IN THE SUPREME COURT OF FLORIDA,

DANIEL GIBBS,

Appellant

v.

STATE OF FLORIDA,

Appellee.

Case No. 88,409

. . . . . .

ON PETITION FOR **DISCRETIONARY** REVIEW
BASED ON **CONFLICT**

****

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZOROSA
Assistant **Attorney General**
Florida **Bar #441510**

CAROL COBOURN ASBURY
Assistant Attorney General
Florida Bar No.: 0393665
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(407) 688-7759

Counsel for Respondent

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellee certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable LARRY SCHACK
Circuit Court Judge, Seventeenth Judicial Circuit
(trial judge)

2. **CAROL** COBOURN ASBURY, Assistant Attorney General
Office of the Attorney General, State of Florida
Robert Butteworth, Attorney General
(appellate counsel for State/Appellee)

3. LOU STERN, Assistant State Attorney(s),
Office of the State attorney, Seventeenth Judicial Circuit
Michael J. Satz, State Attorney
(trial counsel for State/Appellee)

4. **DANIEL GIBBS**
(defendant/Petitioner)

5. FREDERICK KAUFMAN,
(trial counsel for defendant/Petitioner)

6. ELLEN MORRIS, Assistant Public Defender
Office of the Public Defender, Fifteenth Judicial Circuit
Richard Jorandby, Public Defender
(appellate counsel for defendant/Petitioner on first appeal)

7. Jonathan Jay Kirschner
Counsel For Defendant
(Appellate counsel for defendant's second appeal)

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ..... - ii -

TABLE OF CONTENTS ..... - iii -

TABLE OF AUTHORITIES ..... iv -

PRELIMINARY STATEMENT.. ..... - v -

STATEMENT OF THE CASE AND FACTS ..... - 1 -

SUMMARY ARGUMENT ..... - 9 -

ARGUMENT ..... - 10 -

Petitioner's DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED BY HIS DUAL CONVICTIONS OF POSSESSION OF COCAINE AND TRAFFICKING IN COCAINE WHERE THE CONVICTIONS ARISE OUT OFDIFFERENT EVIDENCE ..... 10 -

CONCLUSION ..... - 19 -

CERTIFICATE OF SERVICE ..... - 19 -

TABLE OF AUTHORITIES

Cases Cited — Page Number

Simmons v. State, 634 So. 2d 153 (Fla. 1994) ..... - 11 -

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 304 L.Ed. 2d 306 (1932) ..... - 9 -

Carawan v. State, 515 So. 2d 161 (Fla. 1987) ..... 16 -

Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979). ..... 17 -

v. State, 626 So. 2d 1364 Fla. 1993) ..... - 13 -

Gibbs v. State, 21 Fla. Law Weekly D1414 (Fla 4th DCA June 19,1996) ..... - 10 -

Jackson v. State, 418 So. 2d 456 (Fla. 4th DCA 1982) ..... 16 -

Johnson v. State, 538 So. 2d 553 (Fla. 2nd DCA 1989) ..... 16 -

Lundy v. State, 596 So. 2d 1167 (Fla. 1st DCA 1989) ..... 16 -

Peterson v. State, 645 So. 2d 1028 (Fla. 4th DCA 1994) ..... 11 -

State v. McCloud, 577 So. 2d 939 (Fla. 1991). ..... - 11 -

State v. Smith, 547 So. 2d 613 (Fla. 1989). ..... 16 -

United States v. Shaid, 730 F. 2d 225 (5th Cir. 1984) ..... 9 -

W.B.M. v. State, 452 So. 2d 659 (Fla. 3rd DCA 1984) ..... 16 -

Statutes Cited

Section 775.021(4)(b), Florida Statutes ..... - 12 -

PRELIMINARY STATEMENT

Respondent was the prosecution and petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin, Florida.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

AB = Petitioner's Initial Brief

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitia er, Daniel Gibbs, was charged by an Information alleging in Count I, trafficking in cocaine on April 10,1991 by knowingly having in his actual or constructive possession twenty-eight (28) grams or more but less than two hundred grams of cocaine or any mixture thereof, Count 11, possession of drug paraphernalia, Count 111, assault on a law enforcement officer, Count IV, refusal to sign a citation, and Count V, possession of cocaine. R 53-55,917-918. A jury trial was held on December 3, 1991.

Deputy Sal Rastrelli works for the Martin County Sheriffs Office. R 215. On April 10,1991 he was working on road patrol on 1-95. R 217. At about 8:30 in the morning he was running radar on a BMW on the north side of the Hobe Sound overpass. R 219. He clocked the speed of the vehicle as 76 miles per hour. R 220. Deputy Rastrelli is required to keep a log and ticket number in case any one wants to challenge a speed or a ticket. R 228. The log was published to the jury showing the location of the Petitioner's vehicle, the tag number, the speed of the vehicle and the posted speed on the road and all the internal tests and the ticket number. R 229.

Rastrelli turned onto 1-95 to pursued Petitioner and began to pace the vehicle. R 230. The vehicle slowed down considerably and Rastrelli could see Petitioner waving his arms about frantically in the car. R 230. Petitioner then pulled abruptly off the road before Rastrelli turned on his blue lights to initiate a traffic stop. R 230. Rastrelli pulled in behind the Petitioner. R 230. Petitioner jumped out of the car and began waiving his arms and cursing and screaming at Rastrelli. R 231,235. Rastrelli tried to calm him down by telling Petitioner that all he wanted to do was see he driver's license so that he could write a ticket. R 235. Petitioner handed Rastrelli his driver's license. R 235. Petitioner then turned and opened the trunk of the car and said, "Go ahead and search it, I know that's

what you want to do." R 235. Rastrelli declined stating that all he wanted to do was write a ticket. R 235-236. The Petitioner's license was found to be suspended. R 236. Rastrelli informed Petitioner that he was under arrest for driving with a suspended license. R 236. Petitioner resisted arrest, R 236. Petitioner was handcuffed and placed in the back of the patrol car. R 236.

Petitioner had a wallet in his hand and a piece of paper and cellophane "clenched" in his hands. R 236,237. Rastrelli took the wallet and put it in Petitioner's front shirt pocket. R 237. He had some difficulty getting Petitioner to relinquish the paper and cellophane but eventually got that out of Petitioner's hand too. R 237. This later turned out to have cocaine residue on it.

There was nobody else in the BMW with the Petitioner. R 239.

Rastrelli wrote a speeding ticket to Petitioner. R 242. Petitioner refused to sign the speeding ticket. R 242. Petitioner continued to be belligerent. R 243. Petitioner refused to signed the ticket for driving with a suspended driver's license also. R 243.

Deputy Moore arrived on the scene. R 255. A search incident an arrest for inventory purposes commenced. R 257. Deputy Moore began on the passenger side of the car. He called Rastrelli's attention to an area under the rug on the passenger side about a six inches by six inches square cut out and about two inches deep. R 258. Both recognized it has an area where drugs or contraband are usually concealed. R 258. There was a screwdriver under the seat and a heavy scent in the car. The cut out area, the screwdriver and the heavy scent indicated an attempt to conceal drugs. R 258. After seeing this, both Deputy Rastrelli and Deputy Moore were inclined to believe there was contraband in the vehicle. R 258.

Deputy Moor went to the rear seat of the vehicle to commence a search of that area. R 259. In the center of the rear car seat was an arm rest that folds down. R 259.

Deputy Moore reached down where the arm rest was in the center. R 259. There is a vinyl flap there. R 259. Behind the flap, Deputy reached down and produced a white bag, a paper bag. R 260. Inside the bag was a cellophane wrapped object. R 260. What looked like Bounty type fabric softener was inside the bag. This is also indicative of drugs. R 260. Inside the fabric softener was two ziploc type bags, R 260. Inside the two ziplock bags was cocaine. R 261. The Petitioner was informed that he was under arrest at that point for trafficking in cocaine. R 261. It was later marked as Exhibit 1.

The cellophane that was in the Petitioner's hand was placed in a separate bag. R 261. This was later marked as Exhibit 21.

Photographs of the car and evidence were admitted into evidence. R 264-268. Picture 7 and 8 were of the back seat arm rest where the cocaine was hidden. Picture 6 and 9 were of the cocaine wrapped in fabric softener.

Duck tape was found in the car, this is usually used to conceal narcotics if it has been put in a fabricated hole like the one found in Petitioner's car. R 271. A radar detector was on the dashboard of the BMW. R 272-276.

After Petitioner was placed under arrest and put in the patrol car he made some statements to Rastrelli. R 286. These statements were made after Rastrelli returned to inform Petitioner that he was under arrest for trafficking in cocaine. R 287. Petitioner said, "Huh-uh, you planted that. I saw you take something out of your [shirt] pocket and throw it in the car." R 287. Several minutes later Petitioner changed his story and said that it came out of Rastrelli's pant's pocket. R 287. It was obviously too big a bag of cocaine to have come out of Rastrelli's shirt pocket. R 287.

At the point that Rastrelli arrested Petitioner for trafficking in cocaine, Petitioner also made

a statement that if he was toting cocaine it would have been chunk and not powder shit. R **289.** At that point the Petitioner had not seen the contents of the bag of cocaine which was closed up so that he had no way of seeing through the paper and wrapping. R **289.** There was no way he would have known that there was powder in that bag that was found in the back seat of the car. R **290.**

On the way to the jail Petitioner said, "I thought it was you, but I've been having trouble with the car lately." Petitioner works on the car and keeps the car at his residence. Petitioner said that he had been having trouble with the car, motor problems and wiring problems. Petitioner said that he thinks a neighbor was out to get him and that must have been where the cocaine came from. R **288.**

Petitioner specifically said that he kept the vehicle at his residence. R **288.**

On cross examination, Rastrelli testified that the registration indicated that the owner **of** the vehicle was one Antonio Ovietto. R **303.** It was not until the Petitioner was out of the car that Restrelli saw the cellophane and the white paper in Petitioner's hand. R **304.** The crumpled up paper and cellophane did not have any meaning to him. R 305. It was discovered that Petitioner's license was suspended indefinitely. R **307.**

On cross examination, Rastrelli testified that in 1990, Thanksgiving 1990 he recalled stopping Petitioner in the same **1979** BMW vehicle on I-95. R **319.** It was a holiday weekend. R **320.** Petitioner was driving. R **320.** Petitioner was stopped for following too closely in a pack of cars -- he was bumper to bumper with another car. R **320.** Rastrelli got Petitioner's license. R **323.** Rastrelli gave Petitioner a verbal warning. R **323.** Petitioner told Rastrelli at that time that he used to traffic in drugs but did not do it any more. R **323-324.** Another patrol car drove up. R **324.** Petitioner and Rastrelli went to the back of the vehicle to talk. The passenger got out and joined

them. R **324.** The passenger was very nervous -- shaking his arms, his **legs,** he seemed to be very, very nervous for no apparent reason. R **325. A** dog sniffed the car. Nothing was found. Petitioner said, "See, I told you, there is nothing there. I don't **do** that any more." R **327**

The bag of cocaine weighed 151 grams. **R 340.**

On redirect, Rastrelli again testified that he stopped the Petitioner on Thanksgiving weekend in November, 1990 in the same car he was driving on April 10,1991. R **346.**

Robert Parsons, Jr. testified as a forensic chemist with the Regional Crime Lab in Fort Pierce. R **356.** The paper from Petitioner's hand, State's Exhibit **21,** tested positive for cocaine. R **362.**

The substance found in the paper bag, State's Exhibit 1, found in the car also tested positive for cocaine. This was a large amount of powdered cocaine. R **363-364.** The weight of the cocaine found in the car was 151 grams. R **365.**

Deputy Moore testified that he assisted Deputy Rastrelli, who was having problems with Petitioner . R **370.** Deputy Rastrelli's patrol car was parked behind Petitioner's blue colored BMW. R **371,** Moore and Rastrelli searched the car. R **372.** Moore found **a** cut out area on the floor of the front passenger seat. R 372-373. Moore peeled back the carpet and found a cut out cavity under the carpet. R **273.** Next to the gear shift lever was a can of scent. R **373.** In his experience this **was** used to mask the order of contraband. R **374-375.**

Moore then began searching the back seat of the luxury BMW. R **376.** He noticed that the bench seat in the back was not securely clamped to the floor of the luxury BMW. R **376.** Deputy Moore then looked at back flap of the back seat center arm rest, which could be pulled forward to reveal the inner upholstery of the back seat. R **377.** There he found a bag which smelled like laundry detergent. R **378.** Within the paper bag was a double layer ziploc plastic bag that **was** wrapped up

in Bounce or some other brand of fabric softener sheets. R 379. Inside that was a lump of white powder substance which looked like cocaine. R 379. Field tested positive for cocaine. R 380.

After the state rested the defense counsel moved for a Judgment of Acquittal. R 393. He argued that the State had failed to prove knowledge on the part of Petitioner in regard to the drugs found in the back seat of the vehicle. R 393. Defense counsel conceded that Petitioner was the only person present at the time of the stop. R 394. Defense counsel argued that other people had access to the car. R 396,402. Another person owned the car. R 402.

Defense counsel also argued that judgment of acquittal must be granted as to the cocaine found in the hands of Petitioner, Count V, because traces of drugs are prevalent on commonly used items. R 397. As to Count V, Possession of cocaine, the trial judge held that there was a prima facie case for actual possession of the item that was in Petitioner's hand and had traces of cocaine on it. R 397.

The State argued that there is no evidence that this is a joint constructive possession case. R 403. This is a single possession case. Knowledge may be inferred by and may be proved by direct or circumstantial evidence. R 403-404. The circumstantial evidence shows that Petitioner was in the sole possession of the car at the time of the traffic stop; there is no evidence that the owner, dead or alive, was in possession of the car or had access to the car; Petitioner also possessed the car in November, 1990, when he was stopped for another traffic violation. R 404.

In addition, Petitioner's statements to Rastrelli indicated that he had direct knowledge of the drugs in the back set of the vehicle. R 404. He gave a number of explanations for the existence of the cocaine: (1) First he said the Rastrelli took it out of his shirt pocket, (2) then he said that Rastrelli took it out of his pants pocket, and (3) finally he said that someone else put it there. Petitioner also

told Rastrelli that if he was trafficking in cocaine it would be chunk cocaine not powder cocaine. This proves Petitioner consciousness of guilt since he could not have seen that the cocaine in that back seat was powdered cocaine, therefore, he had to have known that it was powdered cocaine. R 405.

The trial court held as follows:

> And if you will look at all the evidence, again not dealing with the issue of credibility because that's what the jury must decide, or of weight, but in dealing with just the evidence that's been introduced to see if there is a prima facie case here for constructive possession. And looking at everything, there is the testimony concerning the fact of being a former trafficker, but not being a trafficker currently. If the jury believes that, they could believe that the -- that your client knew what cocaine would look like. Second, there is the can of scent. Third, there was the testimony of belligerence. In addition, we have a bit of a different situation from MWW in that in this case if the jury believes the testimony, they will also have testimony concerning actual possession of some cocaine residue in your client's hand as testified to by the officer. In addition there are the statements in evidence, again this is all testimony, I'm not placing -- making any weight determination. But the testimony about the differing statements about who might have planted the cocaine, or it if was planted by the deputy, where he received it from.
>
> Also, the testimony about the 1990 traffic stop really cuts two ways, it's a two edged sword. First of all, it does obviously play into the Defense's theory of the case and gives the Defense the ability to argue that theory. But second of all, it places Mr. Gibbs in possession of the vehicle on more than one occasion, There was also testimony that Mr. Gibbs apparently had the car at his house and did electrical work on the car.
>
> And without question, the strongest piece of evidence dealing on the constructive possession issue and the question of knowledge is the statement if believed by the jury that if he were going to traffic in that stuff that it would not be powder, it would be chunk. And the fact of the, I should say the testimony of the officer that at least at this point there has been no testimony that Mr. Gibbs would of had the ability to see the item before making that statement.
>
> So in looking at the totality of all the evidence, I think there is evidence here that distinguishes this situation from your usual constructive possession case where there is nothing but either two

individuals in a location with hidden drugs, or the MWW situation where you had one person who had been at least at some point in joint custody.

So, I will deny the Motion as it relates to Count I trafficking.

In addition, as it related to Count II, I'm reviewing the knowledge question that same way since basically we're talking about the same situation of the same items tucked away behind the arm rest in the rear seat.

R 406-408.

SUMMARY ARGUMENT

The Fourth District Court of Appeal did not err in holding that a defendant may be convicted of both simple possession and trafficking in cocaine without violating the dictates against double jeopardy based on this Court's ruling in State v. McCloud 577 So. 2d 939 (Fla. 1991). Even if this Court were to reverse itself, the petitioner would still be convicted of the two crimes as each criminal incident arose from different facts.

"Multiplicity" is the charging of a single offense in more than one count. "The test for determining whether the same act or transaction constitutes two offenses or only one is whether conviction under each statutory provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 304 L.Ed. 2d 306 (1932). Nevertheless, "[w]hether a continuous transaction results in the commission of but a single offense or separate offenses . . is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed." United States v. Shaid, 730 F. 2d 225, 23 1 (5th Cir. 1984). In the instant case, the simple possession count arose out of the fact and evidence of the cocaine laced cellophane wrapping taken from Petitioner's hand after he was arrested and the trafficking count arose out of the package of cocaine wrapped in fabric softener hidden behind the flap of the back seat arm rest. Petitioner denied any knowledge of the package of cocaine found in the back seat of his vehicle. The counts are not multiplicious since the elements and facts of each substantive count are different from those of the other count charged. Where there is separate evidence of the two offenses, the offenses have not merged under the "Different Evidence Test.

ARGUMENT

Petitioner's DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED BY HIS DUAL CONVICTIONS OF POSSESSION OF COCAINE AND TRAFFICKING IN COCAINE WHERE THE CONVICTIONS ARISE OUT OF DIFFERENT EVIDENCE

In the instant case, the Petitioner was charged and convicted of possession of cocaine for the cellophane wrapper residue recovered from his hand after he was arrested. Petitioner was also charged and convicted of trafficking in cocaine for the 15 1 grams of powdered cocaine found in plastic bags wrapped in fabric softener sheets hidden in the back of the back seat arm rest. Petitioner argues that his double jeopardy rights were violated for the dual convictions. Petitioner contends that he cannot be convicted of the two offenses based upon contemporaneous possession of contraband of a given kind. He does not argued that the cocaine on the cellophane and the package of cocaine found behind the flap of the back seat arm rest were the same cocaine.

Respondent will proceed based on two theories. First, Respondent agrees with the majority's opinion and reasoning set forth in Gibbs v. State, 21 Fla. Law Weekly D1414 (Fla 4th DCA June 19, 1996). In other words, no double jeopardy violation arises from separate convictions and punishments for offenses of trafficking in cocaine and simple possession of the same cocaine. Second, petitioner could be convicted of these two separate and distinct acts of possession. One, the cocaine found on the cellophane wrapper clutched in his fist, discover in the course of placing him in handcuffs; two, for the trafficking amount found in baggies wrapped in fabric softener sheets hidden in the back seat of the car. There is no evidence that the two are related. That, together with the petitioner's statements, and his defense, denying knowledge of the secreted stash in the back seat, while at the same time acknowledging concealment of the cellophane wrapper in his hand, distinguish

this case from the cases relied upon by the petitioner. [See, Judge Stone's opinion, concurring in part and dissenting in part]

The Fourth District Court of Appeal wanted this Court to consider the certified question, therefore, it assumed that the two quantities of cocaine were from a common source. The Fourth District Court acknowledged that there was no evidence supporting the petitioner's contention on appeal that the cocaine in the cellophane was originally part of the cocaine in the ziplock bags. [See, Gibbs, at D1418 n.l.] The State argued that the cocaine in the cellophane found on the wrapper clutched in the petitioner's hand was not the same cocaine as found in the baggie wrapped in fabric softener sheets hidden in the back seat of the car. The evidence supports the State's contention. At trial, the petitioner proceeded on a defense that he lacked any knowledge of the cocaine found in the back seat of his vehicle. Petitioner's lack of knowledge defense presented at trial is in direct conflict with the theory now that the cocaine in the cellophane came from the cocaine in the two baggies found in the back seat of the car. Moreover, the cocaine in the back seat was not individually wrapped in cellophane.

Nevertheless, the Fourth District Court's en banc decision is correct. A defendant may be convicted of trafficking in cocaine and simple possession of the same cocaine without violating the dictates against double jeopardy. *See,* Peterson v. State, 645 So. 2d 1028 (Fla. 4th DCA 1994) (sale, delivery or possession of cocaine with the intent to sell and possession of cocaine does not violate the double jeopardy prohibition where the evidence at trial was that the defendant sold a cocaine rock to an undercover officer which he had obtained from a codefendant who took it from a vial containing 32 cocaine rocks.); State v. McCloud, 577 So. 2d 939 (Fla. 1991). The Fourth District Court of Appeal distinguished Sirmons v. State, 634 So. 2d 153 (Fla. 1994) from the present case. The Fourth

DCA stated, "The Sirmons line of cases do not cite, refer to, or rely on the McCloud line of cases dealing with drug violations. Neither does Sirmons purport to overrule or recede from McCloud. We thus have no reason to believe that Sirmons was intended to be an expression of the double jeopardy consequences of multiple drug convictions and punishment. Respondent agrees with the analysis of the Fourth DCA:

> As the [Supreme Court] did in the cases discussed, we look too the legislative expression of intent to determine whether crimes are separate, on the one hand, or essentially degrees or lesser included offenses of a single crime. Section 775.021(4)(b) provides:
>
> (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.
>
> Plainly, the two offenses in this case each contain an element that the other lacks. The trafficking possession of cocaine statue requires a knowing intent to possess more than 28 grams but less than 400 grams of cocaine. The simple possession statute requires mere possession of any controlled substance.
>
> The question this presented is whether simple possession of a controlled substance is a necessarily included lesser

> offense -- i.e. one whose elements are subsumed by the greater offense -- of trafficking possession of cocaine. Significantly, the Florida Standard Jury Instructions for criminal cases list no necessarily included lesser offenses for the crime of trafficking possession of cocaine. Hence the question is answered in the negative, from which it follows that there is no double jeopardy violation from separate convictions and punishment for the offenses of trafficking possession of cocaine and simple possession of a controlled substance.

Based on the cogent reasoning by the majority in the Fourth District Court's en banc decision in Gibbs this Court must affirm the conviction and sentence of the petitioner by answering the certified question in the affirmative: A person may be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine

This case does not turn on the answer to this question if this Court determines, as the State has maintained from the beginning, that the cocaine found on the cellophane clenched in the petitioner's hand did not come from the cocaine found in the back seat of the vehicle. The State maintains that under the "Different Evidence Test" the petitioner's convictions for trafficking in cocaine and possession of cocaine must be affirmed.

The legislature meant to prosecute for each act or acts arising from one transaction which violates one or more separate criminal offenses. In other words, a transaction or episode is made up of act(s). An example of how a transaction or episode may lead to convictions for different acts can be found in Gartrell v. State, 626 So. 2d 1364 Fla. 1993). Gartrell was a passenger in the back seat of a vehicle that was stopped for a traffic violation. When the driver of the vehicle was arrested for speeding and for driving without a license, the arresting deputy sheriff asked Gartrell to produce her license in order to drive the car away. Gartrell exited the vehicle, placed her purse on

the trunk of the car, and proceeded to look for her license in the purse. When Gartell pushed some objects to the bottom of her purse, the deputy noticed several ziplock bags partially concealed by a tissue. The deputy deduced that the bags contained marijuana, and Gartrell was arrested. A subsequent search of the purse revealed a folded over dollar bill which contained a white powder and, in an outside zippered compartment of the purse, a brown paper bag containing 86.25 grams of cocaine. Gartrell was charged and convicted of possession of cannabis and trafficking in cocaine. Thus, this one episode or transaction resulted in one person being charged with speeding and driving without a license and for Gartrell, a passenger in the car, with a conviction for possession of marijuana and trafficking in cocaine: one transaction but many acts.

Double jeopardy prohibits subjecting a defendant to multiple punishments for the same offense. But the Clause guarantees only the right not to be twice put in jeopardy for the same offense, and has been interpreted to permit a prosecution based upon the same acts but for a different crime. In other words a single act may be an offense against two statutes. Double jeopardy comes into play when these two statutes can be interpreted to be the same offense. The United States Supreme Court summarized the test for determining whether conduct violating two distinct statutory provisions constitutes the "same offense" for double jeopardy purposes:

> The application rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 304 L.Ed. 2d 306 (1932). However,

double jeopardy is not implicated where the criminal offenses arise out of different acts involving proof of different fact evidence and, therefore, different elements as to each separate offense. In other words, where there is separate evidence of the two offenses, the offenses have not merged. United States v. Shaid, 730 F. 2d 225, 23 1 (5th Cir. 1984) ("[w]hether a continuous transaction results in the commission of but a single offense or separate offenses . . . is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed.")

In the instant case, the Petitioner was found with a cocaine coated cellophane wrapper clutched in his hand, In addition, 15 1 grams of cocaine was found wrapped in fabric softener sheets in the back of the back seat arm rest. Petitioner defense at trial was lack of knowledge of the cocaine found in the back seat of his vehicle. Petitioner claimed first that Deputy Rastrelli had taken the package of cocaine from his shirt pocket. Next he claimed that Deputy Rastrelli had taken the package from his pants pocket, Finally he claimed that someone else had planted the cocaine in the back seat of the vehicle behind the arm rest. R 287,288. Petitioner also made a statement that if he was toting cocaine it would have been chunk and not that powder shit. R 289. At that point the Petitioner had not seen the contents of the bag of cocaine. R 289. There was no way he would have known that there was powder in the bag that was found in the back seat of the car unless he knew what was back there. R 290. Again the Petitioner's defense to the trafficking charge was lack of knowledge. R 393 .

Petitioner's defense to the possession charge was that cocaine is often found on common objects, R 397. Petitioner never argued, nor does he make this argument now, that the cocaine in his hand was the same cocaine found hidden in the back seat of the car. Thus, double jeopardy is not implicated in the instant situation. Petitioner cannot claim that he had no knowledge of the cocaine

in the back seat of the car and at the same time claim that the cocaine in his hand is the same cocaine found in the back seat of the car wrapped in fabric softener sheets. This would be inconsistent defenses.

This case is distinguished from those cases were the contraband found on the person was obviously the same contraband found near the defendant. Lundy v. State, 596 So. 2d 1167 (Fla. 1 st DCA 1989). See also Jackson v. State, 418 So. 2d 456 (Fla. 4th DCA 1982) (contemporaneous possession marijuana on his person and that found in and about jacket on rear floor of automobile where defendant had been bending over immediately prior to being ordered to exit automobile constitutes one offense for purposes of double jeopardy); Johnson v. State, 538 So. 2d 553 (Fla. 2nd DCA 1989) (trafficking and possession of the same cocaine violated double jeopardy). In v. State, 452 So. 2d 659 (Fla. 3rd DCA 1984) the court held that a defendant could not be convicted of having a misdemeanor amount of marijuana on his person and an additional felony amount of marijuana which was found in the rear of the police cruiser after the juvenile had been transported to a detention center there. The marijuana found on his person and that found later under the seat of the police cruiser were obviously the same marijuana. Thus, the defendant in W.B.M. could not be prosecuted on both possession charges. Muwwakil v. State, 435 So. 2d 304 (Fla. 3rd DCA 1983) stands for the same proposition whereby a defendant cannot be convicted of possession of cocaine with the intent to sell and possession of the same cocaine. Moreover, these cases, which the petitioner had relied on in the Fourth District Court, were prior to the change in the law, which invalidated Carawan v. State, 5 15 So. 2d 161 (Fla. 1987). See State v. Smith, 547 So. 2d 613 (Fla. 1989). In the instant case, the cocaine ridden cellophane wrapping extracted form the petitioner's hand did not come from the cocaine package hidden behind the back seat arm rest, nor did the

petitioner claim at trial that it did.

Where the trafficking in cocaine is not the evidence which supports the possession of cocaine charge, then the offenses of possession and trafficking have not merged. In the instant case, the evidence of the trafficking charge emanates from the evidence of the package of cocaine found behind the flap of the back seat arm rest. The Petitioner denied any knowledge of this cocaine. The simple possession charge sprung out of the cocaine residue found on the cellophane wrapping Petitioner was clutching when he was arrested. Since there is separate evidence of the two offenses, the offenses have not merged. See, e.g., Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979).[1] For example, the petitioner could have had his own personal cellophone wrapped cocaine in his pocket when he picked up the larger bundle of cocaine, eventually found hidden in the back seat, which he intended to sell. His personal cocaine does not become part of the large package of cocaine just because the two are discovered during the same incident. In other words, the counts are not multiplicious because the cocaine in petitioner's hand is not the same cocaine as the cocaine found in the back seat of the car.

In sum, multiplicity is the charging of a single offense in more than one count. However, where the elements and facts of each substantive count are different from those in all other counts charged, the counts then recites a separate and distinct prohibited act. In the instant case, the facts

---

[1] In Chikitua the defendant was charged with reckless driving and vehicular homicide. e plead no contest to reckless driving. Defendant argued double jeopardy on the subsequent prosecution of vehicular homicide. Both charges were based on the ultimate fact of the accident. The Court found that the vehicular homicide charge was not based on different facts than the charge of reckless driving so as to prevent that application of double jeopardy. The Supreme Court also found that double jeopardy may not apply if the reckless driving complaint had been based upon ultimate facts different from the accident that caused the death. Thus, even if a single fact pattern or transaction is present, the "different evidence test," which requires proof of different facts and different elements as to each separate offense, would show that the counts in question are not multiplicatous.

and elements of the trafficking in cocaine charge are different than the facts and elements of the simple possession charge. Consequently, double jeopardy is not applicable. Therefore, the Petitioner's conviction and sentence must be affirmed. On the other hand, based on the reasoning set forth in the Fourth District Court's en banc decision, double jeopardy is not implicated even if it is assumed that the two quantities of cocaine were from a common source. This Court must answer the certified question in the affirmative and affirm the two convictions and sentences of the petitioner.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Appellee respectfully requests this honorable Court to affirm the trial court's judgment and sentence.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No.: 0441510

CAROL COBOURN ASBURY
Assistant Attorney General
Florida Bar No.: 0393665
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(407) 688-7759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished to JONATHAN JAY KIRSCHNER, Attorney for Petitioner, 102 N. Second Street, Fort Pierce, FL 34950 on August 22, 1996.

CAROL COBOURN ASBURY
Counsel for Appellee