ORIGINAL

SUPREME COURT OF FLORIDA

JAMES WILLIAM POTTS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 93,546

District Court of Appeal,
5th District - No. 98-114

INITIAL BRIEF OF PETITIONER

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STATEMENT OF FACTS AND CASE

Based on two December 19, 1996 sales of 70 Lorcet Plus 7.5 milligram 73 Lortab 7.5 milligram (R1-3, 8-10)*, Petitioner was charged with two counts of trafficking in hydrocodone by actual or constructive possession in violation of Florida Statutes 893.135(1)(c) and 893.03(2)(a)1 (R22-23).

During the hearing before the trial court on Petitioner's Motion to Dismiss, the prosecution stipulated that each pill is a dosage unit and that each dosage unit contains 7.5 milligrams of hydrocodone and 650 milligrams of acetaminophen** (R97-108). Therefore, the total amounts of hydrocodone underlying one charge is .525 grams and .547 grams supports the other. The gross weight of the pills supporting each charge are 59.2 grams and 66.2 grams respectively (R-99).

Petitioner's Motion to Dismiss the trafficking charges (R44-59) and his "Mixture" Motion to Dismiss (R60-64), which both argued the pills involved in this case would not support trafficking charges, were denied (R92, 108, 185).

Petitioner thereafter entered a nolo contendere plea, specifically reserving the right to appeal the trial court's denial of the Motion to Dismiss and Mixture Motion to Dismiss (R137-171), and was sentenced to seven and one-half years in the Department of Correction (188-197).

Following a timely appeal (R243), the conviction was affirmed by the Fifth District Court of Appeal in an opinion dated June 19, 1998 based on STATE v. BAXLEY, 684 So. 2d 831 (Fla. 5th DCA 1996)

(R68-70) and certifying conflict with STATE v. HOLLAND, 689 So. 2d 1268 (Fla. 1st DCA 1997) (R65-67). This issue is currently awaiting resolution in STATE v. HAYES (Fla. 4th DCA Case No. 97-2014).

A timely Notice to Invoke Discretionary Jurisdiction was filed in the District Court of Appeal on July 30, 1998, and filed in the Florida Supreme Court on July 27, 1998. On July 30, 1998, the Florida Supreme Court entered an order postponing a decision on jurisdiction and establishing a briefing schedule.

*All references are to the record on appeal in the Fifth District Court of Appeal.

**According to the P.D.R., each Lortab contains only 500 milligrams of acetaminophen. This difference does not affect the applicable law, argument or ultimate decision.

SUMMARY OF ARGUMENT

The pills that form the basis of this prosecution are each a Schedule III substance. Schedule III pills cannot form the basis of a trafficking prosecution. F. S. 893.135(C) limits trafficking prosecutions to substances described in Schedule II. The Schedule of a commercially manufactured pharmaceutical does not change as the number of pills increase.

The total weight of the hydrocodone supporting each charge is roughly one half of one gram. More than four grams of hydrocodone are required to support a trafficking charge under F. S. 893.135(C). The weight of the non-controlled acetaminophen contained in the pills should not be considered to satisfy the trafficking threshold.

The sentence was erroneous or these are not trafficking in illegal drug convictions.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS AND THE DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THAT DECISION

STATE v. BAXLEY, 684 So. 2d 831 (Fla. 5th DCA 1996) reversed the trial court's granting of the Accused's Motion to Dismiss hydrocodone trafficking charges.

The Fifth District Court of Appeal held that a defendant who deals in Schedule III pills, which would be a third degree felony, is subject to a trafficking prosecution if a sufficient number of tables are involved so that four grams or more of prohibited substance is involved.

This is so, the Court reasoned, because:

> " ... we believe that a proper interpretation of F.S. 893.03(3)(c)4 makes it clear that only a small amount of hydrocodone is a Schedule III substance. If the amount involved is 4 grams or more of hydrocodone or 4 grams or more of a mixture containing hydrocodone then hydrocodone becomes a Schedule II substance." (emphasis supplied)

Yet, BAXLEY seems to be internally inconsistent when it states:

> "Schedule III substances include hydrocodone or hydrocodone mixtures which meet the section 893.03(3)(c)4 limitation and Schedule II includes all other hydrocodone"

All the pills in BAXLEY, HOLLAND, infra, as well as all the pills in the instant case, meet the F.S. 893.03(3)(c)4 limitations.

STATE v. HOLLAND, 689 So. 2d 1268 (Fla. 1st DCA 1997) affirmed the trial court's granting of the Accused's Motion to Dismiss the trafficking charges, certifying conflict with BAXLEY, supra, finding the hydrocodone sold was a Schedule III substance, rather

than a Schedule II substance for the purpose of the trafficking statute where (as here) the tablets contain less than 15 milligrams of hydrocodone per dosage unit.

HOLLAND held:

> "If the mixture containing controlled substance falls within parameters set forth in Schedule III, the amount of controlled per dosage unit, not the aggregate amount or weight, determines whether the defendant may be charged with violating the trafficking statute"
>
> "The tablets sold ... do not fall within the trafficking statute ... because the concentration of hydrocodone per dosage unit is less than 15 milligrams; the concentration of hydrocodone per dosage unit will remain below this threshold regardless of the number of tablets sold."

For the following reasons, HOLLAND, supra, represents the soundest analysis of the issue. BAXLEY, supra, should be disapproved and the instant case reversed.

> F.S. 893.135(c)1:
>
> "Any person who sells ... or who is knowingly in actual or constructive possession of, 4 grams or more of ... hydrocodone ... as described in F.S. 893.03 ... (2)(a), or 4 grams 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 supplied). If the quantity involved:
>
> c. Is 28 grams or more but less than 30 kilograms such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of $500,000.

Hydrocodone is described in F.S. 893.03(2)(a)1j as follows:

> (2) SCHEDULE II - A substance in Schedule II has a high potential for abuse and has a 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 dependence. The following substances are controlled in Schedule II:
>
> (a) Unless specifically excepted or unless listed in another schedule, any of the following substances (emphasis supplied):
>
> 1. Opium and any salt, compound, derivative or preparation of opium ... including but not limited to the following:
>
> j. Hydrocodone

The particular hydrocodone involved here is precisely and specifically listed in another schedule, F.S. 893.03(3)(c)(4), and by inclusion therein is specifically excepted from Schedule II, to-wit:

> F.S. 893.03
> (3) Schedule III - A substance in Schedule III has a potential for abuse less than substances contained in Schedule I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence ... The following substances are controlled in Schedule III:
>
> (c) Unless specifically excepted, or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities, of any, of the following controlled substances or any salt thereof (emphasis supplied)
>
> (4) ... not more than 15 milligrams [of hydrocodone] per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

Other statutes and regulations that assist in resolution of this issue are:

> F.S. 893.0355(3) recognizes the continuing

> viability of the original legislative purpose of the Florida Comprehensive Drug Abuse Prevention and Control Act of maintaining uniformity between the laws of Florida and the laws of the United States with respect to controlled substances.
>
> 21 C.F.R. 1308.12(b)(1)(10) classifies hydrocodone as a Schedule II substance identified by Drug Enforcement Administration control number 9193.
>
> 21 C.F.R. 1308.13(e)(4) classifies any mixture or preparation ... in limited quantities ... not more than 15 milligrams [of hydrocodone] per dosage unit with one or more active non-narcotic ingredients in therapeutic amounts as a Schedule III substance identified by Drug Enforcement Administration control number 9806 (emphasis supplied)
>
> F.S. 893.04 helps to illustrate that the distinction between Schedule II and Schedule III substances cannot depend on the number of dosage units involved wherein it provides:
>
> (f) A prescription for a controlled substance listed in Schedule II may be dispensed only upon written prescription ... No prescription for a controlled substance listed in Schedule II may be refilled (emphasis supplied)
>
> (g) No prescription for a controlled substance listed in Schedule III, IV or V may be filled or refilled more than five times within six months after written, unless the prescription is renewed (emphasis supplied)

According to the Physicians Desk Reference (52nd Ed. 1998), Medical Economics Company, Inc., at pages 953, 2927, the applicable adult dosage is one tablet every 4 - 6 hours as needed for pain. The total 24-hour dose should not exceed 6 tablets. Therefore, 42 tablets would constitute a weekly adult dose.

According to the Physicians Desk Reference at pages 952, 2926, each dosage unit of Lorcet Plus or Lortab contains 7.5 milligrams

of hydrocodone and either 500 or 650 milligrams of acetaminophen, which is a non-narcotic active ingredient in therapeutic amounts.

There is no dispute one of the pills upon which the prosecution is based would be a Schedule III substance. Likewise, there is no dispute that so long as the gross aggregate weight of the pills does not exceed 4 grams, they remain Schedule III substances. HOLLAND, supra, holds that these pills remain Schedule III substances regardless of their number or aggregate weight. The law of the instant case is that once the gross aggregate weight of the pills exceeds 4 grams, these Schedule III substances are metamorphosed into Schedule II substances and thereby become a sufficient basis for a trafficking prosecution.

Appellee below concedes at page 3 of the Answer Brief:

> "If the dosage unit of any tablet or pill exceeds 15 milligrams of hydrocodone, then the drug is a Schedule II substance; if the dosage unit contains less than 15 milligrams it is a Schedule III substance" (emphasis supplied)

F. S. 893.03 divides all controlled substances into five schedules based on potential for abuse, accepted medical use in treatment in the United States and the potential consequences of abuse.

BAXLEY, supra, holds that once the aggregate weight of a Schedule III substance approaches the recommended daily adult dosage, it becomes a Schedule II substance. Under BAXLEY, supra, the addition of one pill converts a substance with potential for abuse less than substances contained in Schedules I and II into a substance with a high potential for abuse. This same additional

pill converts "accepted medical use" to "severely restricted medical use"; while converting abuse of the substance from leading to moderate or low physical dependence or high psychological dependence into severe psychological or physical dependence.

Under the BAXLEY, supra, reasoning, physicians and pharmacists could be subjected to prosecution for trafficking in Schedule II substances if they prescribe one pill less than one daily adult dosage; or if they refilled a prescription. F. S. 893.04(g) provides a prescription for Schedule III pills may be refilled up to five times within a six month period. F. S. 893.04(f) requires a written prescription for a Schedule II substance and expressly prohibits refilling a prescription for a Schedule II substance. Under BAXLEY, supra, once the aggregate gross weight of the pills exceeds 4 grams, refills of the prescription are prohibited. Based on the weight of the pills, one less than a daily dosage would trigger this change.

According to the Physician's Desk Reference, the appropriate adult dosage of Lorcet Plus and the 7.5/500 Lortab is one tablet every 4 to 6 hours as needed for pain. The total 24 hour dose should not exceed 6 tablets, at pages 953, 2927. Here, this source also indicates both pills are Schedule III controlled substances, the gross weight of five tablets exceeds 4 grams.

Awkward as these statutes may be, a close reading makes reference to rules of statutory construction unnecessary. The pills involved here are specifically fit within the virtually tailor made definition of F. S. 893.03(3)(C)4 because they are a

material, compound, or mixture containing not more than 15 milligrams of hydrocodone per dosage unit with recognized therapeutic amounts of one or more active ingredients which are not controlled substances (acetaminophen). They are excluded from Schedule II by "unless specifically excepted or unless listed in another schedule". The language of inclusion in Schedule II makes no reference to "material, compound or mixture"; unlike Schedule III.

Because the pills involved here are not described in F. S. 893.03(2)(a), neither can they be a mixture of such substance. They are excluded from inclusion in F. S. 893.03(2)(a) by detailed, descriptive inclusion in F. S. 893.03(3)(C)4. The only sensible interpretation of the trafficking statute is to assume the legislature knew what it was doing when it split hydrocodone into two schedules. They specifically excluded these pills from Schedule II by listing them in Schedule III. They specifically included them in Schedule III by a "limited quantity" precise definition of F. S. 893.03(3)(C)4. The legislature then expressly and specifically limited trafficking to Schedule II substances.

These are not two statutes with widely disparate penalties for the exact same conduct. These are very different substances, with dramatically different potential for abuse, with dramatically different acceptance in medical treatment and with dramatically different abuse potential subject to significantly different regulation and penalties..

If the Court feels these statutes, F.S. 893.03(2)(a)j,

893.03(3)(C)4 and 893.135(1)(c) are ambiguous, conflicting or overlapping, then the rules of statutory construction would also support a determination that HOLLAND, supra, is the better reasoned decision.

Penal statutes must be strictly construed; STATE v. CAMP, 596 So.2d 1055 (Fla. 1992); PERKINS v. STATE, 576 So.2d 1310 (Fla. 1991); and where statutes are susceptible to more than one meaning, the statute must be construed in favor of the accused, SCATES v. STATE, 603 So.2d 504 (Fla. 1992); OGDEN v. STATE, 605 So.2d 155 (Fla. 5th DCA 1992); F. S. 775.021(1).

No statute should be so strictly construed as to defeat the intention of the legislature and when two statues are apparently in conflict; the more specific controls over the more general; LINCOLN v. FLA. PAROLE COMM., 643 So.2d 668 (Fla. 1st DCA 1994).

ADAMS v. CULVER, 111 So.2d 665 (Fla. 1959) held that prosecution under the more serious and general F. S. 800.04 prohibiting a lewd and lascivious act in the presence of a minor was prohibited by the more specific and less serious offense of exhibiting a lewd photo to a minor under F. S. 847.01(1,2), where arguably the conduct could be prosecuted under either statute. ADAMS specifically held:

> "It is a well settled rule of statutory construction ... that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms ... this rule is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provisions." (internal citations

omitted)

The reason for rule is stated in IN RE WILLIAMSON, 276 P 2d 593 (Calif. 1969):

> "Where the general statute standing alone would include the same matter as the special act and thus conflict with it, the special act will be considered an exception to the general statute whether it was passed before or after such general enactment." (emphasis supplied)

Specific precise inclusion of these pills under F. S. 893.03(3)(C)4 as a Schedule III substance, the possession of which is a third degree felony under F. S. 893.13(1)a(2) prohibits a more serious trafficking prosecution under F. S. 893.135(c) by virtue of the general Schedule II definition contained in 893.03(2)aj.

All other substances included in the trafficking prohibition are either Schedule I or II substances. Marijuana and methaqualone are Schedule I substances, F. S. 893.03(1). Cocaine, phencyclidine and amphetamine are Schedule II substances, F. S. 893.03(2). None of these substances, even in limited quantities, are listed under Schedule III, F. S. 893.03(3). No other Schedule III substance is prohibited by the trafficking statute.

Under the BAXLEY, supra, reasoning, one pill less than the recommended daily dosage of the pills in question could subject the physician, pharmacist and patient to a 25 year minimum mandatory sentence and a $500,000 fine. This is 10 years more minimum mandatory than a seller of 10,000 pounds of Schedule I marijuana (which must be substantially more than the recommended daily dosage). Under BAXLEY, supra, less than a daily adult dosage would require 10 years more minimum than the seller of three hundred

thirty pounds of pure cocaine, a Schedule II substance. Fifty times the weight of pure amphetamine or 100 times the weight of phencyclidine would only result in a minimum mandatory 15 year sentence.

THE TRIAL COURT ERRED BY DENYING THE PETITIONER'S "MIXTURE" MOTION TO DISMISS AND THE DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THAT DECISION

Petitioner asserts that the Trafficking statute must be strictly construed in his favor; CAMP, PERKINS, SCATES, supra, and F. S. 775.021(1). Thus, when the specific amount of the controlled substance is precisely known and regulated, the actual weight of the controlled substance must determine the punishment without including the weight of the non-controlled substance with which it is combined.

The pills forming the basis of this prosecution are prescription drugs, with a recognized medical purpose commercially manufactured by licensed pharmaceutical firms under the strict supervision of the Federal Food and Drug Administration; with a specific Drug Enforcement Administration identification number.

The total 143 pills involved contained total of 1.07 grams of hydrocodone combined with a quantity of acetaminophen in excess of ninety grams.

If Lorcet Plus or Lortab can form the basis of a trafficking prosecution, then the issue becomes what weight or quantity of what substance is required to support a conviction.

These are F.D.A. approved, D.E.A. regulated, commercially manufactured pharmaceuticals with known, and precise weights, and specified relativity to the non-controlled substance with which it is combined.

Acetaminophen is not a marketing tool to facilitate the

transmission of a controlled substance to a greater market and thereby compounding the harm to society. It is a medical catalyst to enhance the effectiveness of the controlled substance within the body of the consumer.

These pills are not a mixture of hydrocodone and acetaminophen. In interpreting what the Federal Sentencing guideline meant when it stated "... so long as [the mixture] contains a detectable amount [of a controlled substance], the entire mixture is to be weighed when calculating the sentence. The United States Supreme Court had to determine what was meant by "mixture" because neither the statute nor guideline defined that term or substance; nor did they have an established common-law meaning. The terms were given the ordinary meaning, CHAPMAN v. UNITED STATES, 500 U.S. 453, 111 S.Ct. 1919, 1214 2 Ed. 2d 524 (1991). "Mixture" was defined 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" (emphasis supplied). 111 S. Ct. (1926) [quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986) or: "two substances blended together so that the particles of one are diffused among the particles of the other" 111 S.Ct. 1926 [citing 9 OXFORD ENGLISH DICTIONARY 921 (2nd Ed. 1989).

Lortabs and Lorcet Plus meet neither definition. The hydrocodone and acetaminophen are in fixed precise proportion to each other; and they are not diffused among each other but precisely combined to form a distinct product.

Where, as here, a precise combination forms a legally manufactured and defined prescription drug, a distinct product is created, not a mixture of substances with no fixed proportion to one another.

The sentence imposed herein suggests that neither the prosecution nor the Court considered this combination of hydrocodone and acetaminophen a "mixture" for trafficking in illegal drugs purposes; for if they did, the sentence is illegal.

If considered a mixture, the gross weight of each separate quantity would require a mandatory twenty-five year sentence. If not a mixture, the net weight of hydrocodone, being less than one gram total cannot support any trafficking charge requiring four grams; regardless of whether they are Schedule II or Schedule III substances.

The "Mixture" Motion to Dismiss should have been granted. The matter must be reversed and remanded to the trial court with directions to reduce these convictions to Level 3 offenses of possession of controlled substances.

THE TRIAL COURT ERRED IN SENTENCING AND THE DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THAT SENTENCE

The offenses to which the Appellant pled, and of which he was convicted, cannot be properly scored at Level 9. Level 9 requires conviction of trafficking in drugs more than 28 grams, F.S. 921.0012(3)(i). Convictions of trafficking in more than 28 grams of Schedule II substances requires minimum mandatory 25 years in prison and one-half million dollars fine, F. S. 893.135(1)(c), unless the State files a motion for reduction based on substantial assistance, and the Court grants such a Motion, F.S. 893.135(4). No substantial assistance motion was filed or granted.

Appellant was sentenced to 90 months prison followed by four years probation under the Sentencing Guidelines. Level 9 offenses, which by definition require proof of trafficking in over 28 grams, which requires a mandatory sentence and fine, are not subject to a guideline sentence, F.S. 893.135(c)1c. Only Level 8 (14 - 28 grams) and Level 7 (4 - 14 grams) of Schedule II substances trafficking in drugs are sentenced according to the sentencing guidelines, F.S. 893.135(c)1b, and (c)1a.

If properly scored as Level 9 offenses, then the guideline scoresheet computations are correct, but to be a Level 9 offense, the offense must be Trafficking in Illegal Drugs, more than 28 grams, but less than 30 kilograms, F. S. 921.0012(3)(i), a violation of F. S. 893.135(1)(c)1c. For such a conviction the sentence is not according to the sentencing guidelines, but rather requires the imposition of a minimum mandatory 25 year prison term,

and a minimum $500,000 fine, F. S. 893.135(1)(c)1C.

Level 8 offenses of Trafficking in More than 14, but less than 28 grams, of Illegal Drugs, F. S. 921.0012(3)(h) are expressly provided by statute to be subject to the sentencing guidelines, F. S. 893.135(1)(c)1b.

Level 7 offenses of Trafficking in More than 4, but less than 14 grams, of Illegal Drugs, F. S. 921.0012(3)(g), are also expressly provided by statute to be subject to the sentencing guidelines, F. S. 893.135(1)(C)1A.

Level 3 offenses include Possession of any controlled substance, other than felony possession of cannabis, F. S. 921.0012(3)(C). Such offenses are defined by F. S. 893.13(6)(a) and subject to the sentencing guidelines by virtue of the fact such offenses have no minimum mandatory penalty.

If scored as a Level 3 offense, the total sentencing points would be 18.4. The trial court would have discretion to increase this score by up to 15 percent, which if maximized would yield a score of 21.16 points. Even with the discretionary increase applied, the result is a non-state sentence, absent any departure.

The amount of incentive gain time Appellant is eligible to receive is dependent, in part, on the sentencing guideline offense Level.

Administrative Rule 33-11.0035(2)(b) provides:

> "Inmates convicted of offenses occurring on or after January 1, 1994 which fall within Level 8 through 10 of the sentencing guidelines offense severity chart (921.0012) shall be eligible to receive up to 20 days of incentive gain time per month, pursuant to 33-

11.0065(3)."

Administrative Rule 33-11.0035(3) provides in part:

> "... Inmates convicted of offenses occurring on or after January 1, 1994 which fall within Level 1 through 7 of the sentencing guideline offense severity chart (921.0012 F.S.) are eligible to receive up to 25 days of enhanced incentive gain time per month, pursuant to 33-11.0065(3)."

Administrative Rule 33-11.0065(3)(g)(i)(ii) provides in pertinent parts:

> (i) Inmates convicted of an offense occurring on or after 1-1-94 which falls within the sentencing guideline offense severity ranking chart (921.0012 F.S.) Level 1 through 7 shall receive a preliminary base gain time recommendation of 22 days.
>
> (ii) Inmates convicted of an offense occurring on or after 1-1-94 which falls within the sentencing guidelines offense severity chart Level from 8 through 10 shall receive a preliminary base gain time recommendation of 16 days.

Administrative Rule 33-11.0065(4)(i)(ii) has similar provisions for inmates that have no work or program evaluation to qualify under Rule 33-11.0065(3). Subsection (4) provides those convicted of Level 1 through 7 offenses shall receive a base recommendation of 11 days, while those convicted of Level 8 through 10 offenses shall receive a base recommendation of 8 days.

The offenses alleged in the information are trafficking in more than 28 grams of hydrocodone or a mixture containing hydrocodone by actual or constructive possession. Possession of 14 - 28 grams and possession of 4 - 14 grams of hydrocodone, or a mixture containing hydrocodone, would be necessarily lesser

included offenses of trafficking based on the allegations of the information and the factual basis presented, as would be simple possession (less than 4 grams) of hydrocodone or a mixture containing hydrocodone, F.S. 893.135(c)1 a,b; 893.13(6)(a).

The court must impose a minimum mandatory sentence where applicable and has no discretion to do otherwise. There is no authority for the State Attorney to waive the application of a penalty the legislature has deemed to be mandatory. No motion by the State seeking relief of the Accused from the mandatory penalty for substantive assistance was filed; and no such relief was granted by the court. (R1 - End)

For this non-mandatory sentence to be legal, it must be based on a lesser included offense, the sentence for which would properly be calculated under the sentencing guidelines. If a lesser offense was properly considered under the sentencing guidelines, then this guideline score was improperly calculated.

The total gross weight of the 73 pills supporting Count I exceeds 28 grams. The total gross weight of 70 pills supporting Count II exceeds 28 grams. The pleas, judgments and sentences cannot be based on the gross weight because if they were, minimum mandatory sentences of 25 years prison and a $500,000 fine would be required as to each.

The net weight of hydrocodone in all 143 pills is slightly more than one gram. The net weight of hydrocodone is slightly more than one-half of one gram for the pills supporting each charge. This factual base cannot support a charge of trafficking in illegal

drugs because it does not satisfy the threshold amount of four grams.

Because the State did not seek, and the Court did not impose, minimum mandatory sentences as the gross weight of the pills would require, the plea, judgment and sentence must be based on the net weight of the hydrocodone. The net weight of the hydrocodone being less than 4 grams for each charge, the only sustainable charge is a Level 3 offense per F.S. 921.0012(3)(c) and 893.13(6)a. The only legal guideline sentence, therefore, is a non-state sentence. The 90-month sentence must be reversed and remanded to the trial court for imposition of a non-state sentence.

CONCLUSION

The Motion to Dismiss should have been granted because the specific pills which form the basis of this prosecution cannot support a charge of trafficking in illegal drugs.

The "Mixture" Motion to Dismiss should have been granted because the pills which form the basis of this prosecution are not a "mixture" as that term is contemplated relative to trafficking in illegal drugs. Additionally, the amount of controlled substance contained in these pills does not satisfy the threshold amount for a trafficking in illegal drugs prosecution.

The guideline sentence herein was improper based on the applicable law.

The conviction must be reversed, the sentence vacated, and the matter remanded to the trial court for convictions, judgment and sentences for third degree felonies and Level Three offenses.

HOLLAND, supra, is the better reasoned decision which should be approved. BAXLEY, supra, should be disapproved and the instant case reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Attorney General's Office, The Capitol, Tallahassee, FL 32399-1050, by mail, this 21st day of August, 1998.

Respectfully Submitted,

RONALD E. FOX, P.A.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1998

JAMES WILLIAM POTTS,
Appellant,

v.

CASE NO. 98-114

STATE OF FLORIDA,
Appellee.

_____/

Opinion filed June 19, 1998

Appeal from the Circuit Court
for Marion County,
Thomas D. Sawaya, Judge.

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Umatilla, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Carmen F. Corrente, Assistant
Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. See State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So. 2d 737 (Fla. 1997). We certify conflict with State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997).

GRIFFIN, C.J., THOMPSON, J.J., and ORFINGER, M., SENIOR JUDGE, concur.