ORIGINAL

IN THE

SUPREME COURT OF FLORIDA

JAMES WILLIAM POTTS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. 93,546 5th DCA Case No. 98-114 On Discretionary Review

CORRECTED REPLY BRIEF OF PETITIONER

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A. TABLE OF CONTENTS

A. TABLE OF CONTENTS ii

B. TABLE OF CITATIONS iii

1. Cases iii
2. Statutes iii
3. Other Authority iv

C. ARGUMENT AND CITATIONS TO AUTHORITY 1

1. The Lorcet Plus tablets possessed by James Potts cannot reasonably constitute a trafficking offense as such a construction would be contrary to the plain language of the statute and would result in sentences contrary to the intent of the legislature, proportionality in sentencing, and common sense 1

a. A description of hydrocodone and its medicinal use 2

b. The plain language of the statutes supports the *Holland* decision 4

c. Comparing similar sentences for trafficking in cocaine, marijuana, and heroin with hydrocodone (Schedule III), it becomes evidently clear that the legislature meant to exclude Schedule III hydrocodone from the trafficking statute 7

d. The Lorcet tablets do not constitute a "mixture" of hydrocodone and acetaminophen 9

D. CONCLUSION 12

E. CERTIFICATE OF SERVICE 14

B. TABLE OF CITATIONS

1. Cases

Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) 10, 11

State v. Alleman, 23 Fla.L.Weekly D2000 (Fla. 2d DCA, August 26, 1998) 1

State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996) 1, 13

State v. Hayes, - - -So.2d - - -, 1998 WL 646655, (Fla. 4th DCA, September 23, 1998) 2, 5, 11

State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997) 1, 2, 4, 13

State v. Perry, 23 Fla.L.Weekly D1908 (Fla. 2d DCA, August 14, 1998) 1

State v. Wells, 23 Fla.L.Weekly D2000 (Fla. 2d DCA, August 26, 1998) 1

State v. Yu, 400 So.2d 762 (Fla. 1981). 12

United States v. Jackson, 115 F.3d 843 (11th Cir. 1997) 11

2. Statutes

§893.03(3)(c)4, Fla. Stat. 2, 3, 5, 9

§893.03(2)(a)(1)(j), Fla. Stat. 2, 5

§893.03, Fla. Stat. 4

§893.13, Fla. Stat. 4

§893.135, Fla. Stat. 4

§893.135(1)(b)(1)(c), Fla. Stat. 8

§893.135(1)(a)3, Fla. Stat 8

§893.135(1)(c)1.c, Fla. Stat. 9

§893.03(3), Fla. Stat. 5, 12

§893.135(c), Fla. Stat. 4

3. Other Authority

MEDICAL ECONOMICS COMPANY,INC., PHYSICIAN'S DESK REFERENCE 1016 51st ed. 1997) 2, 3, 6, 9

C. ARGUMENT AND CITATIONS TO AUTHORITY

1. The Lorcet Plus tablets possessed by James Potts cannot reasonably constitute a trafficking offense as such a construction would be contrary to the plain language of the statute and would result in sentences contrary to the intent of the legislature, proportionality in sentencing, and common sense.

The Court is presented with the opportunity to resolve an issue that has caused the district courts to reach contrary results. *State v. Baxley*, 684 So.2d 831 (Fla. 5th DCA 1996) (holding that if the number of tablets aggregate 4 grams or more of hydrocodone or a mixture of hydrocodone, a trafficking prosecution is appropriate, regardless of the per dosage unit), and *State v. Holland*, 689 So.2d 1268 (Fla. 1st DCA 1997) (holding that if mixture containing controlled substance falls within Schedule III, the amount of controlled substance per dosage unit, not the aggregate amount of weight, determines whether trafficking charge appropriate). The Second District Court of Appeal has aligned itself with the First District. *State v. Perry*, 23 Fla.L.Weekly D1908 (Fla. 2d DCA, August 14, 1998) (affirming trial court's order dismissing counts of trafficking in hydrocodone on authority of *Holland* and certifying conflict with *Baxley*); *State v. Wells*, 23 Fla.L.Weekly D2000 (Fla. 2d DCA, August 26, 1998) (same); *State v. Alleman*, 23 Fla.L.Weekly D2000 (Fla. 2d DCA, August 26, 1998) (same). The Fourth District Court of Appeal recently aligned

itself with the Fifth. *State v. Hayes*, - - - So. 2d - - -, 1998 WL 646655, (Fla. 4th DCA, September 23, 1998).

The issue presented is whether the legislature intended for persons to be prosecuted for trafficking in hydrocodone--as hydrocodone is defined in §893.03(3)(c)4, Fla. Stat. a Schedule III drug--or is the trafficking statute limited to hydrocodone as defined in §893.03(2)(a)(1)(j), Fla. Stat. a Schedule II drug, regardless of the total weight. Stated another way, can the aggregate weight of a Schedule III controlled substance, when combined with a non-controlled substance that has recognized therapeutic benefits--whether in liquid or tablet form--make possession of the Schedule III substance subject to the trafficking statute. The opinion in *Holland,* and as followed by the Second District, represents the soundest analysis of the issue.

a. A description of hydrocodone and its medicinal use.

A little background information on hydrocodone will prove helpful to the Court in analyzing the issue presented. James Potts was charged with possessing over 140 tablets of Lorcet Plus. (R-2). Lorcet is one of several brand names of pain relievers which contain hydrocodone. Hydrocodone is a semisynthetic narcotic pain-reliever and cough suppressant and is similar to codeine. MEDICAL ECONOMICS COMPANY, INC., PHYSICIAN'S DESK REFERENCE 1016 (51st ed. 1997) (hereinafter,

"PHYSICAN'S DESK REFERENCE"). It is prescribed for the relief of moderate to moderately severe pain. *Id.* Hydrocodone is commonly combined with acetaminophen (Tylenol) and in such combination forms a Schedule III drug, if the amount of hydrocodone is less than 15 milligrams per dosage unit. §893.03(3)(c)4, Fla. Stat. The Lorcet tablets possessed by Mr. Potts contained 7.5 milligrams of hydrocodone and 650 milligrams of acetaminophen, (7.5/650). (R-97-108). Lorcet is manufactured by Forest Pharmaceuticals, Inc. which also makes a 5/500 milligram combination drug, Lorcet-HD, and a 10/650 combination drug, Lorcet 10/650. PHYSICIAN'S DESK REFERENCE, *supra* at 1016. There are several hydrocodone/acetaminophen combination products on the market. *Id.* at 787, 1404, 2751. There are also products that combine hydrocodone with aspirin, Azdone being an example. *Id.* at 808. Du Pont Pharmaceutical manufactures Hycodan, which contains 5 milligrams of hydrocodone combined with 1.5 milligrams of homatropine menthylbromide, yet it is still classified as a Schedule III drug. *Id.* at 946. The most potent combination of hydrocodone and acetaminophen manufactured (legally), that undersigned counsel's research could discover, is the Lorcet 10/650 (discussed above) and Vicodin HP, which contains 10 milligrams of hydrocodone and 660 milligrams of acetaminophen.

Lorcet Plus are supplied in containers of 100 and 500 tablets. *Id.* at 2214.

Hydrocodone is consistently listed in the PHYSICIAN'S DESK REFERENCE as a Schedule III drug. According to the PHYSICIANS' DESK REFERENCE, the appropriate adult dosage of the Lorcet is one tablet every 4 to 6 hours as needed for pain. The total 24 hour dose should not exceed 6 tablets. *Id.*, at 1017.

b. The plain language of the statutes supports the *Holland* decision.

There are three principal statutes that affect the issue before the Court: §§893.03, 893.13, and 893.135, Florida Statutes. Section 893.03 divides all controlled substances into five schedules based upon potential for abuse and currently accepted medical use. Section 893.13 provides the penalties for drug offenses, with the exception of those offenses that the legislature defines as "trafficking" offenses, which are defined by §893.135. It is §893.135 that is of primary concern. The legislature has logically differentiated between mere possession of a controlled substance for personal use and possession of controlled substances in such quantities that exceed personal use and which are reasonably possessed only for purposes of trafficking.

The relevant section is §893.135(c); it discusses the penalties for trafficking in drugs belonging in the opium family, one such drug being hydrocodone. In part the statute provides:

> Any person who ... is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone,

> hydromophone, or any salt, derivative, isomer, or salt or isomer thereof, including heroin, *as described in s. 893.03(1)(b) or 2(a)*, or 4 grams or more of any mixture containing any such substance ... commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." (emphasis added).

One can only traffic in 4 grams or more of hydrocodone *as described in §893.03(2)(a)* or any mixture of hydrocodone *as described in 893.03(2)(a)*. The hydrocodone described in §893.03(3)(c)4 (Schedule III) is specifically and conspicuously absent. The trafficking statute only applies to drugs described in Schedule I [§893.03(1)(b)], and Schedule II [§893.03(2)(a)], but not those listed in Schedule III [§893.03(3)]. The key question is what converts Schedule III hydrocodone into Schedule II. The answer lies in the definition of Schedules II and III.

A Schedule II substance has "a high potential for abuse and has currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to *severe psychological or physical dependance.*" §893.03(2), Florida Statutes. A Schedule III substance, on the other hand, has a potential for abuse less than those substances listed in Schedules I and II, has currently accepted use in the United States, and "abuse of the substance *may lead to moderate or low physical dependance or high psychological dependance* ...." §893.03(3), Florida Statutes. (emphasis added).

If a citizen possesses a number of Lorcet Plus tablets in which the total weight is 3 grams (approximately 4 pills at 657.5 milligrams each), it is a Schedule III substance. The tablets would have accepted medical use in the United States, and their consumption may lead to moderate or low physical dependance. If a couple of tablets are added to the amount, and the total weight increases to 4 grams, the *same* drug still exists. It would still have accepted medical use in the United States, and it may still lead to moderate or low physical dependance. All that has changed is the number of pills.

However, if the amount of hydrocodone is increased from 7.5 milligrams to 15 or more milligrams in each tablet, a much different drug is created, whether a citizen possesses 5 such pills or 200 such pills. The added hydrocodone per dosage unit increases the risk of physical and/or psychological dependance and necessarily restricts its accepted medical use, not the number of pills. Therefore, the amount of hydrocodone in each tablet defines whether the tablet is classified as a Schedule II or III drug and, thus, whether it is subject to the trafficking statute.

The state's argument that the language "any mixture containing any such substance" somehow converts the Schedule III hydrocodone into Schedule II hydrocodone is not supported by the plain, black and white language of the statute. Nor is the above plain reading inconsistent with appropriate objectives of the

legislature to curb drug abuse and punish more severely those who traffic in large amounts of dangerous drugs. Contrary to the state's brief, Mr. Potts was not in possession of a substantial amount of hydrocodone, (Respondent's Brief on the Merits, p 6), especially when considering a daily adult dosage is 6 tablets. PHYSICIAN'S DESK REFERENCE, *supra*, at 1017. Because the trafficking statute was developed to impose more severe sanctions on those who deal in large amounts of various controlled substances, it doesn't make sense that the legislature intended that such a relatively small amount of hydrocodone/acetaminophen be subject to the trafficking statute. It certainly does not make sense that 143 tablets of Lorcet Plus would subject a citizen to a minimum/mandatory 25 year prison sentence. This fact is borne out in dramatic fashion when §893.135 is examined as a whole.

c. Comparing similar sentences for trafficking in cocaine, marijuana, and heroin with hydrocodone (Schedule III), it becomes evidently clear that the legislature meant to exclude Schedule III hydrocodone from the trafficking statute.

At the motion to dismiss hearing below, the prosecutor and the defense stipulated that the tablets possessed by Mr. Potts weighed over 28 grams. (R-99). If the state's interpretation is correct, Mr. Potts would be required to serve a mandatory minimum term of 25 calendar years. Certainly, this is a very severe sentence, among

the most severe provided by law. The gravity with which the legislature views trafficking in such an amount of hydrocodone is further evidenced when compared to other drugs listed in the trafficking statute.

There is no comparable 25 year mandatory minimum sentence for trafficking in cocaine, the longest sentence for that offense, in years, is 15 for trafficking in 400 grams or more but less than 150 kilograms. §893.135(1)(b)(1)(c). Fla. Stat. Quantities above 150 kilograms are punished by a mandatory sentence of life without parole or early release. Thus, if the state is correct, Mr. Potts would have been better off had his house been raided by law enforcement and 300 pounds of cocaine been discovered stashed in his bedroom, instead of his possession of the 143 Lorcet Plus tablets. His sentence for the 300 pounds of cocaine would be 10 years *less* than the sentence for the Lorcet. Similarly, Mr. Potts would have been better off possessing 10,000 pounds or more of marijuana, instead of the Lorcet. §893.135(1)(a)3, Fla. Stat. His sentence would have again been 10 years less. Such results are totally disproportionate to the abuse potential of the drugs; and the accepted medical use (if any) of cocaine and marijuana.

It is also disproportionate because no one keeps 300 pounds of cocaine for personal use, or even 400 grams for that matter. The same goes for 10,000 pounds of marijuana. Such amounts are possessed only for trafficking purposes. On the

other hand, 140 tablets of Lorcet is hardly an excessive amount. Even if it were possible to separate the hydrocodone from the acetaminophen, the 143 tablets would yield barely one gram of pure hydrocodone, an amount insufficient for trafficking purposes.

The same disproportionate results occur with heroin. If the state is correct, 28 grams of *pure* heroin equal the 143 tablets of Lorcet, with its minuscule amount of hydrocodone, for sentencing purposes. §893.135(1)(c)1.c, Fla. Stat.

The only sensible interpretation of the trafficking statute, therefore, is to assume that the legislature knew what it was doing when it split hydrocodone into two schedules. The cut off amount between Schedule II and III is 15 milligrams per dosage unit,[1] "with recognized therapeutic amounts of one or more active ingredients which are not controlled substances." §893.03(3)(c)4, Fla Stat. A review of medical research instructs that the highest per dosage unit of hydrocodone (legally manufactured) is 10 milligrams. PHYSICIAN'S DESK REFERENCE, *supra*. Thus, 15 milligrams per dosage unit is a significant departure and may be too high an amount for legitimate medicinal purposes. Such an amount would then be classified as a Schedule II drug and subject to the sanctions of the trafficking statute if 4 grams or

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[1] Unless in liquid form where the cut off is not more than 300 milligrams of hydrocodone per 100 milliliters with recognized therapeutic amounts of non-controlled substances. §893.03(3)(c)4, Fla. Stat.

more, or 4 grams or more of any mixture containing any such substance, are possessed.

d. The Lorcet tablets do not constitute a "mixture" of hydrocodone and acetaminophen.

The fallacy in the state's position is the belief that the Lorcet tablets at issue contain a "mixture" of hydrocodone and acetaminophen. The problem is appreciating the definition of "mixture," specifically when discussing controlled substances. In *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), the Supreme Court held that, "[s]o long as [the mixture] contains a detectable amount [of a controlled substance], the entire mixture or substance is to be weighed when calculating the sentence." *Id.* at 459, 111 S.Ct. at 1924. Noting that "[n]either the statute nor the Sentencing Guidelines define the terms "mixture" and "substance," nor do they have an established common-law meaning," the Supreme Court gave the terms their ordinary meaning. *Id.* at 462, 111 S.Ct. at 1924. Therefore, the Supreme Court defined a "mixture" as " 'a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence' "[2] or "two substances blended together so that the particles of one are diffused among the

[2] *Id.* at 462, 111 S.Ct. at 1926 [quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986)].

particles of the other." *Id.* at 462, 111 S.Ct. at 1926 [citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)].

The Lorcet tablets at issue meet neither of the above two definitions of mixture. The hydrocodone and acetaminophen do have a precise, fixed proportion to one another, in this case, 7.5 milligrams to 650 milligrams. The two are not diffused among each other but are combined precisely to form a distinct product. The acetaminophen acts as a buffer to the hydrocodone, not as a dilutant, cutting agent or carrier medium. *See United States v. Jackson*, 115 F.3d 843 (11th Cir. 1997) (holding that packaged possessed by defendant which contained 99 percent sugar and 1 percent cocaine was not a mixture under the United States Sentencing Guidelines).

In *Hayes*, the Second District Court of Appeal found that the analysis by the Supreme Court in *Chapman* supported its holding. In *Chapman*, the defendant was convicted of selling 10 sheets of blotter paper containing 1,000 doses of LSD. The Supreme Court held that the weight of the blotter paper, and not just the weight of the pure LSD, which the paper contained was to be used in determining the sentence. The Supreme Court concluded that this interpretation was compatible with Congress' "'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of the pure drug involved, is used to determine the length of sentence." *Id.* at 461 (citing H.R. Rep. No. 99-845,

pt. 1, pp. 11-12, 17 (1986)).

The *Hayes* court concluded from the above analysis that the "hydrocodone has been mixed, or commingled, with the acetaminophen, and the two are ingested together. The acetaminophen facilitates the use, marketing, and access of the hydrocodone." *Hayes, supra.*

What the Second District overlooked was that the blotter paper in *Chapman* facilitated the *illegal* use of a scheduled drug. The acetaminophen at issue here, however, facilitates the *legal* and *legitimate* use of a scheduled drug. The "mixture" language of the trafficking statute addresses the legitimate concern that a diluted mixture of a controlled substance, such as cocaine mixed with sugar or flour, could be disseminated to a larger number of people and create a greater potential for harm. *State v. Yu*, 400 So.2d 762 (Fla. 1981). Therefore, the state's reliance as *Yu* is misplaced. (Respondent's Brief, p.7). The combination of hydrocodone with acetaminophen does not "dilute" the hydrocodone and increase its potential for abuse, but actually causes the otherwise Schedule II drug to be down classified to Schedule III. By statutory definition, such a combination has *less* potential for abuse and has currently accepted medical uses as opposed to "severely restricted" medical use. §893.03(3), Fla. Stat.

D. CONCLUSION

This case presents an ideal opportunity for the Court to clarify the meaning of "mixture" in the context of legally manufactured prescription drugs. It is Mr. Pott's position that the combination of hydrocodone with acetaminophen, aspirin, or other similar agents do not constitute a "mixture" of hydrocodone for criminal law purposes. If the combination forms a legally manufactured prescription drug, a distinct product is created, not a mixture of substances with no fixed proportion to one another or a dilution of scheduled drug that facilitates its illegal use. Clarifying this definition would go a long way toward more consistent application of the trafficking statute.

As to the remaining issues, the Petitioner would rely on the arguments set forth in his initial brief.

Based on the foregoing, the district court's opinion should be reversed. The Court should approve the holding of the First District in *Holland* and disapprove the holding of the Fifth District in *Baxley*. The Court should also take the opportunity to clarify the term "mixture" in the context of prescription drugs as discussed above.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Anthony J. Golden, Assistant Attorney General
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by ~~hand~~/mail delivery this 30th day of September, 1998.

Respectfully submitted,

RB. White

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