

SUPREME COURT OF LOUISIANA

01-K-0556

STATE OF LOUISIANA

VERSUS

SERELL J. ANDERS AND GLENDA A. DIECEDUE

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS**

TRAYLOR, J., dissenting

The parties do not contest that the crime of distribution of marijuana contains elements necessary to constitute the crime of possession of marijuana. In order to distribute marijuana, it must have been possessed by the distributor; therefore, the elements are the same, albeit constructively so in some cases. The fact that a distribution of marijuana charge contains additional elements is irrelevant for purposes of determining under La. R.S. 40:966 (D)(4) whether a prior conviction for distribution is a “violation of any other statute or ordinance *with the same elements* as R.S. 40:966(C) prohibiting the possession of marijuana. . . .” (emphasis added).

While technically the crime of actual possession is not necessarily an element of distribution, exclusion of the charge for enhancement purposes based on the reasoning employed by the lower courts would lead to a result that defies logic and would not serve justice. *See, e.g., State v. Harrison*, 32-643 (La. App. 2 Cir. 10/27/99), 743 So. 2d 883, *writ denied*, 99-3352 (La. 6/30/00), 765 So. 2d 327 (finding that use of a distribution of marijuana conviction to enhance a possession of marijuana charge in 1994 to second offense felony, and a

distribution of cocaine charge in 1997 would constitute double enhancement). Simple possession of marijuana is in fact a lesser included responsive verdict to a charge of distribution of marijuana, C.Cr.P. art. 814, and, therefore, it clearly indicates that possession is an element of distribution. To disallow a previous distribution charge for enhancement purposes for a subsequent misdemeanor possession of marijuana would put sellers and distributors of narcotics (who happen to also partake of their product) in a more favorable position as opposed to mere simple possessors and users of marijuana.

Interpreting Section (D) to exclude distribution of marijuana would render the law meaningless. The felony charge involving possession to distribute should not be relegated to lesser impact than a mere simple possession charge - an absurd result. Based on the foregoing reasons, I respectfully dissent.