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**IN THE FLORIDA SUPREME COURT**

**STATE OF FLORIDA,**  
**Petitioner,**

**v.**

**Case No. 77,414**  
**2ND DISTRICT NO. 90-01506**

**CESAR ANTWON JAMES,**  
**Respondent.**

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**REVIEW OF THE DECISION OF THE  
DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA**

**PETITIONER'S BRIEF ON THE MERITS**

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PRELIMINARY STATEMENT

The STATE OF FLORIDA will be referred to as the "Petitioner" in this brief and the CESAR ANTWON JAMES, will be referred to as the "Respondent".

NOTICE OF SIMILAR CASES

Presently, there are two cases pending before this Court that present the identical following 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.

State v. V.A.A., Fla. S.Ct. #75,902; State v. McCloud, Fla. S.Ct. #75,975.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts as stated in Respondent's brief filed in the Second District Court of Appeals, and they are as follows:

On August 22, 1989, the State Attorney for the Sixth Judicial Circuit in and for Pinellas County, Florida, filed an information charging Appellant [Respondent], CESAR ANTWON JAMES, with Count 1, sale of cocaine to another person in violation of section 893.13, Florida Statutes (1987), and also with Count 2, possession and control of a certain controlled substance, to-wit: Cocaine. (R-1) At the time of the entry of the plea, prior to the entry of the plea, the attorney for Appellant [Respondent] made an oral motion to dismiss Count 2 which the trial court denied. (R-33)

The Appellant [Respondent] then went ahead and plead both counts reserving the rights to appeal the denial of the motion to dismiss as to count 2. (R-17) The Appellant [Respondent] timely filed his Notice of Appeal on May 9, 1990. (R-25)

On August 3, 1989, at 3455 14th Avenue South, St. Petersburg, Florida, Detective K. M. Shelley of the St. Petersburg Police Department purchased from the Appellant [Respondent] crack cocaine and proved positive. The detective was able to identify and verify the defendant's identity. A *capias* was subsequently issued (R-7) and the defendant was arrested upon the *capias*. (R-11)

Respondent filed his brief on October 11, 1990. Petitioner filed its brief on the 14th day of November, 1990.

On February 1, 1991, the Second District Court of Appeal issued its opinion and it is as follows:

We affirm appellant's conviction and sentence for one count of sale of cocaine. We vacate the conviction and sentence for

possession of cocaine on the authority of V.A.A. v. State, 561 So.2d 314 (Fla. 2d DCA 1990). As in V.A.A. v. State, we certify to the Florida Supreme Court the following question of great public importance:

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.

On the 5th day of February, 1991, the State of Florida filed a Notice to Invoke Discretionary Jurisdiction of this Court asserting that the Second District Court's decision passes upon a question certified to be of great public importance. Simultaneous with the submission of the notice to invoke discretionary jurisdiction, the State filed a Motion to Stay Issuance of Mandate in the Second District Court. This motion was denied on February 21, 1991. In response, the State filed with this Court a Motion to Stay Lower Court Proceedings on February 22, 1991.

### SUMMARY OF THE ARGUMENT

Respondent was charged with sale and possession of cocaine in one information occurring on August 3, 1989. Carawan v. State, 515 So.2d 161 (Fla. 1987), is applicable to crimes occurring before the effective date of Chapter 88-131, Section 7, Laws of Florida, but not to crimes occurring after that date. State v. Parker, 551 So.2d 1209 (Fla. 1989); State v. Smith, 547 So.2d 613 (Fla. 1989). The effective date of chapter 88-131, Laws of Florida, is July 1, 1988. Carawan has been overridden for offenses occurring after July 1, 1988, the effective date of Chapter 88-131, Section 7. As recognized by this Court in State v. Burton, 555 So.2d 1210 (Fla. 1989), the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

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.

Respondent was charged with both possession, and sale and delivery of cocaine, via the same information. These offenses occurred on August 3, 1989. However, in State v. Smith, Gordon, et. al., 547 So.2d 613 (Fla. 1989) the Supreme Court held that the its decision in Carawan v. State, 515 So.2d 161 (Fla. 1987) has been overridden for offenses that occurred after the effective date of Chapter 88-131, Section 7, i.e. July 1, 1988. Section 775.021, Florida Statutes (1988). Accordingly, Carawan does not apply to the offenses which occurred on August 3, 1989, and separate convictions are appropriate for both sale and possession of cocaine.

In amending Section 775.021(4), the legislature declared the crimes of possession and sale of an illegal drug separate offenses. 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.

The First District Court, the Fifth District Court, and Judge Parker of the Second District have authored opinions which have concluded that there is no double jeopardy bar to dual convictions for both sale and possession of the same contraband. In St. Fabre



v. State, 548 So.2d 797 (Fla. 1st DCA 1989), the court found that possession of cocaine and sale of cocaine constitute separate offenses for double jeopardy purposes, even when they are both predicated on the same act or transaction. Sub judice, as in St. Fabre, the defendant was charged with violating two separate subsections of the statute and, since possession of cocaine is not a necessarily lesser included offense of sale of the same cocaine, his double jeopardy claim must fail. In Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990) the Fifth District Court affirmed the defendant's conviction and sentence for two statutory offenses: possession of a controlled substance (a third degree felony under Section 893.13(1)(f)), and delivery of a controlled substance (a second degree felony under Section 893.13(1)(a)(1)). In Davis, the Appellant, pursuant to a negotiated drug deal, handed an undercover officer one piece of crack cocaine and in Davis, the court recognized that possession is not required for a sale and a sale is not required to possess contraband. In fact, in Carawan, the this Court recognized that: ". . . Sale of drugs can constitute a separate crime from possession. . ." Id. at 176.

In Crisel v. State, 561 So.2d 453 (Fla. 2d DCA 1990), Judge Parker's concurring opinion sets forth a detailed analysis supporting his conclusion that there can be dual convictions for both the sale and possession of the same illegal drug under the amended statute, Section 775.021.

In Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1981), approved, 447 So.2d 219 (Fla. 1984), the Supreme Court specifically

stated that possession is not an essential aspect of sale, and in Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979), cert. denied, 376 So.2d 76 (Fla. 1979), this Court reversed a conviction for possession of marijuana for insufficient evidence, but let stand a conviction for sale of the same drug. In addition, it is not a necessary element of delivery that the State prove possession, State v. Daophin, 533 So.2d 761, 762 (Fla. 1988).

Separate evils have been addressed in the legislature's proscriptions in Section 893.13, Florida Statutes. The statutory provision prohibiting possession of a controlled substance is aimed at punishing the individual possessor for his criminal activity which does not directly or necessarily involve persons other than the perpetrator. Sale necessarily includes the involvement of the citizens and the legislature has a legitimate interest in punishing not only those engage in private, personal illegal conduct, but who also seek to include the participation of others in the society in proscribed conduct.

Section 775.021(4), Florida Statutes, provides that whoever commits several offenses shall be sentenced separately for each. 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." Since sale does not necessarily include the element of possession, separate convictions and sentences are appropriate. Pursuant to Section 775.021, in the absence of an applicable exception, a defendant who commits an act which constitutes more than one offense shall, where each offense

requires proof of an element that the other does not, be convicted and sentenced for each offense. The legislature may permissibly decide to punish separately those who seek to involve others persons in illegal activity as well as those who individually engage in proscribed conduct. Accordingly, the lower court erred in concluding that the double jeopardy clause would be violated by virtue of dual convictions for both sale and possession of cocaine.

The principle of double jeopardy as espoused in the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, is intended to protect individuals against a second prosecution after an acquittal, a second prosecution after conviction and multiple punishments for the same offense. See, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The first two considerations are not applicable here. In the case sub judice we need only consider double jeopardy in the context of multiple punishments for the same offense. In this context the test outlined in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), requires only that each offense contain an element that the other does not. The requirement of Blockburger v. United State, *supra*, is the same requirement outlined in Section 775.021(4). This Court need look no further than the statutory elements when dealing with the issue of double jeopardy in a single prosecution and on the issue of multiple punishments.

In Porterfield v. State, 567 So.2d 429 (Fla. 1990) this Court held that separate convictions and sentences for possession of

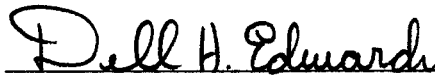
cocaine and sale of cocaine were not authorized because the convictions were based on incidents which occurred prior to July 1, 1988, the effective date of Chapter 88-131.

**CONCLUSION**

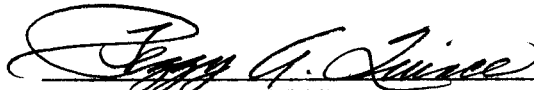
WHEREFORE, based on the foregoing reasons, arguments, and authorities, Petitioner respectfully requests this Court to reverse the decision of the Second District Court of Appeal, approve the rationale set forth by Judge Parker, and the First and Fifth District Court of Appeals, and clearly authorize dual convictions for both the sale and possession of cocaine.

Respectfully submitted,

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**COUNSELS FOR PETITIONER**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, has been furnished by U.S. Mail to J. MICHAEL RYON, ESQ., 5124 Trouble Creek Road, New Port Richey, Florida 34652, this 27th day of February, 1991.

*Dell H. Edwards*

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