IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES R. PACCIONE,

Petitioner,

vs. CASE NO. 88.809

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, James R. Paccione, was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida was the appellee and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

"R"	Record on appeal
"T"	Transcript of trial

STATEMENT OF THE CASE AND FACTS

Petitioner was informed against for sale, delivery, or possession of marijuana with intent to sell or deliver (Count I), possession of more than twenty grams of marijuana (Count II), and use or possession with intent to use drug paraphernalia (Count III) (R 20-21). He moved to dismiss Count II, arguing that double jeopardy prevented his convictions on both that charge and Count I (R 31). The motion to dismiss was denied by the trial court (R 32, 33).

Petitioner thereafter agreed to plea nolo contendere to the charges against him, specifically reserving the right to appeal the denial of his motion to dismiss (R 37-42). The trial court accepted the plea (R 12), adjudged Petitioner guilty of each count as alleged in the information (R 49), and sentenced him, on July 20, 1995, to concurrent two-year terms of community control on Counts I and II (R 58-62). A concurrent term of time served was imposed as to Count III (R 51-54). These dispositions were consistent with the sentencing guidelines recommendation of nonstate prison sanctions on a total score of only 18.5 points (R 55-56).

On direct appeal from Petitioner's judgement and sentence, the Fourth District Court of Appeal upheld both of his convictions, but certified the following question to this Court:

> **MAY A PERSON BE SEPARATELY CONVICTED AND PUNISHED FOR POSSESSION OF MARIJUANA WITH INTENT TO SELL AND SIMPLE POSSESSION OF THE SAME QUANTITY OF MARIJUANA?**

SUMMARY OF THE ARGUMENT

Petitioner's convictions and sentences for possession of marijuana with intent to sell and possession **of** the same marijuana in an amount greater than twenty grams violated the double jeopardy **clauses** of the Florida and United States constitutions. The offense of possession of marijuana contains all the elements and no additional elements of the greater offense of possession **of** marijuana with intent to sell, thus satisfying the Blockburger test for determining with two offenses are the same for double jeopardy purposes.

ARGUMENT

POINT I

MAY **A PERSON BE** SEPARATELY CONVICTED AND PUNISHED **FOR POSSESSION** OF MARIJUANA **WITH** INTENT TO **SELL** AND **SIMPLE** POSSESSION OF THE SAME QUANTITY OF MARIJUANA?

Section **775.021(4),** Fla. Stat. **(1993)** provides:

> (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 included offenses the statutory elements of which are subsumed by the great offense.

This statute in essence formalizes the requirements set out by the United States Supreme **Court** in Blockburger v. United States, **284** U. **S. 299, 52 S.** Ct. **180, 76 L. ED. 306 (1932),** for testing whether multiple convictions arising from the same criminal episode are permissible pursuant to the Double Jeopardy Clause of the United States Constitution.

Petitioner was charged with possession of marijuana with intent to sell (Count **I)** and with possession **of** more than twenty grams of marijuana (Count 11) (R 42). Moreover, the marijuana which formed the basis for both counts was "the same" (R **7):** it was seized during the execution of a search warrant at Appellant's home (R 11). Petitioner's convictions and

sentences for ***both*** these charges were barred by double jeopardy, and the trial court erred in denying Petitioner's motion to dismiss based on that contention.

The courts of this State have consistently held that convictions for both possession with intent to sell contraband and possession of the same contraband is not constitutionally permitted. E.g., Keane v. State, **600 So.** 2d **513** (Fla. 2d DCA 1992), Milhouse v. State, 521 ***So.*** 2d 380 (Fla. 1st **DCA** 1988); Murray v. State, **464 So.** 2d 622 (Fla. 2d DCA 1985). Further, the **same** principle has been applied to preclude convictions for both possession with intent to sell and possession of more than twenty grams of the same marijuana. Burke v. State, 640 **So. 2d 1222** (Fla. **5th DCA** 1994); Pasley v. State, 625 ***So,*** 2d 1303 (Fla. 1st DCA 1993). The trial court's refusal to dismiss Count II of the instant information was thus contrary **to** law.

In upholding Petitioner's convictions, the Fourth District Court of Appeal relied on its prior decision in Gibbs v. State, 676 **So.** 2d 1001 (Fla. 4th DCA 1996), which held that the **offense of** possession **of** a controlled substance **is** somehow not subsumed within the elements of the greater offense of possession of more than 28 grams of cocaine ("trafficking").[1] ***See*** **State** v. McCloud, **577 So.** 2d 939 (Fla. **1991).** However, the district court's conclusion overlooked the fact that possession for a controlled substance, i.e., cocaine, is a necessarily included subset of possession of more than 28 grams of cocaine. That is, ***everyone*** who commits possession of more than 28 **grams** of cocaine necessarily commits the lesser offense of possession of a controlled substance, since, of course cocaine is a substance controlled by law. That cocaine is the specific substance named in the trafficking statute does not make it any less controlled, nor does it add an element to the lesser offense of possession **of** a controlled substance which is not included in the greater offense. Thus:

---

[1] "Plainly, the two offenses in this case each contain an element that the other lacks. The trafficking possession of cocaine statute requires a knowing intent to possess more than 28 but less than 400 grams of cocaine. The simple possession statute requires mere possession of any controlled substance." Gibbs v. State, **676** ***So.*** 2d at 1005 [footnotes omitted).

POSSESSION	TRAFFICKING
Possession of a controlled substance (including cocaine)	Possession controlled substance (cocaine) more than 28 grams

Although not every possession of cocaine charge will necessarily also involve a charge of possession of more than **48** grams of cocaine, this is not the test which must be met. It is not required that the offense involved be ***identical*** in order to raise the bar of jeopardy against multiple convictions. Every charge of possession of more than 28 grams of cocaine necessarily includes a lesser charge of possession of cocaine. This is sufficient to satisfy the statutory elements of Section 775.021(4)(b) ("lesser included offenses the statutory elements of which are subsumed by the great offense"). This reasoning was recognized by the concurring opinion of Judge Gross in Gibbs:

> **A** traditional *Blockburger* analysis examines two statutes to see if each requires proof of an element that the other does not. [Citation omitted.] The "elements" of a crime are [t]hose constituent parts of a crime which must be proved by the prosecution to sustain a conviction." Black's Law Dictionary 520 (6th ed. 1990). Where a statute proscribes several types of conduct in the alternative, all forms of the conduct are embraced in a single "element." Thus, the Florida Standard Jury Instructions for criminal cases breaks trafficking into cocaine down into four elements. ***See*** Fla. Std. Jury Instr. (Crim.) **233.** All of the potential alternatives in the conduct element of trafficking -- sale, purchase, manufacture, deliver, bring into Florida and possess -- are contained in the first element of the standard jury instruction. The conduct element of the possession statute ("to be in actual or constructive possession') is one of the alternative conduct elements of the trafficking charge. Cocaine is one of many possibilities in the controlled substance element of the possession charge. ***The possession charge contains no element that is not a part of the trafficking charge.*** Proof of possession of cocaine requires proof of not additional fact that trafficking in cocaine does not require. Using a traditional ***Blockburger*** approach [and the "lesser included offense" test set forth in Section 775.021(4)(b)], the two statutes here at issue are not "separate" within the meaning of section 775.021(4)(a).

***See** also,* Wolf v. State, **21** Fla. L. Weekly D2008 (Fla. 5th DCA **1996)** [no dual convictions for petit theft and felony fraudulent use of a credit card: "While use of a credit card contains

several elements that are not required to commit petit theft, petit theft does not require any element that is not found in the fraudulent use of a credit card," citing State v. Barton, 523 So. 2d 152, 153 (Fla. 1988)].

This situation is patently different from that faced by this Court in State v. McCloud, 577 So. 2d 939, the decision on which the Fourth District Court of Appeal relied for its analysis of Gibbs. In McCloud, this Court held that possession of a controlled substance is not a lesser included offense of sale of a controlled substance, because not every sale involves possession of the drugs in question. Thus,

SALE	POSSESSION
sale (by a go-between who never possesses the drugs)	possession
controlled substance	controlled substance

Because not ***every*** sale ***necessarily*** involves a possession of drugs, the latter is not a necessarily included offense of the former, and multiple convictions are permitted.

Gibbs was thus mistakenly decided and cannot control the instant case.

Moreover, a correct analysis of the applicable statues also demonstrates that possession of a controlled substance with intent to sell it must always necessarily include the lesser offense of simple possession of the controlled substance. For this reason, the latter is a necessarily included lesser offense of the former, and multiple convictions for both offenses based on possession of the same substance cannot be countenanced. See Ball v. United States, 470 U. S. 856, 862, 105 S. Ct. 1668, 1672, 84 L. Ed. 2d 740 (1895).

Even if the above analysis is incorrect, the result arrived at in the instant case is barred by this Court's rationale in Sirmons v. State, 634 So. 2d 153 (Fla. 1994). In that case, the defendant was convicted of robbery with a weapon and grand theft of an automobile. This Court held that

> these offense are merely degree variants of the core offense of theft. The degree factors of force and use of a weapon aggravate the underlying theft offense to a first degree felony robbery. Likewise, the fact that an automobile was taken enhances the core

> offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only be degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

Sirmons v. State, 634 So. 2d 154.

Just as in Sirmons, the offenses at issue in the instant case -- and the cases used to analyze it -- likewise involve a single core offense. In Gibbs, the core offense is, of course, possession of a controlled substance: the identity of the substance and its amount are aggravating factors which merely transform the offense of simple possession, a third degree felony, into a first degree felony with a mandatory minimum sentence. Similarly, the core offense of possession of cocaine may be aggravated from a third degree felony to a second degree felony if the possession is with the intent to sell. Finally, in the instant case, it is evident that the core offense implicated in Petitioner's case is possession of marijuana: the fact that the marijuana in question was more than twenty grams aggravates his simple possession of marijuana, a misdemeanor, into the third degree felony of possession of marijuana (just as the fact that the object stolen in Sirmons was an automobile aggravated the misdemeanor core offense of theft into a third degree felony of grand theft), and the fact that Petitioner's possession of the marijuana was with the intent to sell worked another aggravation of the core offense into a second degree felony (just as the core theft offense in Sirmons was aggravated into a first degree felony punishable by life in prison where the defendant used force and a firearm in its commission). Under Sirmons, no separate offenses were committed in the instant case, and multiple convictions are therefore barred by the operation of the bar against double jeopardy.

Finally, even if there were any merit to the trial court's position that this issue could not be raised pre-trial (R 2-3), so that the trial court arguably did not err in denying Appellant's motion to dismiss, ***but*** see, Gordon v. State, 528 So. 2d 910 (Fla. 2d DCA 1988), *affirmed* ***sub*** nom., State v. Smith, 547 So. 2d 613 (Fla. 1989), ***receded from on other grounds,*** St. Clair

v. State, 575 So. 2d 243 (Fla. 2d DCA 1991) (en banc), *review den.*, 582 So. 2d 623 (Fla. 1991), that contention lost its validity when Petitioner renewed his motion prior to the imposition of adjudication and sentence (R 14-15). At that point, after the entry of Petitioner's plea, there should have been no question that he could not properly be convicted of both Counts I and II. The only correct action by the trial court was thus to dismiss Count II without adjudication or sentence when it imposed judgment on the other counts. Bell v. State, 437 So. 2d 1057 (Fla. 1983). The district court's misinterpretation of the applicable law to permit the trial court's multiple sentencing in this case consequently requires correction by this Court, and the certified question must be answered in the affirmative.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court reverse the judgment of the Fourth District Court of Appeal below and remand this cause with directions that only a single judgment of conviction and sentence be entered against Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AUBREY WADE ROBINSON, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 20 day of SEPTEMBER, 1996.

Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES R. PACCIONE,

Petitioner,

vs. CASE NO. 88.809

STATE OF FLORIDA,

Respondent.

PETITIONER'S APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1996

JAMES R PACCIONE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-2768

Opinion filed July 17, 1996

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; John E. Fermelly, Judge; L.T. Case No. 95-144CFA.

Richard L. Jorandby, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant,

Robert A. Butter-worth, Attorney General, Tallahassee, and Aubin Wade Robinson, Assistant Attorney General, West Palm Beach, for appellee.

SHAHOOD, J.

James Paccione pled nolo contendere to the charges of possession of marijuana with intent to sell in violation of section 893.13(1)(a), Florida Statutes (1993), and simple possession of the same marijuana in violation of section 893.13(6)(a), Florida Statutes (1993), reserving the right to appeal the denial of his previously-fled motion to dismiss based on double jeopardy violations. We affirm appellant's convictions on the authority of Peterson v. State, 645 So. 2d 1028 (Fla. 4th 1994). As we did in Gibbs v. State, No. 94-1244 (Fla. 4th DCA June 19, 1996), we find it necessary to certify to the supreme court the following as a question of great public importance:

> May a person be separately convicted and punished for possession of marijuana with intent to sell and simple possession of the same quantity of marijuana?

AFFIRMED.

GUNTHER, C.J., and POLEN, J., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Appendix has been furnished to AUBIN WADE ROBINSON, ESQ., Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 30 day of SEPTEMBER, 1996.

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