the U.S. Const. or Art. I, §9 of the Fla. Constitution. The opinion did not address the Defendant's contentions that his due process rights had been violated by: (1) having to stand trial before a jury whose impartiality had been

destroyed by an inadvertent judicial remark which constituted both a comment on his guilt, as well as judicial vouching for the integrity of the prosecutor; and (2) grossly improper prosecutorial comments during closing argument.

On April 20, 1990, the Defendant filed a timely Motion for Rehearing which was denied on May 15, 1990.

On May 23, 1990, the Defendant timely filed a notice to invoke this Court's discretionary jurisdiction. Jurisdictional Briefs were subsequently filed by the parties and on October 24, 1990 this Court issued an Order accepting jurisdiction, pursuant to Art. V, §3(b)(3) of the Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv), because of express and direct conflict with *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990).

STATEMENT OF THE FACTS

On Thursday, August 25, 1988, at about 10:30 p.m., members of an Orange County Sheriff's Department "arrest team" descended upon a restaurant known as the Cozy Inn and arrested Defendant on the suspicion that he had, seconds earlier, made a Twenty Dollar ($20.00) sale of crack cocaine to undercover agent Julia Chatman. (R-96, 105) At the time of his apprehension, the Defendant was standing outside of the restaurant. (R-169, 170) There were at least four (4) or five (5) other people in the vicinity. (R-103) An on-the-spot search of his person failed to produce the marked Twenty Dollar ($20.00) bill just used by Chatman to purchase the cocaine. (R-119, 172)

At trial, Agent Chatman testified that she drove to the Cozy Inn on the evening of August 25, 1988 to pose as a motorist seeking to purchase cocaine. (R-96) While ostensibly alone, she was using her police radio and also a body bug to stay in contact with back-up agents. (R-99, 100) It was her testimony that once she pulled in, the Defendant approached her car so she asked him about getting Twenty Dollars ($20.00) worth of crack cocaine. (R-97) He said he didn't have it, but he could go inside and get some. (R-97, 98) He then directed her to park her car at the rear of the business. (R-98) She complied. (R-98) Shortly thereafter, the Defendant came out of the rear of the Cozy Inn and told her to park in the front of the business. (R-98) While the Defendant was approaching for the second time, she repeated a description of his clothing (dark blue pullover V-neck shirt, blue pants, and a knit-

type cap), plus his location to the arrest team. (R-101, 102) After being directed to move her car again, Agent Chatman drove to the side entrance of the Cozy Inn. On his third approach to her car, the Defendant purportedly handed Chatman a suspected piece of crack cocaine, at which time Chatman handed over a Twenty Dollar ($20.00) bill then gave the code signal for the arrest team to move in. (R-101, 103, 105) Chatman then left the area. As she was leaving the parking lot area of the Cozy Inn she saw the arrest team arriving in a separate car. (R-103) Within a minute or less of the time of the exchange, Chatman circled around in her car to confirm that the arrest team had taken the correct suspect into custody. (R-104, 105)

On cross-examination, Chatman admitted that the marked Twenty Dollar ($20.00) bill was never recovered from Defendant's person. (R-119) She indicated she had just begun doing undercover narcotics work the previous month, and over the course of five months had been responsible for setting up 42 arrests. (R-127) In fact, five (5) or six (6) of those arrests took place at the Cozy Inn. (R-127) She admitted that she lost visual track of the Defendant every time she moved her car, and didn't actually see him being apprehended. (R-130, 137) She positively identified the Defendant in trial as the person who sold her Exhibit #1, however, she was unable to identify the names of any officers in the take-down car who actually implemented Defendant's arrest. (R-101, 145)

Lab analyst, Nanette Rudolph, testified she had analyzed the contents of State's Exhibit #1 and had determined that the exhibit contained cocaine. (R-88-93)

The Defendant testified that in the late evening of August 25, 1988, he and a friend named James Robinson went to the Cozy Inn for dinner. (R-163, 166) Apart from speaking to someone named "Noony" before they entered the building all they did at the Cozy Inn was eat dinner and drink a beer or two. (R-168)

After finishing their meals, James Robinson and the Defendant were exiting the restaurant when the Defendant was taken into custody by a member of the arrest team. (R-168-170, 172) After being handcuffed, the Defendant's money was temporarily removed from his pocket, checked and then placed back inside his pocket. (R-172) Another man was also taken into custody, but was soon released by the officers. (R-174, 175) The Defendant denied ever approaching Chatman's car or offering to sell her any cocaine. (R-173, 174)

Defense witness James Robinson testified that he knows Defendant as a neighbor, friend, and co-worker. (R-191) According to Robinson, he and the Defendant went to the Cozy Inn on August 25, 1988 in order to eat dinner. (R-195) After eating and upon exiting the restaurant, the arrest team converged upon the area causing people to scatter. (R-201) In addition to taking Davis into custody, law enforcement agents also apprehended another man. (R-201, 202) Robinson testified to being confident that the

Defendant wasn't selling crack cocaine on the evening of his arrest. (R-202)

SUMMARY OF THE ARGUMENT

Defendant/Appellant's argument in Point I is that as a matter of statutory construction and legislative intent, Fla. Stat. §775.021(4)(b)3 (Supp. 1988) prohibits dual convictions and sentences for the simultaneous sale (or delivery) and possession of the same quantum of contraband. In other words, simple possession is a lesser offense falling within the third "subsumed elements" category of §775.021(4)(b). Therefore, the appellate court below erred in affirming Defendant's separate conviction and sentence for simple possession of the same piece of crack cocaine he was convicted of selling on August 25, 1988.

The argument in Point II is that the Defendant's separate convictions and punishments for the crimes of delivery of one rock of cocaine and simple possession of that same rock of cocaine violate the double jeopardy clause of Art. I, §9 of the Fla. Constitution.

In Point III, the Defendant maintains that the trial court committed reversible error in denying his motion to strike the jury panel, thereby requiring him to stand trial before a jury whose impartiality had been destroyed by an inadvertent judicial remark which constituted both a comment on the Defendant's guilt, as well as judicial vouching for the integrity of the prosecutor.

The argument in Point IV is that fundamental error occurred as a consequence of highly improper and prejudicial prosecutorial comments during closing argument. In short, the improper remarks of counsel meet the criteria for fundamental error

in that they had the capacity to so thoroughly taint his trial that neither objection nor retraction could entirely destroy their sinister influence. The comments at issue were prejudicial because they: (1) urged the jury to "solve" society's drug problem by returning a guilty verdict against Defendant; (2) vouched for the credibility of the State's two (2) witnesses; and (3) indicated the Defendant would not have been brought to trial if he was innocent as claimed.

Point V is a cumulative error argument with the Defendant maintaining that the collective impact of the errors raised in Points III and IV regarding improper judicial comment and prosecutorial misconduct during closing argument was so extensive that its influence pervaded Defendant's trial.

Point VI is an alternative double jeopardy argument wherein the Defendant maintains his separate convictions and punishments for the crimes of sale of cocaine and simple possession of the same cocaine violate the double jeopardy clause of the Fifth Amendment to the U.S. Constitution.

POINT I

FLA. STAT. §775.021(4)(b)3 (SUPP. 1988) PROHIBITS DUAL CONVICTIONS AND SENTENCES FOR THE SIMULTANEOUS DELIVERY AND POSSESSION OF THE SAME QUANTUM OF CONTRABAND.

The present appeal arises from the context of an August 25, 1988 hand-to-hand drug transaction and presents the issue of whether §775.021(4)(b)3 (Supp. 1988) (effective July 1, 1988) will allow separate convictions and sentences for the crime of delivery of one rock of cocaine, and for the crime of simultaneously possessing that same rock of cocaine. The Defendant/Appellant maintains that the 1988 Amendment to §775.021 prohibits separate convictions and sentences for sale or delivery of cocaine and possession of cocaine as to a single factual event (single act) involving one quantum of contraband, since possession is a lesser offense falling within the third "subsumed elements" category of §775.021(4)(b). Accordingly, the appellate court below erred when it affirmed Defendant's separate conviction and sentence for having possessed the same piece of crack cocaine delivered or sold on August 25, 1988 based on its conclusion that §775.021(4)(b)3 was inapplicable.

Section 775.021 provides rules of construction for criminal statutes. Section 775.021(4) incorporates the *Blockburger*[1] test that offenses are separate if each offense requires an element of proof that is not contained in the other

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[1] *Blockburger v. United States*, 284 U.S. 299 (1932).

offense. In 1988 the Legislature amended §775.021(4) to read as follows:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Ch. 88-131, §7, Laws of Fla. (insertions are underlined).[2]

By its terms, subsection 775.021(4)(b) provides that it is the legislature's intent to prohibit multiple punishments for offenses which, *inter alia*, are lesser offenses in the sense that all of the elements of one of the crimes are included or subsumed within the essential elements of the greater offense.

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[2] The 1988 amended version of §775.021 applies to crimes occurring on or after July 1, 1988. *See, State v. Smith*, 547 So.2d 613 (Fla. 1989).

In *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990), *review pending* Case No. 75,902, the Second District applied the amended version of §775.021 (Supp. 1988) and held that separate convictions and punishments for sale and possession of the same quantity of contraband (cannabis) was prohibited because the crimes fit into the third enumerated exception outlined in §775.021(4)(b). The *V.A.A.* Court explained its holding was based on an analysis of the elements of the crimes of sale and possession it had utilized earlier in *Gordon v. State*, 528 So.2d 910 (Fla. 2d DCA 1988), *approved sub nom State v. Smith*, 547 So.2d 613 (Fla. 1989). The facts of *Gordon v. State*, *Id*. were that the accused possessed a single piece of crack cocaine which he sold to undercover police agents for Ten Dollars ($10.00). Based on the sale of that one rock the defendant was arrested and charged with one count of sale of cocaine and one count of possession of cocaine with intent to sell. Cognizant that each of the charged crimes involved the element of possession, the *Gordon* Court stated:

> We begin our discussion with the possession element of these two (2) crimes. A defendant cannot be convicted of either crime unless he is deemed, at law, to have had some sort of possession of the contraband. [footnote omitted] 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. For example, a person acting as a go-between or broker may arrange for or be the moving force in the sale of contraband, yet never have either actual nor constructive possession of the contraband. In such case, the active seller who has actual possession of the contraband becomes the act of the broker.

> The broker is deemed to have the same possession as the seller and can be convicted as a principal of the crime of sale under Chapter 777, Florida Statutes. 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. In the case before us, then, where there is no question of a broker or others involved in the crime charged, but rather a single act of 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 contraband is possession.

Id. at 912. (emphasis supplied)

In *State v. McCloud*, 559 So.2d 1305 (Fla. 2d DCA 1990), *review pending* Case No. 75,975, the Second District applied its *Gordon/V.A.A.* analysis to the crimes of simple possession and sale of cocaine, arising from a single transaction and single quantum of cocaine, and concluded these crimes also fit within the "subsumed elements" category of the amended version of §775.021(4)(b), precluding dual convictions. *See also*, *Crisel v. State*, 561 So.2d 453 (Fla. 2d DCA 1990), *review pending* Case No. 76,183, (defendant entitled to have possession of contraband charges dismissed since charges were subsumed into contraband sale charges for purposes of §775.021(4)(b)3); *Gibson v. State*, 565 So.2d 402 (Fla. 1st DCA 1990), *review pending* Case No. 76,626, (possession of cocaine with intent to sell charge subsumed by crime of sale of cocaine, precluding conviction and sentence for both crimes).

The Defendant also relies upon the analysis provided by Judge Cowart who dissented in the opinion below (*Davis v. State*, 560 So.2d at 1234-1239), and urges this Court to adopt his position that the 1988 Amendment to §775.021(4) by Ch. 88-131, §7, Laws of

Florida, does not reflect a legislative intent to treat sale or delivery of a controlled substance, and the possession of that substance as separate offenses subject to separate convictions and punishments. In explanation of this conclusion, Judge Cowart made the following analysis of the relationship between these crimes:

> Every time a person is in possession of a controlled substance (or any other tangible personalty) that possession may either continue in the possessor or it may terminate. Termination of possession can occur in only a limited number of ways: the termination of possession can be involuntary, such as when the possessor unintentionally loses the object or when another person takes possession by theft, robbery or confiscation. The termination of possession may be voluntary as when the possessor consumes the object possessed, or the possessor abandons possession or when the possessor engages in a transaction and intentionally transfers or delivers possession to another person. A voluntary intentional delivery or transfer of possession commonly occurs in three circumstances:
>
> (a) when the possessor delivers possession for the purpose of a bailment . . .
>
> (b) when the possessor transfer possession in order to make a gift . . ., and
>
> (c) when the possessor delivers possession to a recipient in exchange for something of value (in law called 'consideration.') This last type of delivery is, of course, a sale.
>
> Possession means to exercise such a controlling dominion over an object as permits the possessor to use or consume the object or transfer possession to another person. Possession means having power and control over an object and having an intent to exercise that power. Constructive possession is merely knowing of the existence of an object and having, and intending to exercise, the power to obtain actual physical possession of the object. Delivery is a transaction in which a person with possession of an object transfers that possession to another person. Delivery is variously defined as a change of possession or the act by which the res is placed within

the actual or constructive possession or control of another. Sale is a transaction in which a possessor of an object, as seller, transfers that possession to another person, as purchaser, buyer, for a consideration; it is a delivery for a consideration. One can be in possession without making a delivery and one can make a delivery without a sale but one cannot make a delivery without having the controlling dominion (possession) necessary to make a delivery and one cannot make a sale without making a delivery, actual or constructive, of possession of the object sold.

As a practical matter and in correct legal contemplation of the essence of the terms and concepts, as to a single factual event (single act) involving one quantum of contraband, the offense of delivery is the offense of possession plus the element of a transfer of possession and the offense of 'sale' is the offense of 'delivery' plus the element of consideration.

It is an enticing mental game to construct hypotheticals [footnote omitted] to argue that a sale can occur without a delivery or a delivery can occur without a possession. This is best done by using factual scenarios that obscure (a) the true nature of transactions, (b) the legal concept of constructive possession, or (c) a crime committed by several persons as co-perpetrators or in various agency relationships, in order to confuse an analysis of the elements of sale, delivery and possession and the true relationships between the concepts. The majority opinion citation of *Daudt v. State*, 368 So.2d 52 (Fla. 2d DCA 1979) is an example. Daudt was convicted of both sale and possession but on appeal his conviction of sale was upheld, but his conviction of possession was reversed. This was because Daudt was charged not as the actual perpetrator of the two (2) crimes but only as an aider and abetter under §777.011, Florida Statutes, which statute provides that a person who aides, abets or procures another person to commit a criminal offense can be convicted of that offense whether he is or is not present at the commission of that offense. Mike, the actual perpetrator, possessed marijuana and sold (delivered possession for a considera-

tion) some of it. While the evidence showed that Daudt helped (aided and abetted) Mike in the sale, there was no evidence that Daudt helped Mike acquire or keep possession, so it was held that, under the aider and abetter statute, Daudt could be convicted only for the sale but not the possession. An aider and abetter does not have to personally commit any element of an offense in order to be guilty; he only needs to help or encourage another person commit an offense. Mike, the actual perpetrator, had the possession that was essential to the sale. *Daudt v. State*, does not demonstrate that a sale can exist without possession of the object sold.

Of course, delivery and sale are usual 'event' crimes that finally occur at a single moment of time while possession is a continuing offense. This causes a peculiar analytical problem. Almost all who sale or deliver drugs possess them for some period of time before the sale or delivery event and most who purchase drugs possess them for some period of time after the sale event. Therefore, conceivably, a possession charge could be carefully drafted to relate to a possession occurring before or after the sale event or before the delivery event [footnote omitted] but there is no indication that the legislature contemplated this situation. Therefore, a separate charge of possession at a distinctly different time from a delivery or sale could, by careful drafting of a charging document, be differentiated from either event crime.

* * * * * * * * * *

This statutory exception [§775.021(4)(b)3] appears to have been intended to describe what is heretofore been the criminal law concept of 'necessarily included lesser offenses' [footnote omitted] as that concept was originally explained in *Brown v. State*, 206 So.2d 377 (Fla. 1968) (category 3) and listed as a category 1 in a Schedule of Lesser Included Offenses adopted by the Florida Supreme Court as part of the Standard Jury Instructions in Criminal Cases [footnote omitted] and referred to Fla. R. Cr. P. 3.510(b). As 'possession' is a separate offense, all of the statutory elements of

> which are included within (subsumed by) the greater offense of 'delivery,' and as 'delivery' is a separate offense, all of the statutory elements of which are included within ('subsumed by') the greater offense of 'selling,' it would appear from the amendment of §775.021(4) . . . that the legislature does not intend the sale or delivery of a controlled substance and the possession of that substance be treated as separate offenses subject to separate convictions and separate punishments. [footnote omitted]

Id. at 1236-1238.

The Defendant respectfully urges this Court to adopt the above-stated position expressed by Judge Cowart and likewise expressed by the Second and First District Court of Appeals in *V.A.A. v. State*, *supra*; *Gordon v. State*, *supra*; *State v. McCloud*, *supra*; *Crisel v. State*, *supra*; and *Gibson v. State*, *supra*. Because §775.021(4)(B)3 prohibits separate convictions and sentences for sale or delivery of cocaine and possession of cocaine, as to a single factual event involving one quantum of contraband, the Defendant's conviction and sentence for possession should be vacated.

POINT II

DEFENDANT'S SEPARATE CONVICTIONS AND PUNISHMENTS FOR THE CRIMES OF DELIVERY OF ONE ROCK OF COCAINE AND SIMPLE POSSESSION OF THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY ART. I, §9 OF THE FLA. CONSTITUTION.

This argument is grounded on the contention that the "double jeopardy" protection under Art. I, §9 of the Fla. Const. is now broader in scope than its counterpart in the federal constitution. In pertinent part, Art. I, §9 provides that "[n]o person shall . . . be twice put in jeopardy for the same offense . . . .". In support of Defendant's claim that the Florida Constitution bars his multiple convictions and punishments for delivery and simple possession of a single rock of cocaine on the basis that they are the "same offense" (for which multiple punishments are proscribed), the Defendant relies upon *Ex parte Lange*, 21 L.Ed. 872 (1873) and the majority analyses of *Lange, Id.* found in *Carawan v. State*, 515 So.2d 161, 163-164 (Fla. 1987) and *Wilkins v. State*, 543 So.2d 800, 802 (Fla. 5th DCA 1989). Accordingly, unlike double jeopardy arguments under the Fifth Amendment to U.S. Const., as interpreted by *Missouri v. Hunter*, 74 L.Ed.2d 535 (1983), and *Ohio v. Johnson*, 467 U.S. 493 (1984), the question of what is the "same offense" under Art. I, §9 of the Fla. Const. is not constrained by exclusive reliance on the analysis provided by *Blockburger v. United States, supra*.

The majority opinion of the Court below expressed its view that Art. I, §9 of the Fla. Const. should be given the same

construction as its federal counterpart due to this Court's 1982 opinion in *State v. Cantrell*, 417 So.2d 260 (Fla. 1982). *Davis, supra* at 1232, 1233. The Defendant disputes that *Cantrell, Id.* can reasonably be given such a sweeping interpretation when the opinion limits itself to following the lead of the Supreme Court on the *Albernaz*[3] issue of whether Art. I, §9 of the Fla. Const. will permit the imposition of consecutive sentences for violations committed during one criminal transaction of two or more separate statutes. Apart from the narrowness of the issue and holding of *State v. Cantrell, supra*, it bears noting that *Cantrell, supra* was decided in July of 1982 whereas the panel majority below relies on it to assume that this Court is inclined to presently embrace the "balkanization" direction the United States Supreme Court has embarked on with its 1983 and 1984 decisions in *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) and *Ohio v. Johnson*, 467 U.S. 493 (1984).[4] The "balkanization" metaphor refers to reducing the federal constitutional double jeopardy analysis to a question of legislative intent, rather than regard for the intent of the framers of the constitutional provision. In practical terms, this is accomplished by having the judiciary delegate to the states' legislatures the power to determine or define which offenses constitute the "same offense" for double jeopardy purposes. Contrary to the expression of the majority panel of the appellate

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[3] *Albernaz v. United States*, 450 U.S. 333 (1981).

[4] *Double jeopardy after State v. Smith*. David W. Henry, 62 Fla. Bar J. 37 (1989).

court below, there exist compelling public policy reasons for why Art. I, §9 of the Fla. Const. should be construed to provide protection to citizens for multiple criminal convictions and punishments arising from the single act.

A. FLORIDA'S CONSTITUTIONAL AUTONOMY

Except for Art. I, §12 of the Fla. Const., wherein the voters of Florida explicitly decided to make Florida's search and seizure standards conform to the scope of the Fourth Amendment to the United States Constitution (as interpreted by the Supreme Court), all other state constitutional protections stand independent of any federal counterpart. Accordingly, this Court is at liberty to reject any federal double jeopardy analysis which is unsound in constitutional principle, unworkable and arbitrary in practice, and which would operate to the detriment of the people of this State. In short, this Court is at liberty to construe Florida's constitutional double jeopardy clause in a manner which bars multiple convictions and sentences for offenses arising from a single act. *See, State v. Glosson*, 462 So.2d 1082 (Fla. 1985), (this Court rejected the narrow application of the due process defense founded in federal cases in light of Art. I, §9 of the Fla. Const.); *In re: T.W.*, 551 So.2d 1186 (Fla. 1989), (in the 1980 passage of Florida's Privacy Amendment and Art. I, §23, the citizens sought to achieve individual liberties more expansive than those conferred by the federal constitution). *See also, Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985). Therefore, the question of what is the "same offense" under Art. I,

§9 need not be constrained by United States Constitution, as interpreted by cases such as *Missouri v. Hunter*, *supra* or *Ohio v. Johnson*, *supra*. Nor is there any requirement of exclusive reliance upon the analysis of *Blockburger v. United States*, *supra*.

B. UNSOUND CONSTITUTIONAL UNDERPINNING OF *MISSOURI V. HUNTER, SUPRA* AND *OHIO V. JOHNSON, SUPRA.*

The Defendant is cognizant that it is not the prerogative of this Court to overrule decisions of the United States Supreme Court. The argument which follows is, therefore, aimed toward demonstrating why Art. I, §9 should not be construed in the same manner that the United States Supreme Court is construing the Federal Double Jeopardy Clause; and why this Court should refuse to give effect to §775.021(4).

As noted previously, *Missouri v. Hunter*, *supra* and *Ohio v. Johnson*, *supra* effectuate a doctrine of "balkanization" by permitting the substantive protection afforded by the United States Constitution to be defined by state law. From a federal constitutional viewpoint, this "balkanization" is, *inter alia*, an assault on the Supremacy Clause because it means, in the context of double jeopardy, that the scope of constitutional protection will conform to state law--rather than requiring state law to conform to constitutional standards. Certainly, from a state constitutional viewpoint, it assaults the constitutional separation-of-powers doctrine because it improperly shifts the task of interpreting the constitution from the judiciary to the legislature. Judge Cowart addressed this ramification during the course of advocating the

need for this Court to construe Art. I, §9 in a manner to prohibit multiple punishments based upon a single act (and to refuse to give effect to §775.021(4) by stating:

> The process of deciding whether or not any particular two offenses are the 'same' for constitutional purposes is a judicial, not a legislative, function, although a proper judicial analysis of the problem involves a consideration of both the intent of those who propose the language in the constitution and the intent and purpose of the legislature in enacting each of the two criminal statutes being compared. The controlling intention is that of the framers of the constitutional provision and not the intent of the legislature in passing the criminal statutes because the constitution is a limit on the legislature as well as the executive and judicial branches of government. Even if the legislature expressly declared that its intent in enacting a particular statute, or statutes, was to cause, or enable the executive branch of government to put, a citizen to be twice placed in jeopardy "for the same offense" both the legislative intent and statute would be unconstitutional. Further, any legislative intent as to the meaning of the constitution is immaterial because under the constitutional separation of powers doctrine, the interpretation of the constitution is an exclusive judicial function which the judiciary should not abrogate in favor of the legislature. If the legislature intends to substitute a statutory enactment (§775.021(4), Fla. Stat.) for the constitutional double jeopardy clause, such intent should not be effectuated by the judiciary.

Davis v. State, *supra* at 1235. It is no more appropriate for the legislature to interpret or dictate what the "same offense" is, for double jeopardy purposes, than it would be for the legislature to set caps on damages recoverable for pain and suffering (*Smith v. Dept. of Insurance*, 507 So.2d 1080 (Fla. 1987); or to dictate the

standards for what might constitute violations of due process or equal protection.

C. THE *MISSOURI V. HUNTER* MODEL[5], UPON WHICH §775.021(4) IS BASED, IS ARBITRARY AND UNWORKABLE IN PRACTICE.

With the United States Supreme Court having effectively delegated the problem of multiple punishments in a single trial setting to fifty (50) state legislatures since 1983, the double jeopardy clause of the United States Constitution does nothing more than prevent the sentencing court (in a single trial setting) from prescribing greater punishment than the state legislature intended. The lack of wisdom associated with permitting the substantive protections of the United States Constitution to be defined by state law is exemplified by considering the impact "balkanization" can have on state habitual offender sentencing. In his article entitled *Double Jeopardy After State v. Smith*, 62 Fla. Bar J. 37, author David W. Henry observed:

> The potential ramifications of *Missouri v. Hunter* are far-reaching because, as Justice Marshall noted in *Hunter*, the number of prior convictions is 'often critical to the collateral consequences that an individual faces' under habitual offender statutes . . . .
>
> Suppose that a defendant is convicted of multiple offenses in jurisdiction A offering minimal double jeopardy protection, but in the

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[5] By use of the term "*Missouri v. Hunter* model", the Defendant is referring to the treatment of the judicial problem of analyzing offenses to determine whether they are in substance and constitutional contemplation the "same offense", or two different offenses, as one of interpreting the intent of the legislature; rather than one of interpreting the intent of the framers of the constitution.

> other forty-nine states his conduct would sustain only one conviction. Further, suppose that the same defendant is arrested in state B for the commission of an offense arising from a separate criminal episode. Upon discovering that defendant's criminal history in state A, the state prosecutor might obtain grounds for charging the defendant under the recidivist statute of state B, although he may have committed only one prior offense under the law of forty-nine of the fifty states.
>
> Conversely, suppose the defendant commits several crimes in one state which has unusually protective double jeopardy standards. Then, an individual who would be a recidivist under most state laws would lack the number of prior offenses necessary to support a recidivist charge under the statutes of another state, yet be a dangerous individual warranting recidivist treatment. These scenarios raise issues of fundamental fairness with a possibility of public danger.

Supra at 38.

Another unsavory ramification flowing from the judiciary's abdication of its exclusive responsibility to interpret the Constitution, in the area of double jeopardy, is that the answer to the question of whether these crimes are the "same" under the Constitution could change with every legislative session in Florida.

Apart from the balkanization problems referred to above, the *Missouri v. Hunter* approach to double jeopardy analysis is also unworkable because of its strict reliance on the *Blockburger* analytic test. Having codified the *Blockburger* test in §775.021(4), the Florida Legislature has revealed its intent that the *Blockburger* test alone (subsection "(a)" above) is to serve as the single standard by which Florida courts are to determine

whether charged offenses were the "same offense" for double jeopardy purposes. The Defendant is not contending that the *Blockburger* analysis has no value in a double jeopardy inquiry. However, exclusive reliance upon *Blockburger* provides no double jeopardy protection whatsoever to citizens against cumulative punishments in a single trial setting, and leads to absurd results. The inability of exclusive reliance on *Blockburger* to afford any meaningful protection to citizens was commented upon by Justice Barkett in her dissenting opinion in *State v. Smith*, 547 So.2d 613 (Fla. 1989) where she stated:

> Under the double jeopardy clause, the government is forbidden from punishing a person twice for the same offense. As we recognized in *Carawan*, the Florida double jeopardy clause was designed as much to prevent multiple punishments as multiple trials for the same offenses. *Carawan*, 515 So.2d at 164; Art. I, §9, Fla. Const. Accordingly, there is, and must be, a limit to the number of offenses that may be charged when a person commits only a single criminal act. A 'strict *Blockburger*' analysis affords no limiting principle at all, since it theoretically can result in a person being charged with a dozen, a hundred, or a thousand offenses based on a single criminal act.
>
> Accordingly, I conclude that the analysis employed in *Carawan* arises from art. I, s.9 of the Fla. Const., and remains in force notwithstanding the 1988 amendment to section 775.021. I would so hold.

Id. at 621, 622. (Kogan, J., concurring)

A strict *Blockburger* analysis has also been criticized because of its tendency to produce results which are absurd and illogical. For example, this Court in *Carawan v. State*, 515 So.2d 161, 167 (Fla. 1987) said:

> It would be absurd indeed to apply *Blockburger*, which was meant to help determine legislative intent, in a way that actually defeats what reason and logic dictate to be the intent. As has been noted, an exclusive *Blockburger* analysis sometimes leads to a result contrary to common sense. [footnote omitted] The courts, however, are obliged to avoid construing a particular statute so as to achieve an absurd or unreasonable result. *Wakulla County v. Davis*, 395 So.2d 540, 542 (Fla. 1981); *State v. Webb*, 398 So.2d 820, 824 (Fla. 1981).

Id. at 167. *See also*, *Williams v. State*, 560 So.2d 311, 315 (Fla. 1st DCA (1990), (court reluctantly affirmed defendant's convictions for robbery while armed with a firearm and for display of a firearm during the commission of a felony i.e., the robbery, while noting its exclusive application of *Blockburger* had produced a result contrary to common sense).

Even though the *Blockburger* analysis may be attractive in the limited, myopic sense that it offers a "bright line" mechanical approach to disposing of double jeopardy questions--its "convenience" (be it either to the legislature or the judiciary) is grossly outweighed by its disservice to the citizens of Florida if it is to be utilized to withhold double jeopardy protection even from citizens who are convicted of multiple offenses predicated on a single act. Like the Second District in *Gordon v. State*, *supra* at 914, this Court should reach a holding in the instant case which protects citizens from double jeopardy violations predicated on a single act. Inasmuch as Defendant's multiple convictions and punishments stem from making a hand-to-hand sell of a single rock of cocaine, Art. I, §9's proscription against being twice put in

jeopardy for the same offense forbids his separate conviction and punishment for the offense of possession of cocaine. Accordingly, this Court should vacate Defendant's conviction and sentence for simple possession.

POINT III

THE TRIAL COURT ERRED IN REQUIRING DEFENDANT TO STAND TRIAL BEFORE A JURY PANEL TAINTED BY EXPOSURE TO A JUDICIAL REMARK SUGGESTING THE STATE WOULD NOT BRING CRIMINAL CHARGES AGAINST AN INNOCENT PERSON, THEREBY DEPRIVING DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. I, §16 OF THE FLA. CONSTITUTION.

In order for an accused to receive a constitutionally fair jury trial, it is imperative that there be a "panel of impartial, 'indifferent' jurors". *Murphy v. Florida*, 44 L.Ed.2d 589, 594 (1975), (quoting *Irvin v. Dowd*, 6 L.Ed.2d 751 (1961)); *Weber v. State*, 501 So.2d 1379, 1382 (Fla. 3d DCA 1987); *Flicker v. State*, 374 So.2d 1141 (Fla. 5th DCA 1979).

Florida's appellate courts, long sensitive to the highly visible and dominant role that the trial judge plays before the jury, have consistently declared that the judge is to avoid making directly to or within the hearing of the jury any remark which is capable directly or indirectly, expressly, inferentially or by innuendo of conveying any intimation as to what view the judge takes of the case or as to what opinion the judge holds as to the defendant's guilt, or the weight, character or credibility of any evidence adduced. *See*, *Raulerson v. State*, 102 So.2d 281 (Fla. 1958); *Parise v. State*, 320 So.2d 444 (Fla. 3d DCA 1975).

For example, in *Hamilton v. State*, 109 So.2d 422, 424-425 (Fla. 3d DCA 1959), Judge Horton wrote:

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him

> overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of a trial to which the litigant or accused is entitled.

Subsequently, in *Robinson v. State*, 161 So.2d 578, 579 (Fla. 3d DCA 1964), the Third District applied *Hamilton v. State*, *supra*, and articulated the test for reversal as follows:

> We do not say that the trial judge's comment in this case amounted to any preference, or even an indication of such, but it could have been so interpreted, and on that possibility, we must reverse for a new trial. Where there is simply a doubt, as here, that an accused has been prejudiced by a remark of the court, we must grant him a new trial.

See also, *Flicker v. State*, *supra* at 1142.

In the case at bar, this issue arises from the following inadvertent remark made to the prospective jury by the judge:

> THE COURT: [I]f the state knew beyond any reasonable doubt that the defendant was innocent, they would not bring those charges.

(R-58) Defense counsel immediately responded by approaching the bench and stating:

> DEFENSE COUNSEL: Judge, . . . I object to the way you answered the question and moved to strike the panel, because I believe that although you truly meant to explain the gentlemen's questions, what you have done is present it in the juror's mind the fact that if the state preceded with the case it's because they thought it should have been preceded on, and they should find the defendant guilty because the state in fact--it's like a violation I committed my first time, Judge, the Judge granted a mistrial on the grounds I put in the jury's mind at the time I was advocating the state's position

> because I believe that if they went forward with the evidence, the jurors could also think I think he's guilty; and we're just going through the formality of proving beyond a reasonable doubt, but the state has already seen fit to charge that.
>
> THE COURT: I understand what you're driving at. If I'm giving that impression, I'll go back and give a curative.
>
> DEFENSE COUNSEL: I think it's beyond a curative.
>
> THE COURT: Do you want a curative instruction?
>
> DEFENSE COUNSEL: I would ask for one. I ask one be given if you're intending to not strike the panel. My objection --
>
> PROSECUTOR: For the record, I think that this, that the government prosecutor is not to bring charges that are not supported by probable cause. And that in fact I wouldn't have; would be ethically obliged to drop the charge, short of knowing beyond a reasonable doubt that the defendant was innocent.
>
> I don't think that what you said is harmful to the state or prejudices the state, but I think it's appropriate that you instruct the jury that opinions of the lawyers as to the merits of the case shouldn't be considered in reaching a verdict.

(R-59, 60) The trial court denied Defendant's motion to strike the jury panel but granted his fall-back request that a curative instruction be given. (R-60) In that instruction, the jury was told:

> I didn't want to leave the impression just because the case is, the state is bringing the case, you ought to accept the evidence blindly and go forward assuming the state felt there was enough evidence to come forward with the case, and therefore you ought to go ahead and confirm the state's decision, because that's

> not it at all. The state is merely presenting the facts as they understand them.
>
> Whatever the state's opinion is, or whatever the defense's opinion is, the defense attorney's opinion is irrelevant, because what we're asking you to do is make that decision. You have to make that decision.
>
> They're going to argue what they believe the evidence shows, but you're free to disregard the evidence. You can believe the evidence or you cannot believe the evidence. The state only looks at the facts and decides whether or not the charge, to charge someone. That does not mean they're guilty, because they're not guilty until the state can convince you to the exclusion of a reasonable doubt based on evidence presented.
>
> I don't want you to go away thinking just because the state brought the charges there must be something wrong; some state attorney back in the charge division felt there was enough evidence based on what the police officer told him to charge him, that you ought to uphold it and find him guilty, because that's not the case at all.

(R-60-62)

Subsequently, the Defendant conditionally accepted the jury panel, stressing he was not waiving his prior objection represented by the Motion to Strike or his related contention that the comment was so prejudicial that a curative instruction was insufficient to preserve his ability to receive a fair trial before an impartial jury. (R-63)

In the context of the question being responded to, the Court's remark was essentially an assurance that the State would not prosecute an innocent man because it was the prosecutor's duty to seek justice. (R-57, 58) Because the Court's remark could have been interpreted by panel members as an expression of the judge's

view on the integrity of the prosecutor or the guilt of the accused, or both, it tainted the panel and rendered the denial of his Motion to Strike reversible error under cases such *Hamilton v. State*, *supra*; *Robinson v. State*, *supra*; *Parise v. State*, *supra*; and *Lester v. State*, 458 So.2d 1194 (Fla. 1st DCA 1984).

While the trial judge's offending remark in the instant case was undoubtedly unintentional, the test for reversal focuses not on the subjective intent of the Court, but on whether the comment is of such a nature that the jury could interpret it as an expression of the judge's view on the weight of the evidence, the credibility of a witness, or the guilt of the accused. *Hamilton v. State*, *supra* at 425; *Flicker v. State*, *supra* at 1142. Nor does the trial judge's effort to mitigate damage through the giving of a curative instruction necessarily mean the comment should now be held harmless. There are a number of reasons which militate against any finding that the prejudicial effect of the judge's remark was cured by his instruction.

First, defense counsel's assessment of "I think it's beyond curative" was correct in that the Court's comment was so highly prejudicial that it simply was not amenable to being erased from the collective mind of the jury panel. One similar case which illustrates that curative instructions can not always be relied upon to "undo" damage from a judicial comment is *Flicker v. State*, *supra* where the reviewing Court rejected the State's claim that the judge's comment before the jury on how the evidence showed the existence of a conspiracy between a key state witness (an alleged

accomplice) and Flicker, could be cured by telling the jury not to consider the reference to a conspiracy. *See also*, Saint Jour v. State, 534 So.2d 874 (Fla. 3d DCA 1988); *Weber v. State*, *supra*.

The clearest expression that the Court's remark was well beyond the reach of any curative instruction is provided by the simple context of the trial itself. At Defendant's trial, the only issue for the jury to decide was whether the State had arrested the right person when the Defendant was seized on the night of August 25, 1988 outside the front entrance to the Cozy Inn/Restaurant. The State's case consisted entirely of testimony from a crime lab analyst and from undercover agent Julia Chatman. Thus, the bareness or simplicity of both the evidence, and the identity issue itself, accentuated the dominant role of the trial judge, and greatly magnified the ability of the Court's remark to destroy impartiality.

Second, even if it were theoretically possible to craft an instruction which would neutralize or remove any prejudicial effect of the Court's comment from the minds of the jury venire, the curative instruction actually given was a clumsy effort at back-peddling. For example, the corrective instruction told the jury that the defense attorney's opinion (regarding Defendant's guilt or innocence) was irrelevant, but failed to specify that the prosecutor's opinion was equally irrelevant. (R-61)

A third reason the Court's remark remained prejudicial despite the curative instruction is that the State had an extremely tenuous case of identification against Davis due to the State's

failure to recover from Defendant's person the marked Twenty Dollar ($20.00) bill that Agent Chatman testified to having handed to Defendant just moments before his arrest; Chatman's admission that she lost visual track of the person who sold her cocaine every time she moved her car, and didn't actually see the seller being apprehended by members of a take-down team; Chatman's admission that there were other third-parties standing in front of the restaurant where Defendant was (R-116, 137); and her admission that she "verified" that the take-down team had arrested the right person by glancing toward the take-down team as she drove by the building. (R-140) Given the relatively scanty evidence linking Davis to the crime, as well as the nature of the defense (mistaken arrest/identity) the Court's comment was harmful, and remained so notwithstanding curative efforts. *See*, *Whitfield v. State*, 452 So.2d 548 (Fla. 1984).

Fourth, the State's case against Defendant was essentially a "swearing contest" between the defense witnesses and Agent Chatman, with the jury being called to decide which version to believe. *See*, *Bass v. State*, 547 So.2d 680 (Fla. 1st DCA 1989); *Jacob v. State*, 546 So.2d 113 (Fla. 3d DCA 1989); *Renney v. State*, 543 So.2d 420 (Fla. 5th DCA 1989).

Another critical reason militating against any finding that the prejudicial effect of the judge's remark was cured by his instruction is that during closing argument the prosecutor exploited the prejudicial themes of the Court's remark by stating that the State was only seeking justice and wouldn't prosecute an

innocent person. For example, the prosecutor told Defendant's jury:

> Deputy Chatman has the same interest in the outcome that any other law-abiding citizen would have. She saw a crime committed and she wants to see justice comes (sic). That's her sole interest in this case. (R-229, 230)
>
> * * * * * * * * * * *
>
> I think you could judge it for yourselves. I submit to you, she does it in a professional way. You can tell from her demeanor, she has a professional approach about this, she's interested in seeking truth . . . (R-233)
>
> * * * * * * * * * * *
>
> You know why they turned the other guy loose? I wouldn't want to drag him in here, wouldn't want to bring him in here for you, he didn't do it, didn't do anything. That's why they turned him loose. She said that the guy, maybe the other guy looked something like him, but she it's that guy, not the other guy. They turned him loose. Justice was done. (R252, 253)
>
> * * * * * * * * * * *
>
> I submit to you, again, ladies and gentlemen, the state has proven this case. Deputy Chatman knows who did it, you know who did it. (R-255)

Because the offending remark of the trial court during voir dire could have been interpreted by panel members as an expression of the judge's view on the integrity of the prosecutor or the guilt of the accused, or both, the Defendant was deprived of his ability to receive a constitutionally fair trial before an impartial jury. Reversal is warranted.

POINT IV

IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT CONSTITUTED FUNDAMENTAL ERROR IN LIGHT OF THE STATE'S TENUOUS CASE AGAINST DEFENDANT.

The prosecutor's comments set forth below were not objected to at trial. Accordingly, the Defendant maintains that their individual and cumulative effect was so prejudicial that appellate review is afforded due to considerations of fundamental fairness as recognized in *Fuller v. State*, 540 So.2d 182 (Fla. 5th DCA 1989); *Nazareth v. Sapp*, 459 So.2d 1088 (Fla. 5th DCA 1984); *Coleman v. State*, 420 So.2d 354 (Fla. 5th DCA 1982); *Hines v. State*, 425 So.2d 589 (Fla. 3d DCA 1982), *rev. den.* 430 So.2d 452 (Fla. 1983); and *Dukes v. State*, 356 So.2d 873 (Fla. 4th DCA 1978). As was noted in *Coleman v. State*, *supra* at 356, the test for whether improper remarks of counsel constitute fundamental error is whether the remarks have the capacity to so thoroughly taint the trial that neither an objection nor a retraction can entirely destroy their sinister influence. *See also*, *Ryan v. State*, 457 So.2d 1084 (Fla. 4th DCA 1984), *cert. den.* 462 So.2d 1108 (Fla. 1985).

In the case at bar, the prosecutor destroyed the fundamental fairness of Defendant's trial proceeding by: (1) inviting the jury to "do their part" to support the law enforcement community's battle against drugs by convicting Defendant; (2) vouching for the credibility of the State's witnesses; and (3) indicating that Defendant would not have been brought to trial if he was innocent as he claimed.

(1) APPEAL TO BIAS, CIVIC DUTY, AND OTHER MATTERS EXTRANEOUS TO THE ISSUE OF DEFENDANT'S GUILT AND INNOCENCE.

In this regard the prosecutor argued to the jury the following:

> [W]e're talking about a crime and delivery of, selling of cocaine. It's a serious matter. It's a blight on our society is why it's against the law. Something needs to be done about. Somebody can stop it. Julia Chatman is doing what she can to stop it, Nanette Rudolph is doing what she can to stop it.
>
> I'm here before you to present the evidence but, you know, it's up to you to decide whether or not you're going to stop it. You're the jury, the buck stops here, ladies and gentlemen, stops with you.

(R223, 224) A strikingly similar pitch to the jury was condemned in *Reed v. State*, 333 So.2d 524, 525 (Fla. 1st DCA 1976) where the prosecutor stated:

> Now, we've got a police force that is trying to make arrests on dope peddlers. We've got courts that are going to try dope peddlers. We've got prosecutors that are going to prosecute dope peddlers to try and clean up this country. But the ultimate and final responsibility, the whole system comes down to one focal point, one responsibility: Citizens of each community that sit on the juries of these cases. You have the ultimate power over controlling drug abuse: Sitting on drug cases and listening to the testimony, deciding whether the state has proved its case. The welfare of the citizens of Florida and the people of Duval County, I'm contending, ask that you return a verdict of guilty in this case after considering the evidence.

See also, *State v. Wheeler*, 468 So.2d 978 (Fla. 1985).

In the case at bar, the prosecutor continued his appeal to matters extraneous to the issue of guilt and innocence when he stated:

> I won't kid you, I'm going to call Agent Chatman, going to tell her what the verdict was. It's not going to hurt her feelings if it's not a guilty verdict; it's not going to hurt anybody feelings if it's not a guilty verdict. You know, it's not going to go into anybody's job evaluation or statistics or anything like that.

(R-229) Arguments which beseech the jury to convict for any reason except guilt are highly prejudicial and strongly discouraged. *Ryan v. State*, *supra*.

(2) VOUCHING FOR THE CREDIBILITY OF STATE WITNESSES.

Among the comments designed to bolster the credibility of Officer Chatman were the following:

> Deputy Chatman has the same interest in the outcome that any other law-abiding citizen would have. She saw a crime committed and she wants to see justice comes (sic). That's her whole interest in this case.
>
> * * * * * * * * * * *
>
> If there was any reason to believe him, that would be different, but I submit to you, ladies and gentlemen, the simple fact he's brought his drinking buddy, got him a job; he's been convicted--thought it was funny--to corroborate his testimony is, is not sufficient corroboration for a statement, for you to give it more weight than the testimony of Deputy Chatman. She's trained to observe, she's trained to look, she's trained to get the right guy; it's her job, she does it.
>
> I think you could judge for yourselves. I submit to you, she does it in a professional way. You can tell from her demeanor, she has a professional approach about this, she's interested in seeking truth . . .

(R-229, 230, 233)

It is clear from the foregoing comments that the prosecutor was seeking to bolster Chatman's credibility *vis-a-vis* that of the

Defendant. And, under the facts here, such was an improper comment on Chatman's veracity. *See*, *Jones v. State*, 449 So.2d 313 (Fla. 5th DCA), *rev. den.* 456 So.2d 1182 (Fla. 1984).

(3) THE STATE OF FLORIDA WOULD NOT BRING AN INNOCENT MAN TO TRIAL.

The prosecutor also injected his personal belief into his argument when he stated:

> You know why they turned the other guy loose? I wouldn't want to drag him in here, wouldn't want to bring him in here for you, he didn't do it, didn't do anything. That's why they turned him loose. She said that the guy, may be the other guy looked something like him, but she its's that guy, not the other guy. They turned him loose. Justice was done.
>
> * * * * * * * * * *
>
> Deputy Chatman knows [i.e., the State] who did it, you know who did it.

(R-252, 253, 255)

As exemplified by *Ryan v. State*, *supra*, and *Reed v. State*, *supra* at 526, it can constitute fundamental error for the prosecutor to express his or her personal belief that the accused is guilty, and the sentiment that the State would not have brought him to trial otherwise. *See also*, *Price v. State*, 267 So.2d 39 (Fla. 4th DCA 1972), (fundamental error occurred when prosecutor stated "[the] State has no reason to bring an innocent man before you . . .").

As in *Jones v. State*, *supra*, the relative weakness of the State's case presented against Davis precludes the prosecutor's improper arguments being ruled harmless. *See also*, *Pait v. State*, 112 So.2d 380 (Fla. 1959); *Peterson v. State*, 376 So.2d 1230 (Fla.

4th DCA 1979), *cert. den.* 386 So.2d 642 (Fla. 1980). The combination of the prosecutor's improper argument and the State's tenuous case against Davis means that on the whole Davis did not receive a fair and impartial trial and that fundamental error occurred. *Jones v. State*, *supra*. Reversal of Defendant's convictions and orders of probation on the ground of fundamental error is entirely appropriate where the prosecutor destroyed the essential fairness of the trial proceeding by inviting the jury to help police fight drugs by convicting the Defendant; by vouching for the credibility of the State's only two (2) witnesses; and by indicating that the Defendant would not have been brought to trial if he was mistakenly arrested as he claimed.

POINT V

THE COMBINATION OF THE ERRORS DETAILED IN POINTS III AND IV RESULTED IN IMPROPER PREJUDICE TO DEFENDANT AND REQUIRE THE GRANTING OF A NEW TRIAL.

Even if the grounds raised in Points III and IV regarding improper judicial comment and improper prosecutorial conduct during closing argument are determined to separately constitute insufficient grounds for a reversal of Defendant's convictions and orders of probationary placement;--the Defendant hereby urges this Court to reverse due to cumulative prejudicial effect.

As this Court recognized in *Tyus v. Apalachicola Northern Railroad Company*, 130 So.2d 580, 587 (Fla. 1961), cumulative error is a proper basis for granting a new trial "if the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, a new trial should be awarded regardless of the want of objection." (original emphasis)

The test for reversing a conviction due to cumulative error remains as set forth above in *Tyus v. Apalachicola Northern Railroad Company*, *Id*. *See*, *Renney v. State*, 543 So.2d 420 (Fla. 5th DCA 1989); *Redish v. State*, 525 So.2d 928 (Fla. 1st DCA 1988); *Singletary v. State*, 483 So.2d 8 (Fla. 2d DCA 1985); *Nazareth v. Sapp*, 459 So.2d 1088 (Fla. 5th DCA 1984); *Dukes v. State*, 356 So.2d 873 (Fla. 4th DCA 1978).

Reversing Defendant's convictions on the basis of cumulative error is especially appropriate because the errors

raised herein are interrelated in the sense that the prosecutor shamelessly exploited the Court's inadvertent comment (Point III) when he told the jury in closing argument that he wouldn't prosecute an innocent man (Point IV) (R-252, 253).

Because the collective impact of the errors raised herein is so extensive that its influence pervades the trial, reversal is warranted on the basis of cumulative error.

POINT VI

THE DEFENDANT'S SEPARATE CONVICTIONS AND PUNISHMENTS FOR THE CRIMES OF SALE OF ONE ROCK OF COCAINE AND SIMPLE POSSESSION OF THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

As interpreted by the United States Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) the double jeopardy clause of the Fifth Amendment embodies three (3) protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; (3) protection against multiple punishments for the same offense. The double jeopardy clause of the U.S. Constitution is enforceable against the states through the Fourteenth Amendment. *Benton V. Maryland*, 395 U.S. 784 (1969).

In light of Supreme Court cases such as *Missouri v. Hunter*, *supra* and *Garrett v. United States*, 471 U.S. 773 (1985) the Defendant acknowledges that the weight of authority is that the exclusive definition of the term "same offense" in the federal double jeopardy clause is provided by *Blockburger v. United States*, *supra*. Under a strict *Blockburger* test, the critical inquiry is concerned solely with the statutory elements of the offenses charged.

Recently, the United States Supreme Court in *Grady v. Corbin*, 110 S.Ct. 2084 recognized that a technical comparison of the elements of the two (2) offenses, as required by *Blockburger*, did not protect the defendant sufficiently from the burdens of

multiple trials, and thus the *Blockburger* test could not serve as the sole means of determining whether a subsequent prosecution violates the Fifth Amendment. The Court went on to hold that the Fifth Amendment barred subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government would have to prove conduct that constitutes an offense for which the Defendant has already been prosecuted. *Id.* at 2087.

In this issue, the Defendant argues for a good faith extension of *Grady v. Corbin*, *Id.* in order to likewise recognize that use of the *Blockburger* test as the exclusive means of determining whether multiple convictions and punishments can be imposed in a single trial setting, without regard to the Defendant's underlying conduct, does not adequately protect Defendant against multiple punishments for the "same offense".

If exclusive reliance upon the *Blockburger* test is inadequate to vindicate the Double Jeopardy Clause's protection against multiple prosecutions, for the "same offense", in the absence of examining the underlying conduct of the accused, strict reliance upon the *Blockburger* test is also inadequate to define the term "same offense" for the purpose of protecting citizens from multiple punishments in a single trial setting. Therefore, this Court should reverse the Defendant's conviction for simple possession and remand the cause for sentencing because his conviction and punishment violate the Fifth Amendment to the U.S. Constitution.

CONCLUSION

Based upon the foregoing arguments and authorities, the following relief is respectfully requested. As to Points I, II, and VI, this Court should reverse his conviction for simple possession of cocaine, and remand the cause for sentencing. As to Points III, IV and V, the Defendant requests that his convictions and orders of probationary placement be vacated and the cause remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to DAVID S. MORGAN, ASSISTANT ATTORNEY GENERAL, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 on this 19th day of November, 1990.

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