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IN THE FLORIDA SUPREME COURT

JAMES WILCOTT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.

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 TALLAHASSEE, FLORIDA

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE	2
III STATEMENT OF THE FACTS	3
IV SUMMARY OF ARGUMENT	5
V ARGUMENT	
<u>ISSUE PRESENTED</u>	
THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE CONFLICT WITH <u>DEES v. STATE</u> , 397 So.2d 1145 (Fla. 2d DCA 1981).	6
VI CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Brown v. State</u> , 206 So.2d 377 (Fla. 1968)	6
<u>Dees v. State</u> , 397 So.2d 1145 (Fla. 2d DCA 1981)	6,7,8
<u>London v. State</u> , 347 So.2d 639 (Fla. 4th DCA 1977)	7,8
<u>State v. Abreau</u> , 363 So.2d 1063 (Fla. 1978)	6
<u>STATUTES</u>	<u>PAGE(S)</u>
Section 893.13(1)(f), Florida Statutes (1983)	6
Section 944.47, Florida Statutes (1981)	6
Section 944.47, Florida Statutes (1975)	7
Section 944.47, Florida Statutes (1983)	8
Section 951.22, Florida Statutes (1979)	6
<u>MISCELLANEOUS</u>	<u>PAGE(S)</u>
Fla.R.Crim.P. 3.510(a)	6

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal and one volume transcript are sequentially numbered, and will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is a copy of the decision of the First District.

II STATEMENT OF THE CASE

By information filed August 7, 1984, petitioner was charged with introducing contraband into a state prison (R 1). The cause proceeded to jury trial and at the conclusion thereof petitioner was found guilty as charged (R 9). On September 10, 1984, petitioner was adjudicated guilty and sentenced to 5 1/2 years in state prison (R 10-12; 14-18). Petitioner's motion for new trial (R 13) was orally denied (R 146-48).

On September 13, 1984, a timely notice of appeal was filed (R 19). By opinion filed August 1, 1985, the First District affirmed petitioner's judgment and sentence (Appendix). On August 9, 1985, a timely notice of discretionary review was filed.

III STATEMENT OF THE FACTS

Correctional Officer Leroy Green testified that on July 20 he brought petitioner back to the Marianna Community Correctional Center from his outside work. During a routine search, he found a package of rolling papers. He did a further search and found a baggie, which appeared to contain marijuana, in petitioner's underwear (R 52-67). Laboratory Analyst Sherma Moore was stipulated to be an expert. She determined the substance was cannabis, and weighed 2.3 grams (R 94-100).

Petitioner, age 25, testified that he was serving an eighteen month sentence for burglary, and was due to be released on August 1. While at work, he found a bag of marijuana and stuck it down his pants. He intended to leave the baggie at work and enjoy it later. He did not intend to take it back into the prison, but he did not have time to leave it at work when Officer Green arrived (R 102-18).

Petitioner's counsel noted that he had requested a jury instruction on possession of marijuana as a lesser offense, which had been denied at a charge conference. The court agreed that the request had been denied (R 145). Petitioner's motion for new trial again raised the question of whether the court erred in refusing to instruct on misdemeanor possession of marijuana as a lesser offense (R 13). This motion was argued and orally denied (R 46-48).

On appeal, petitioner again argued that the jury should have been instructed on misdemeanor possession of marijuana as a lesser offense. The First District disagreed and affirmed

petitioner's judgment and sentence (Appendix).

IV SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the instant case should be accepted for review because the decision of the First District is in irreconcilable conflict with a decision of the Second District, thus leaving the trial courts of this state in doubt as to whether misdemeanor possession of marijuana is a proper lesser offense to introduction of contraband.

V ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE CONFLICT WITH DEES v. STATE, 397 So.2d 1145 (Fla. 2d DCA 1981).

The information charged that petitioner did "unlawfully introduce into or possess upon the grounds of a state correctional institution" (R 1) the cannabis. This is a violation of Section 944.47, Florida Statutes (1981), which prohibits both the introduction of contraband into a prison, or the possession of such contraband.

In order to be a Category 4 (now Category 2) lesser offense, both the allegation of the information and the proof at trial must support the lesser crime. Brown v. State, 206 So.2d 377 (Fla. 1968). Here, the information charged introduction or possession in the alternative. The evidence at trial showed that petitioner was in actual possession of the contraband at the same time he introduced it into the prison. Since there was a completed act, attempt is not a lesser offense. Fla.R.Crim.P. 3.510(a). Since the amount of the contraband was less than 20 grams, the only proper lesser offense was misdemeanor possession. Section 893.13(1)(f), Florida Statutes (1983). The failure to instruct on the next-lower lesser offense is always reversible error. State v. Abreau, 363 So.2d 1063 (Fla. 1978). The only verdicts available to petitioner's jury were guilty as charged or not guilty (R 8).

In Dees v. State, 397 So.2d 1145 (Fla. 2d DCA 1981), the court construed Section 951.22, Florida Statutes (1979), which is a parallel statute prohibiting introduction into or pos-

session of contraband inside of a county jail. That statute provided:

It is unlawful except as duly authorized by the sheriff or officer in charge to introduce into or possess upon the grounds of any county detention facility . . . the following articles which are hereby declared to be contraband for purposes of this act, to wit: . . . any narcotic, hypnotic, or excitative drug

The defendant plead guilty to misdemeanor possession of marijuana in county court. He was then prosecuted for the felony of introducing or possessing the same contraband and claimed double jeopardy. The Second District distinguished London v. State, 347 So.2d 639 (Fla. 4th DCA 1977) and held:

Here, however, Dees' possession of marijuana was category four lesser-included offense of his simultaneous introduction or possession of the same marijuana into the county detention facility.

Id. at 1146. Thus, because misdemeanor possession was a lesser offense of introducing or possessing in the county jail, double jeopardy barred a prosecution for the greater crime.

London, supra, had held that possession of marijuana was not a lesser of introduction under the version of Section 944.47, Florida Statutes (1975), which provided:

It is unlawful to introduce into or upon the grounds of any correctional or penal institution, . . . any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit: . . . any narcotic or hypnotic or excitative drug or any drug of whatever kind or nature

The difference between London and Dees may be explained by examining the statutes at issue. The county jail statute expressly included possession within its terms, while the state prison statute in effect at that time did not.

The present state prison statute, under which petitioner was charged, now includes either possession or introduction within its terms:

Except through regular channels as authorized by the officer in charge of the correctional institution, it is unlawful to introduce into or upon the grounds of any state correctional institution . . . any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit: . . . any narcotic, hypnotic, or excitative drug or any drug of whatever kind or nature

. . .

It is unlawful for any inmate of any state correctional institution or person while upon the grounds of any state correctional institution to be in actual or constructive possession of any article or thing declared by this section to be contraband, except as authorized by the officer in charge of such correctional institution.

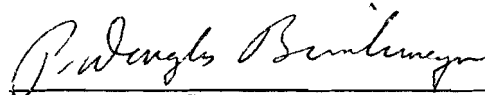
Section 944.47, Florida Statutes (1983). Thus, London, supra, which construed the prior statute in which possession was not an element, is no longer valid and the holding of Dees, supra, which construed the parallel county jail statute in which possession is an element, is fully applicable to the present case. Because the present statute prohibits the introduction or possession of contraband, because the information charged the alternative crimes, and because the proof at trial showed that petitioner possessed the marijuana at the same time he introduced it, misdemeanor possession was a Category 2 lesser offense of the crime charged. The First District's futile attempt to distinguish Dees, cannot survive scrutiny by this Court. The two decisions are in direct and irreconcilable conflict with each other. This Court must grant review to determine whether simple possession is a proper lesser offense of introduction.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court accept review and proceed to decide the case on the merits.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



P. DOUGLAS BRINKMEYER
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on Jurisdiction has been furnished by hand to Assistant Attorney General Gary L. Printy, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, James Wilcott, #906768, Post Office Box 628, Lake Butler, Florida 32054 on this 13 day of August, 1985.