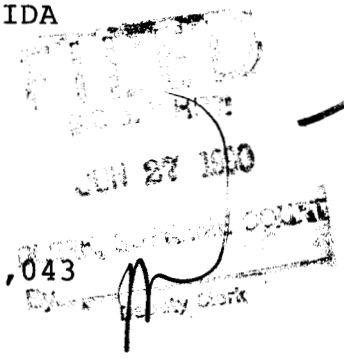
IN THE SUPREME COURT OF FLORIDA



STEVE ANTON DAVIS,

Petitioner,

vs. CASE NO. 76,043

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Petitioner, STEVE ANTON DAVIS, stands convicted and sentenced for two (2) statutory offenses i.e., Delivery of a Controlled Substance (a second degree felony under Fla. Stat. §893.13(1)(a)1 and Possession of a Controlled Substance (a third degree felony under Fla. Stat. §893.13(1)(f)) stemming from a drug sale whereby an undercover agent was handed, at one time and one place on August 25, 1988, a single piece of crack cocaine. (R310,311,317)

In Petitioner's direct appeal from those convictions and sentences, the Fifth District issued an opinion in Davis v. State, 15 FLW D880 (Fla. 5th DCA April 5, 1990), rehearing denied May 15, 1990. The majority opinion rejected Petitioner's claims that his separate convictions and sentences violated his double jeopardy right to protection from multiple punishments for the "same offense" as secured by Art. I, §9 of the Fla. Const., or, alternatively, the Fifth Amendment to the U.S. Constitution. In affirming Defendant's separate convictions and punishments, the court majority acknowledged its decision was in conflict with V.A.A. v. State, 15 FLW D672 (Fla. 2d DCA March 9, 1990) on the question of whether Fla. Stat. §775.021(4)(b) (Supp. 1988) will permit multiple punishments for the sale and possession of a single quantum of cocaine. Id. at 881.

On May 21, 1990, Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction, accompanied by the requisite filing fee.

SUMMARY OF ARGUMENT

Discretionary review of the case sub judice is appropriate and warranted where the Second District in V.A.A. v. State, 15 FLW D672 (Fla. 2d DCA March 9, 1990); State v. McCloud, 15 FLW D723 (Fla. 2d DCA March 14, 1990), review pending Case No. 75,975; and Crisel v. State, 15 FLW D1401 (Fla. 2d DCA May 18, 1990) has considered the legal issue of whether Fla. Stat. §775.021(4)(b) (Supp. 1988) will allow separate convictions and sentences for sale (or delivery) and possession of the same quantum of a controlled substance in the context of a hand-to-hand transaction--and reached a diametrically opposite conclusion from the Fifth District Court of Appeal. Accordingly, this Court should exercise its discretionary jurisdiction pursuant to Art. V, §3(b)(3) of the Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS IN V.A.A. V. STATE, 15 FLW D672 (FLA. 2D DCA MARCH 9, 1990); STATE V. MCCLOUD, 15 FLW D723 (FLA. 2D DCA MARCH 14, 1990), REVIEW PENDING CASE NO. 75,975; AND CRISEL V. STATE, 15 FLW D1401 (FLA. 2D DCA MAY 18, 1990), THEREBY PERMITTING THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW JURISDICTION PURSUANT TO ART. V., §3(b)(3) OF THE FLA. CONST., AND FLA. R. APP. P. 9.030(a)(2)(A)(iv).

The Petitioner submits that the decision of the Fifth District Court of Appeal in the instant case applies a rule of law to produce a different result than reached by the Second District Court of Appeal in cases such as V.A.A. v. State, supra; State v. McCloud, supra; and Crisel v. State, supra on substantially the same controlling facts.

Discretionary review of State v. McCloud, is now pending before this Court in Case No. 75,975.

The question of law shared by the case sub judice and the aforementioned decisions out of the Second District Court of Appeal is whether Fla. Stat. §775.021(4)(b) (Supp. 1988) will permit separate convictions and sentences for the simultaneous sale (or delivery) and possession of a single quantum of a controlled substance for offenses occurring on or after July 1, 1988.

In each of the aforementioned post-Carawan[1] cases, the Second District Court of Appeal has taken the position that the 1988 Amendment to §775.021 prohibits dual convictions and sentences for sale (or delivery) and possession of the same quantum of contraband since possession is a lesser offense falling within the third "subsumed elements" category of §775.021(4)(b). Accordingly, in each case, the defendants' separate convictions for possession were either reversed or the trial court's action of dismissal was upheld on appeal by the State.

However, in the case sub judice, the Fifth District affirmed Petitioner's separate conviction and sentence for having possessed the same piece of crack cocaine delivered on August 25, 1988 to the undercover agent. In its opinion, the Fifth District concluded that §775.021(4)(b) (Supp. 1988) will permit separate convictions and sentences for the crimes of delivery and simple possession of the same quantum of cocaine, and specifically rejected the Second District's statutory and legislative intent analysis of §775.021(4)(b)3. Moreover, the Fifth District specifically acknowledged conflict with V.A.A. v. State, supra.

Because the legal issue is the same and the controlling facts too close to reasonably produce or justify such different applications of §775.021(4)(b)3 (Supp. 1988), this Court should

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[1]Carawan v. State, 515 So.2d 161 (Fla. 1987); See, State v. Smith, 547 So.2d 613 (Fla. 1989), (the amended version of §775.021 applies to crimes occurring on or after July 1, 1988, whereas the "Carawan" analysis applies to crimes committed prior to July 1, 1988.)

grant discretionary review pursuant to Art. V, §3(b)(3) of the Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

CONCLUSION

Based on the foregoing, the Petitioner requests this Court to exercise its discretionary review herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to ASSISTANT ATTORNEY GENERAL, DAVID S. MORGAN, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 on this 26th day of June, 1990.

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