

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT**

**LAWRENCE PENDARVIS,**

Petitioner,

vs.

**CASE NO. 2D02-1118**

**STATE OF FLORIDA,**

Respondent.

**PETITION FOR WRIT OF PROHIBITION**

Petitioner, Lawrence Pendarvis, Pro Se, hereby petitions this Court for a writ of prohibition to prohibit the Honorable Charles Lee Brown, Judge of the Tenth Judicial Circuit, from adjudicating and sentencing Petitioner for more than one count in Case No. CF96-03319A-XXX. In support of this petition, Petitioner states:

1. This Court has Original Jurisdiction to issue writs of prohibition concerning pending criminal charges, under **Rule 9.030(b)(3), Florida Rules of Appellate Procedure**. *Taylor v. State, Case No. 1D02-0424, First District Court of Appeal, March 15, 2002.*

2. In this 1996 case, Petitioner is currently charged with 129 counts of possession of child pornography, Florida Statute 827.071(5).
3. Petitioner's case is subject to the 1995 sentencing guidelines, or the 1994 sentencing guidelines, which are identical for this offense.
4. A peculiar but undeniable interplay among Double Jeopardy, Cruel or Unusual Punishment, and Florida's 1994 and 1995 sentencing guidelines (the "point system"), has led to an Absurd Result.
5. Possession of Child Pornography (Florida Statute 827.071(5)) is a lesser included offense of Possession with Intent to Promote (Florida Statute 827.071(4)). The elements of the crimes are the same, except for the element of "Intent to Promote." The statutory description of Possession with Intent to Promote (Florida Statute 827.071(4)) does not explicitly state that scienter is an element of the offense, whereas scienter is explicitly mentioned in Florida Statute 827.071(5). But scienter is necessarily an element of any possession charge, even where the Prosecution does not bear the burden of proof. *Chicone v. State*, 684 So. 2d 736 (Fla. 1996); *Abbott v. State*, Case No. 99-00863, Second District Court of Appeal, November 12, 1999.
6. Under the 1994 and 1995 sentencing guidelines, those convicted had to be sentenced under the guidelines, absent a written reason for departure. The guidelines assess 4 points for the first third-degree felony, then 0.7 point for each additional count, so that for 129 counts Petitioner would have 93.6 points. But if he were convicted of 129 counts of Florida Statute 827.071(4), a second-degree felony, he would have to be sentenced on only *one* count, which is only 22 points.
7. A "grossly disproportionate sentence" analysis is appropriate even in non-capital cases. *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001).
8. The Florida Constitution forbids "excessive punishment" even more strongly than does the U.S. Constitution, because it forbids punishments that are EITHER *cruel* OR *unusual*, whereas the U.S. Constitution prohibits only punishments which are BOTH cruel AND unusual.

- a. *Florida Constitution, Article I, Section 17. Excessive punishment.—Excessive fines, cruel OR unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.*
  - b. Therefore, in Florida, a punishment which is **unusual**, but not necessarily cruel, is unconstitutional. And it is very unusual for one behavior (simple possession, without more) to carry a severe sentence, whereas the very same behavior (“possession”), **together with** an aggravating factor (“intent to promote”), cannot be punished so harshly.
9. The Supreme Court of Florida has prescribed the “a/any” test for Double Jeopardy cases. *State v. Watts, 462 So. 2d 813 (Fla. 1985)*. If the Legislature uses the word “any,” the assumption is that they meant that only one conviction may be had even if multiple violations of the same statute are charged.
10. The Second District Court of Appeal (in an opinion by Judge Oliver Green) applied the “a/any” test to reverse multiple counts in *Thibeault v. State, 732 So.2d 28 (Fla. 2d DCA 1999)*.
  - a. With regard to the Possession Statute, Judge Oliver Green’s opinion stated, ‘The Fourth District dealt with section 827.071(5), Florida Statutes (1987), which made it a crime to possess "any" photograph, etc., that depicted sexual conduct by a child: “The court in *Schmitt v. State, 563 So. 2d 1095 (Fla. 4th DCA 1990)*, applied the ‘a/any’ test and said the use of the word ‘any’ indicated the legislature intended the possession of several articles should be treated as a single offense. Subsequent to that decision, the legislature amended the statute and changed the word ‘any’ to ‘a’.’’
  - b. Note that the Legislature declined to also change the language of the Greater Including Offense to use the word “a”, despite having an excellent opportunity to do so at that time.

11. In *State v. Parrella*, 736 So.2d 94 (Fla. 4th DCA 1999), the Fourth District Court of Appeal reversed all but one of 4 convictions for “possession with intent to promote” (Florida Statute 827.071(4)) on Multiple Jeopardy grounds.
12. In *Wade v. State*, 751 So.2d 669 (Fla. 2d DCA 2000), the Second District Court of Appeal reversed all but one of 3 convictions for “possession with intent to promote,” while letting stand 54 counts of mere possession (the offense with which Petitioner is charged). Thus Wade was assessed more points for his lesser included offense than for the greater including offense.
13. In *Crosby v. State*, 757 So.2d 584 (Fla. 2d DCA 2000), the Second District Court of Appeal reversed all but one conviction for “possession with intent to promote,” while letting multiple counts of mere possession stand. Thus Crosby may have been assessed more points for his lesser included offense than for the greater including offense.
14. In *Hudson v. State*, 761 So.2d 1161 (Fla. 2d DCA 2000), the Second District Court of Appeal reversed all but one of 48 convictions for “possession with intent to promote,” while letting 280 counts of mere possession stand. Thus Hudson was assessed far more points for his lesser included offense than for the greater including offense.
15. In *State v. Riley*, 26 Kan. App. 2d 533, 989 P.2d 792 (1999), the Court of Appeals of the State of Kansas said: “In considering whether a sentence is disproportionate, a court may compare the punishment with punishments imposed for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect. *Freeman*, 223 Kan. at 367: ‘Other jurisdictions agree that a lesser included crime may not carry a harsher sentence than the greater. See *Willoughby v. Phend*, 301 F. Supp. 644, 647 (N.D. Ind. 1969); *State v. Dayutis*, 127 N.H. 101, 105, 498 A.2d 325 (1985).’ “

16. From *People v. Koppa*, 184 Ill.2d 202, 703 N.E.2d 91 (1998): “This court has recognized three ways in which the proportionate penalties clause may be violated. First, there is a violation of the proportionate penalties clause where the punishment for a particular offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community. See *People v. Morris*, 136 Ill. 2d 157, 167 (1990); *People v. Steppan*, 105 Ill. 2d 310, 320 (1985). Second, the proportionate penalties clause is violated where identical offenses result in different sentences. See *People v. Lewis*, 175 Ill. 2d 412, 418 (1996); *People v. Christy*, 139 Ill. 2d 172, 181 (1990). Third, the proportionate penalties clause is violated where similar offenses are compared and conduct that creates a less serious threat to the public health and safety is punished more harshly. See *People v. Davis*, 177 Ill. 2d 495, 503 (1997); *People v. Hickman*, 163 Ill. 2d 250, 259 (1994); *People v. Johns*, 153 Ill. 2d 436, 447 (1992).”

- a. In *Lewis*, the Circuit Court dismissed the charges, and was upheld on appeal. The sentence wasn't merely made to conform to the sentence given for the Greater Offense.
- b. In *Christy*, the conviction and sentence were vacated; the defendant was not resentenced.

17. The Oregon Court of Appeals has stated: "... successful challenges based on constitutional proportionality have been exceedingly rare in Oregon. See *State v. Shumway*, 291 Or 153, 630 P2d 796 (1981) (a statutory scheme that provides a greater penalty for a lesser included offense violates Article I, section 16, of the Oregon constitution); *Cannon v. Gladden*, 203 Or 629, 281 P2d 233 (1955) (*same*). Both *Shumway* and *Cannon* involved vertically disproportionate sentences...." *State v. Thorp*, 2 P.3d 903 (Or. Ct. of App. 2000). And Petitioner's case too involves “vertically disproportionate sentences,” which violate the “cruel or unusual” clause of the Florida Constitution.

18. The proper sentence, if any, must be for only one count (or NO COUNTS) of the Third Degree Felony of simple possession. Although Petitioner's argument is only that it is Cruel OR Unusual to have disparate and disproportionate punishments, the punishment cannot simply be made equal to that for one Count of the Second Degree Felony, because Petitioner is not charged with the Second degree Felony. All the Trial Court can do is sentence him for, at most, one Count of Simple Possession.

- a. The Statute against "Possession With Intent To Promote" is not before the Trial Court. Therefore the only thing that can be decided is whether or not Petitioner's offense can be punished for MORE THAN ONE Count, when those convicted of multiple Counts of the Greater Including Offense cannot be punished for more than a SINGLE Count. The Trial Court cannot address the legality of the Greater Including Offense Statute, which has consistently been construed to allow only ONE Count for "Possession With Intent To Promote."
- b. It is obvious that the Legislature did not intend this absurd result, and it is also obvious that they intended Petitioner's offense (Possession of Child Pornography) to be punishable for multiple Counts, but the now well-established principle that the Greater Including Offense cannot be punished as multiple Counts makes the two parts of the Statute incompatible (an ABSURD RESULT). The Court must construe the Statute under which Petitioner has been charged so as to avoid this Absurd Result. The Court cannot construe the Greater Including Offense so as to avoid the Absurd Result, because that part of the statute is not at issue here and is not before the Court. Therefore the Court must construe the offense with which Petitioner has been charged so as to be in conformity with the Greater Including Offense. Therefore Petitioner cannot be sentenced for multiple Counts in this case.

19. Because the penalty for Florida Statute 827.071(5) violated the “cruel or unusual” clause at the time of the offense, the State has no authority, discretionary or otherwise, to charge that offense. However, Petitioner is unable to simply move for dismissal in the trial court, because he is represented by counsel (the Office of the Public Defender) before that Court.

WHEREFORE, Petitioner prays that this Court issue a Writ of Prohibition to prohibit the lower Court from adjudicating and sentencing Petitioner for more than one count, or any relief deemed appropriate.

RESPECTFULLY SUBMITTED on this 25<sup>th</sup> day of March, 2002.

Signed under the penalties of perjury this 25<sup>th</sup> day of March, 2002.

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Lawrence Pendarvis,  
Petitioner  
P.O. Box 1621  
Brandon, FL 33509-1621

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STATE OF FLORIDA

Signed and sworn before me this 25<sup>th</sup> day of March, 2002, by Lawrence Pendarvis,  
who produced a Driver's License as identification.

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NOTARY PUBLIC

My commission expires:

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery this 25<sup>th</sup> day of March, 2002, to Paul Bueker, Assistant State Attorney, State Attorney's Office, Polk County Courthouse, Bartow, Florida; and to the Honorable Charles Lee Brown, Judge of the Tenth Judicial Circuit, Polk County Courthouse, Bartow, Florida.

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**CERTIFICATE OF COMPLIANCE**

This Petition is set in a Times New Roman 14-point font.

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