IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JOHN J. CONNELLY,

Respondent.

S. CT. CASE NO. 93,507

5th DCA Case No. 97-668

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

MERIT BRIEF OF RESPONDENT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent generally accepts the Petitioner's statement of the case and facts, but would add the following facts and/or corrections:

On the day charged in the instant information, Officer White testified that there were four to six individuals who were being processed into the facility. There were also other individuals leaving the facility at the same time, but he did not personally process those individuals who were leaving the facility. (T 109-111; Vol. 2) White further testified that he had seen cannabis at the facility before. (T 108-109; Vol. 2) In addition, Officer White testified that there was a laundry bin in the shower room containing dirty towels and uniforms and that there could have been dirty towels on the floor at the time the Respondent went into the shower room. (T 111, 113; Vol. 2) Officer White also

agreed that there is a lot of volume going in and out of that room. (T 111; Vol. 2)

As for what Officer White actually saw, he testified on cross-examination that he did not remember actually seeing the plastic wrapping fall to the ground, but instead, found it under or in the Respondent's underwear which was on the floor of the shower room. (T 119; Vol. 2) Deputy Adrian Moss testified that when he arrived at the Brevard County Jail, he observed Officer White in possession of some Saran Wrap plastic containing what appeared to him to be loose tobacco. (T 122, 128-130; Vol. 2) There were also three rolled up cigarettes, lying by themselves, apart from the Saran Wrap, on a desk which White handed to Moss. (T 128-131; Vol. 2)

At the jury instruction conference, defense counsel requested that the offense of simple possession of cannabis not more than 20 grams be given as a lesser included offense of the introduction of contraband into a county facility offense. The trial court denied the request, but agreed to readdress the matter depending on the jury's verdicts. (T 139-144; Vol. 2) During the subsequent hearing held on the motion for arrest of judgment, defense counsel explained that "I think it's clear the jurors found him not guilty of the possession of cannabis. The ... information alleged introduction of <u>that cannabis</u> that he was supposed to be in possession of. The only evidence of introduction was through possession..." (R 10; Vol. 1)

SUMMARY OF ARGUMENT

Petitioner's contention that the instant verdicts rendered by the jury below were "not truly inconsistent" is without merit. As pointed out by the Fifth District in its decision sub judice, the jury found the Respondent not guilty of possessing the same cannabis which the Respondent was charged with possessing or introducing upon a county detention facility. Thus, Petitioner's argument that the jury "... legally and factually distinguished the charges ... by concluding that while the [Respondent] was guilty of introducing [the same cannabis] into the detention facility he did not know it was cannabis," is a legal impossibility that is not supported by Florida law or the factual circumstances of the instant record.

In addition, Respondent would submit that the answer to the certified question submitted by the Fifth District should be answered in the affirmative. This is because Florida law is well established, based on the prior decisions rendered by this Court, that truly inconsistent verdicts occur when a jury acquits as to an essential element of an offense upon which it also convicts. Thus, Petitioner's "restated" question involving nonessential elements existing in inconsistent verdicts is inapplicable to the factual circumstances sub judice. The decision rendered by the Fifth District below should, therefore, be affirmed by this Court and the actual question presented by the Fifth District answered affirmatively.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT SHOULD BE AFFIRMED BY THIS COURT AND THE CERTIFIED QUESTION BY THE FIFTH DISTRICT SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Petitioner initially argues that the certified question by the Fifth District Court of Appeal should be "restated" as follows:

> WHEN A JURY REFUSES TO CONVICT ON ONE COUNT OF A TWO COUNT INFORMATION IN A SITUATION IN WHICH A CONVICTION FOR BOTH COUNTS WOULD NOT CONSTITUTE DOUBLE JEOPARDY, DOES ITS ACQUITTAL ON THE ONE COUNT, WHEN THAT COUNT DOES NOT DUPLICATE AN ESSENTIAL ELEMENT OF THE OTHER, REQUIRE AN ACQUITTAL ON THE OTHER COUNT?

Respondent would point out, however, that the Petitioner's "restated" question is not applicable to the instant factual circumstances. To begin with, as noted by the Fifth District, the factual circumstances sub judice do not encompass a situation where a jury has rendered independent and noninterlocking verdicts. In fact, the Fifth District directly rejected the Petitioner's contention that the Respondent "... could have 'introduced' the cannabis onto the grounds of the detention facility without actually possessing it." **State v. Connelly**, 23 Fla. L. Weekly D1610 (Fla. 5th DCA July 2, 1998)(Footnote one) *See* Appendix.

Petitioner next directly relies on this Court's decisions in **Fayson v. State**, 698 So. 2d 825 (Fla. 1997); **Redondo v. State**, 403 So. 2d 954 (Fla. 1981); and **State v. Powell**, 674 So. 2d 731 (Fla. 1996), in arguing that the instant jury verdicts are not truly inconsistent. (Petitioner's initial merit brief, pages 6-9) The problem is, however, that Petitioner centers this assertion on both an incorrect factual basis and legal analysis. Specifically, Petitioner maintains that because the jury was instructed only as to "contraband" being "introduced" onto a county facility, the jury did not need to find that the Respondent "possessed" cannabis in order to support a conviction as to the introduction offense citing this Court's decision in **Chicone v. State**, 684 So. 2d 736 (Fla. 1996). Such an interpretation of Chicone is misplaced.

In Chicone, this Court clarified that "... guilty knowledge is an element of the crim[e of possession of a controlled substance]..." Id. at 744. [Emphasis added] This Court further held in Chicone that innocent possession was not intended ever to be criminally prosecuted by the Legislature under any statute, which would include the offense of introduction or possession upon a county detention facility. As this Court noted in Chicone, the requirement of a mens rea is "...the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Id. at 743. [Citation omitted] Thus,

Petitioner's argument that the jury verdict rendered in the case at bar could be interpreted to mean that the Respondent could be found guilty of "introducing" the cannabis onto the county detention facility without "knowing" what he was introducing onto the detention facility is clearly not in conformity with this Court's decision in Chicone or with Florida Statutes. (Petitioner's initial merit brief, page 8) Id., 743-4

The Petitioner's additional reliance on this Court's decision in **Fayson; supra**, is also misplaced. In Fayson, this Court held that the two verdicts at issue in that case were not "true" inconsistent verdicts. This was because, as explained by this Court in Fayson, the jury in that case could have factually distinguished the charges of burglary of a dwelling with a battery and aggravated battery by concluding Fayson had only committed a simple burglary when he first entered the dwelling without the intent to commit a battery. Id., 827. Thus, this Court determined that the jury in Fayson, as the facts unfolded, could have logically concluded that the aggravated battery came after and was separate from the burglary. Id., 827. The converse of this is true, as previously noted herein, and by the Fifth District in the opinion on review, when the instant factual circumstances and charged offenses are plugged into the "true" inconsistent verdicts quotient first outlined by this Court in **Redondo v. State**, 403 So. 2d 954 (Fla. 1981) and reaffirmed again

by this Court in **Fayson**; **supra**.

As also pointed out by the Fifth District in **Shivers v. State**, 593 So. 2d 318 (Fla. 5th DCA 1992), "Florida case law is well settled that possession of less than 20 grams of cannabis is a category four lesser included offense of introduction of the same cannabis into a county detention facility." [citations omitted] Id. at 319. The Second District Court of Appeal in **Tessier v. State**, 462 So. 2d 123 (Fla. 2d DCA 1985), as well, held that "...all elements of the simple possession offense under section 893.13 are contained **within** the elements of the introduction **or** possession of contraband offense under Section 951.22." [Emphasis added] Id. at 124. In addition, the Second District Court of Appeal pointed out in Tessier that "[s]ection 951.22 proscribes the introduction of possession of contraband into a county detention facility and specifically includes 'controlled substances' as being ***within*** the definition of contraband. Section 893.13 proscribes the unlawful possession of controlled substances." Id. at 124. [Emphasis added] Accordingly, the Second District concluded in Tessier that these two offenses "...are not separate offenses." Id. at 124. [citations omitted] [Emphasis added] Likewise, in **Rozier v. State**, 620 So. 2d 194 (Fla. 1st DCA 1993), the First District Court of Appeal determined that the only distinction between the two aforementioned offenses is "..the additional element of proof

required to prove a violation of Section 951.22, i.e., that the offense occurred in a county detention facility." Id. At 196.

More recently, the Fifth District in **Turner v. State**, 661 So. 2d 93, 94 (Fla. 5th DCA 1995), citing **Shivers**, **supra**, and **Rozier**, **supra**, held that the only distinction between the two offenses is the additional element of proof for Section 951.22 relating to the offense occurring in a county detention facility. Petitioner attempts to distinguish cases like Turner from the instant case by asserting that the trial court "precluded a true inconsistent verdict" by instructing the jury solely as to "introduction of contraband as to Count I; and possession of cannabis as to Count II." (Petitioner's initial brief, page 7) Respondent would disagree. The finding by jury that the Respondent was not guilty of possessing the same controlled substance, i.e., the cannabis, which the instant information charged Respondent with introducing or possessing on a county detention facility, negated a **necessary element** for a conviction on the offense of introducing or possessing contraband on a county detention facility. **State v. Powell**, 674 So. 2d 731, 733 (Fla. 1996) This is particularly true where the jury was instructed below, in defining the contraband the Respondent was charged with introducing, that cannabis was a controlled substance. (T 178; Vol. 2) No other "controlled substance" was defined and cannabis was the only type of contraband Respondent

was charged with introducing upon a county facility. Accordingly, the trial court properly vacated the Respondent's conviction for introducing or possessing contraband on a county detention facility.

Finally, Petitioner argues that this Court should adopt the federal courts' abandonment of "true" inconsistent verdicts, citing to **United States v. Powell**, 469 U.S. 57 (1984). (Petitioner's initial merit brief, pages 9-11) This contention has been repeatedly rejected by this Court, including most recently in **Fayson**, **supra**. Moreover, the rationale for Florida's longstanding prohibition against the state obtaining a conviction as the result of "true" inconsistent verdicts was clearly explained by this Court in Fayson as follows:

> An exception to the general rule is warranted when the verdicts against a single defendant are truly inconsistent because the possibility of a wrongful conviction in such cases outweighs the rationale for allowing verdicts to stand.

Id. At 827. In sum, the holding initially announced by this Court in **Redondo**, **supra**, which was reaffirmed in **Fayson**, **supra**, mandates an affirmative answer to the certified question posed by the Fifth District sub judice. Similarly, a "harmless error" type of appellate review, as suggested by Petitioner, would not be appropriate in light of the fact that, when "true" inconsistent verdicts exist, the resulting harm is self-evident

and remains uniformly disfavored under well established Florida case law. This Court should, therefore, affirm the decision rendered below by the Fifth District which is in conformity with this Court's decisions in **Redondo**, **supra**, and **Fayson**, **supra**.

CONCLUSION

Based on the foregoing argument and authority, Respondent respectfully requests this Honorable Court affirm the decision rendered below in this cause by the Fifth District and answer the certified question in the affirmative.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

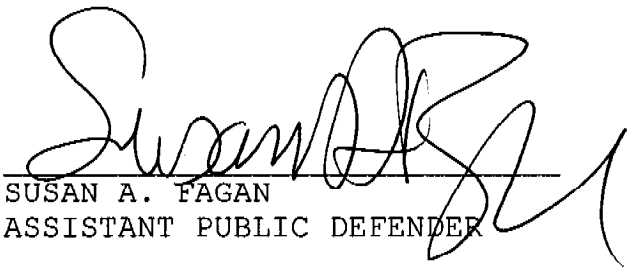
CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. John J. Canaille, 3400 Daryl Terrace Road, Titusville, FL 32796, this 3rd day of September 1998.



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