In The

SUPREME COURT OF FLORIDA

LISA BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 94,528

ON APPEAL
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN THE FOURTH DISTRICT

Petitioner's Brief on the Merits

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner, Lisa Brown, certifies that the following persons or entities may have an interest in the outcome of this case:

1. LISA BROWN
   STEPHEN FALKENSTEIN
   (Petitioners)

2. JOHN GALLAGHER, Assistant State Attorney
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   (Trial Counsel for Respondent)

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

Petitioner was the appellee and Respondent was the appellant in the District Court of Appeal of the State of Florida for the Fourth District.

In this brief, petitioner will be referred to as "petitioner" or as "Lisa Brown" or "Ms. Brown". Respondent will be referred to as "respondent" or "the State".

In this brief, the symbol "App." followed by the appropriate page number will be used to denote the appendix; the appendix is the petitioner's Amended Motion to Dismiss re: Trafficking Count Including Memorandum of Law filed on May 21, 1998.

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STATEMENT OF JURISDICTION

In State v. Falkenstein, 720 So.2d 1143 (Fla. 4th DCA 1998), the Fourth District Court of Appeal certified conflict with the First District Court of Appeal's decision in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), and the Second District Court of Appeal's decision in State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998).

This Court has jurisdiction to hear this case pursuant to Article V, § 3(b)(4) of the Florida Constitution.

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STATEMENT OF THE CASE AND FACTS

Petitioner, Lisa Brown ("Brown"), was charged with trafficking in hydrocodone for possession of 1500 prescription Vicodin tablets. State v. Falkenstein, 720 So.2d 1143 (Fla. 4th DCA 1998). At the time, Ms. Brown was working at a pharmaceutical wholesale company. See App. at 9.

Vicodin is a FDA approved prescription drug with a recognized medical use that is lawfully manufactured and distributed in Florida. According to publications of the Federal Drug Enforcement Administration (DEA) and the Physician's Desk Reference, each Vicodin tablet contains 7.5 mg. of hydrocodone and 750 mg of acetaminophen, a non-prescription, over-the-counter medicine (i.e. Tylenol). See App. at 2. Acetaminophen is a recognized therapeutic non-controlled substance. The total or aggregate amount of hydrocodone in 1500 tablets is 11,250 mg, or 11.25 grams. Falkenstein, 720 So.2d 1143. Pursuant to Florida Statute § 893.03(3)(c)4, Vicodin tablets are a Schedule III substance of which possession is a third-degree felony. Petitioner filed an Amended Motion to Dismiss Re: Trafficking Count, which was granted by the trial court. Falkenstein, 720 So.2d 1143. The State appealed. The Fourth District Court of Appeals reversed in Falkenstein, and certified that a conflict existed in the District Courts of Appeal. Id. at 1143.

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In Falkenstein, 720 So.2d 1143, the district court reversed the decision of the trial court and held that, "where the hydrocodone has been mixed or commingled with a substance which is capable of being consumed along with the hydrocodone...the aggregate weight of the tablets seized, and not the amount of hydrocodone per dosage unit, is the determinative weight for prosecution for drug trafficking" under Fla. Stat. § 893.135(1)(c)1. Id. at 1143. In its opinion, the district court certified conflict with the First District's holding in State v. Holland, 789 So. 2d 1268 (Fla. 1st DCA 1997), and the Second District's holding in State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998). Id.

Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court on December 4, 1998.

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SUMMARY OF THE ARGUMENT

I. A Familiar Issue of Statutory Interpretation

The particular issue of statutory construction before the Court is familiar to this Court. In prior similar instances this Court construed the statute in favor of the accused. When statutes differ in construction, Fla. Stat. § 775.021 dictates that they be "construed most favorably to the accused."

II. Intent of Legislature

The intent of the Legislature was to treat pharmaceutical mixtures of known quantities of therapeutic drugs differently from mixtures of unknown substances that are mixed to create profits for illegal sales. Any contrary interpretation allows the 'exception to the rule' urged by the State to 'swallow the rule' of law enunciated by the Legislature in Schedule III of Fla. Stat. § 893.03(3)(c)4.

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ARGUMENT

I. A Familiar Issue of Statutory Interpretation

The case before the Court presents a question of statutory interpretation that is familiar to this Court. When the statute in the case before the Court is interpreted in the same manner as this Court has interpreted other similarly situated conflicting statutes, it is clear that petitioner can only be prosecuted for the third-degree felony of simple possession.

The conflict in the case before the Court arises because petitioner was charged pursuant to Florida Statute § 893.135(1)(c)1 (1995) which defines a first-degree felony for trafficking in illegal drugs for the possession of more than "four grams or more of any mixture containing any such substance." Id. Pursuant to this statute the State erroneously believes that the petitioner can be prosecuted for the possession of a mixture of hydrocodone as a Schedule II prohibited substance under Florida Statute § 893.03(2)(a)(1)(j).

This statute is inapplicable. The appropriate statute makes the possession before the Court a third-degree felony because the specific mixture of drug is specifically classified pursuant to Florida Statute §893.03(3)(c)4 (1995) as a Schedule III substance. This statute specifically refers to pharmaceutically manufactured mixtures of hydrocodone with

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"active ingredients which are not controlled substances" and are of a therapeutic nature. Id. The drug in the case before the Court is marketed under the trade name Vicodin with the active ingredient acetaminophen (trade name: Tylenol). The State seeks to treat the therapeutic amounts of a non-controlled substance acetaminophen as merely something added to the hydrocodone that increases its weight and makes it a first-degree felony. This interpretation is erroneous for several reasons.

At the outset it must be noted that the Legislature invested a great deal of time distinguishing between controlled substances which are manufactured by pharmaceutical companies in combination with other therapeutic agents for distribution under a trade name and concoctions or mixtures created by individuals for sale on our streets[1]. At the beginning of Florida Statute § 893.03(3) (1995) a Schedule III (third-degree felony), the Legislature notes that drugs under this subsection are different from those under Schedule II (the Schedule that the State relies on for prosecution as a first-degree felony) because "a substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a

[1] The purpose of additives to Schedule II drugs is to increase the profit to the drug dealer. The nature and amount of these non-therapeutic substances are unknown to the purchaser. To the contrary, with Schedule III mixtures, the purpose and amount of the acetaminophen as in the case before the Court, is known to the user and does not increase the 'street' value of the drug.

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currently accepted medical use." Id. Schedule III specifically describes the pharmaceutically manufactured Vicodin (trade name) in the case before the Court. To the contrary in Schedule II, in which no therapeutic substances are present, the Legislature made a finding that the substances in Schedule II have "a high potential for abuse." Fla. Stat. § 893.02(2). Because the legislative findings that proceed the list of Schedule III and Schedule II drugs are so very different, the exact same mixture of drugs cannot be prosecuted under both categories. To find otherwise would lead to a logical absurdity.[2]

Thus, the question before the Court is did the Legislature intend to distinguish between pharmaceutically manufactured hydrocodone that contains a therapeutic substance (acetaminophen) and is distributed under the trade name Vicodin, from other mixtures of hydrocone in which there are no therapeutic additives and the mixture of unknown ingredients is made on

[2] The fallacy of the State's argument is evident by the fact that the specific mixture of hydrocodone in the case before the Court is articulated in Schedule III. The State's argument that the Legislature intended to give the State the discretion to prosecute as either a Schedule II (first-degree felony) or a Schedule III (third-degree felony) for the exact same known pharmaceutical mixture of hydrocodone leads to an absurd conclusion. It leads to the absurd conclusion that the same mixture has been found by the Legislature to have the "potential for abuse less than Schedule II drugs." Fla. Stat. 893.03(3). Yet, at the same time the exact same mixture is found by the Legislature to have a "high potential for abuse in Schedule II." Fla. Stat. 893.03(2). This is a total absurdity.

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the 'street' and sold for purposes of abuse. Clearly, this was the intent of the Legislature. Were it not so, there would in effect be no Schedule III controlled substances except at the discretion of the State Attorney when he or she so wished.

This Court has confronted numerous situations where a crime has been specifically prohibited with a lesser penalty in one statute, but could theoretically be considered as a more serious crime in a more general statute at the discretion of the prosecutor. Consistently this Court has ruled that the specific mention of a type of crime carrying a lesser penalty prohibited the prosecution from applying a more general statute for a more serious crime. Most recently, in Bradenton Group Inc. v. Department of Legal Affairs, WL 650595 (Fla. 1998), this Court held that "without a clear signal from the Legislature, we are unwilling to create such a distinction and transform routine bingo offenses into lottery and RICO violations." Id. at 5. In Bradenton, a bingo gaming operation was alleged to have violated several statutes regarding bingo gaming. A statewide grand jury indicted Bradenton Group, Inc. for a violation of the more serious gambling and RICO statute. The rationale of the State was that bingo gaming was gambling and since the Bingo Statute was violated, it was a form of unauthorized bingo and

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therefore, felony gambling under the Racketeering Statute[3]. The State reasoned that it had the discretion not to charge under the statute that specifically declared that bingo violations were a misdemeanor. This is similar to the case before the Court where the pharmaceutically made Vicodin containing a therapeutic amount of Tylenol, which is a third-degree felony, is being prosecuted by the State under the more general statute making it a first-degree felony for trafficking in a mixture of a controlled substance.[4] In the case before the Court, as in Bradenton, the Legislature has not made a clear pronouncement that the State has the discretion to decide whether to charge the accused with a third-degree or a first-degree felony.

Similarly, this Court has consistently held that where there is ambiguity as to the manner in which to interpret a criminal statute, the issue

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[3] This principle of statutory interpretation is "espressio unius est exclusio alterius". Because the Legislature specifically provided for the prosecution of pharmaceutically manufactured mixtures of hydrocone and therapeutic substances in Schedule III, it by definition excluded the prosecution for this specifically described substance in other sections of the statute. This Court has recognized the espressio unius est exclusio alterius rule of statutory interpretation. E.g. Federal Insurance Co. v. Southwest Federal Retirement Center, 707 So.2d 1119 (Fla. 1998); Capers v. State, 678 So.2d 330 (Fla. 1996); Olson v. State, 287 So.2d 313 (Fla.1973).

[4] In the past when the Legislature has not been clear as to how to calculate the amount of a controlled substance considered in determining punishment, this Court has consistently ruled that such ambiguity must be resolved in favor of the defendant. Purifoy v. State, 359 So.2d 446 (Fla. 1978).

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must be resolved in favor of the defendant. This Court held that possession by a defendant of five firearms in a single episode did not give rise to five separate offenses absent clear and unambiguous intent by the Legislature. Grappin v. State, 450 So.2d 480 (Fla. 1984). Similarly in interpreting the crime of resisting arrest, this Court held that one episode of resisting arrest, even though it involved multiple police officers, did not give rise to multiple charges of battery on a law enforcement officer. Again this Court held that "distinguishing single from multiple units of prosecution is a matter for the Legislature, not for adroit prosecutors or for wondering courts. Legislation for defining crimes therefore must be read as strictly, as narrowly, as reasonably possible." Wallace v. State, WL 849542 (Fla. 1998) at 10 footnote 5.

The Legislature has enunciated a similar rule of statutory construction in Fla. Stat. §775.021 (1998), which states in pertinent part that, [t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Id.

II. Intent of Legislature

Clearly, the Legislature did not intend Schedule III (third-degree felony) listed mixtures of pharmaceutical drugs to apply to any and all

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possible 'mixtures' that happen to contain a drug also listed in Schedules I and II. The 'mixture' clause in the trafficking statutes was effectuated to prosecute people who mix drugs with another substance, unknown to the buyer, in order to sell more of the drug on the 'street', make more money and create more illegal transactions. The 'mixture' clause of Schedule II was not meant to include pharmaceutically manufactured mixtures of known amounts and of a therapeutic nature. In the case before the court, where a commercial pharmaceutical company manufactured a small amount of hydrocodone together with 99% Tylenol, it is a completely different situation from that of a drug dealer who mixes another substance with a controlled substance and sells the *complete* new mixture as a controlled substance (emphasis added). The difference is in the intent of the possessor.[5] The public knows, and pharmaceutical books describe that Vicodin is always 99% Tylenol and this fact reflects in the intent of the possessor. This is completely different from someone who sells mixture of unknown substances to prospective buyers as 100% pure to create a greater

[5] Trafficking is a specific intent crime. In the case before the court, the defendant never had the specific intent to add the Tylenol to hydrocodone to increase the total volume of substance to be sold as a controlled substance. It is easily known that 99% of Vicodin is Tylenol. This is different from the intent of a drug dealer who mixes a substance with a controlled substance and sells it as all pure controlled substance. This furthers the goal of the illegal transaction, unlike the Tylenol in the case before the Court.

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number of illegal transactions. There is a different intent of the possessor in each situation. Thus, it must be remembered that the crime charged is a specific intent crime.

Petitioner is aware that this Court has accepted certiorari in several other cases involving the same issues as presented in this brief. Therefore, petitioner will not discuss the reasoning in these cases, such as in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), but petitioner concurs with the reasoning in these cases.

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CONCLUSION

As a matter of statutory interpretation, the therapeutic mixture of hydrocodone in the case before the Court can only be prosecuted as a Schedule III third-degree felony. This is required as a matter of clear legislative intent and the principle of interpretation that requires ambiguous statutes to be read in favor of the accused. This principle is explicitly codified in Fla. Stat. 775.021 and articulated clearly in the case law of this Court.

Finally, in similar situations where a lesser crime is specifically mentioned by statute but the general conduct can be theoretically considered a more serious crime, this Court has consistently held that only prosecution for the specifically mentioned crime is appropriate.

Petitioner moves this Court to rule that she can only be prosecuted for the third-degree felony of possession of hydrocodone as listed under Schedule III.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished this 15 day of January, 1999 via U.S. Mail to: Barbra Amron Weisberg, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401; Edward M. Kay, P.A., 633 SE 3rd Avenue, Suite 4F, Ft. Lauderdale, FL 33301.

BRADLEY R. STARK

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APPENDIX

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO. 96-9875CF10A

JUDGE: SCHAPIRO

STATE OF FLORIDA,

Plaintiff,

v.

LISA BROWN,

Defendant,
_____/

AMENDED MOTION TO DISMISS RE: TRAFFICKING COUNT, INCLUDING MEMORANDUM OF LAW

COMES NOW the Defendant, Lisa Brown (Brown), by and through the undersigned attorney, pursuant to Fla.R.Crim.P. 3.190,[1] the Due Process and Equal Protection Clauses of the United States and Florida Constitutions, and the Eighth Amendment of the United States Constitution, and moves this Court to dismiss count 1, and grant the State Attorney leave to re-file the offense as unlawful possession of a Schedule III controlled substance; or in the alternative to reduce the charge to the lesser included offense of trafficking in a controlled substance less than 14 grams; or in the alternative, to declare the penalties for the offense unconstitutional. As grounds therefore the Defendant states:

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[1] In State v. Globe Communications Corp., 622 So.2d 1066 (Fla. 4th DCA 1993), the court declared Florida Statute 794.03, which made it a crime to identify the victim of a sexual battery, unconstitutional both on its face and as applied. The State objected that the defendant's motion to dismiss was procedurally barred, because it was a mixed question of law and fact which did not conform to Fla.R.Crim.P. 3.190(c)(4). The court noted that a motion challenging the constitutionality of the statute, on its face, is a question of law; and a motion attacking the constitutionality of a statute, as applied, is a mixed question of law and fact. The court ruled, "(m)otions made under Rule 3.190, which do not fall into the subsection (c)(4) category, may raise factual issues and it is appropriate for the court to resolve them in order to decide whether (the statute) is constitutional as applied to the facts in this case." Based on this reasoning, it is proper for this Court to resolve issues of fact, or make findings of fact in determining this motion. For purposes of this motion, it is undisputed that the Defendant possessed 1500 Vicodin tablets, which were commercially manufactured pharmaceutical drugs. The tablets were removed from the Defendant's

1. Count 1 charges the Defendant with trafficking in hydrocodone over 28 grams but less than 30 kilograms, which is punishable by a mandatory minimum sentence of 25 years, and a mandatory fine of $500,000. The State charges that the Defendant was in possession of 1500 Vicodin tablets.[2] Vicodin is an FDA approved prescription drug, which is lawfully manufactured and distributed in Florida and the United States, and has a recognized medical use. According to the Physician's Desk Reference and publications of the Federal Drug Enforcement Administration (DEA), each tablet contains 7.5 mg of hydrocodone and 750 mg of acetaminophen, a non-prescription, over-the-counter medicine (Tylenol). Each tablet contains less than 300 milligrams of hydrocodone per 100 milliliters, and not more than 15 milligrams per dosage unit, and a recognized therapeutic amount of acetaminophen, a non-controlled substance. The total or aggregate amount of hydrocodone in 1500 tablets is 11,250 mg, or 11.25 grams (i.e. 1500 tablets x 7.5 mg of hydrocodone per tablet = 11,250 mg or 11.25 grams of hydrocodone).

2. The Broward County Sheriff's Office forensic chemist analyzed the tablets as follows. When given tablets to analyze, first he conducted a visual examination. All the tablets appeared to be genuine, commercially manufactured pharmaceutical drugs. The tablets did not appear to be bootleg, home-made or clandestinely produced copy-cat drugs. Given the tablets appeared to be genuine, commercially manufactured tablets, he compared the "markings" or "writings" on the tablets with a manual published by the DEA. The DEA manual gives a description of the tablet, and gives the name of the pharmaceutical company that manufactured the tablet. **The manual states the active ingredients contained in the tablet and the amount of each ingredient.** A Vicodin tablet contains 7.5 mg of hydrocodone and 750 mg of acetaminophen. After reading in the DEA manual what the tablet contained, the chemist

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place of business, a licensed pharmaceutical supply house.

structured his test to test to detect the substance listed in the DEA manual. Because the tablet had a Vicodin marking, he tested for hydrocodone. Because all the tablets appeared to be identical, genuine, commercially manufactured tablets, it was only necessary to test one tablet. The weight listed on the laboratory report was derived by weighing the pills; in other words, the weight listed in the laboratory report is the gross weight of the tablets, including the non-controlled substance, acetaminophen. Even though the chemist knew the exact amount or weight of the controlled substance, the gross weight of the tablets, including non-controlled substances, was included in the weight calculation. The State Attorney's Office based its decision as to what degree of the offense to charge based on the gross weight of the tablets, even though the exact amount or exact weight of the controlled substance was known, or readily ascertainable. (emphasis added)

3. Given that each tablet contains not more than 300 milligrams of hydrocodone per 100 milliliters, and not more than 15 milligrams per dosage unit, and a therapeutic amount of acetaminophen, the tablets are a Schedule III substance regulated by s. 893.03(3)(c)(3) or (4), Fla. Stat. (1993). Thus, any unlawful possession of the tablets is a third degree felony, regulated by s. 893.13(1)(a)(2), Fla. Stat. (1993).

4. In the alternative, given the aggregate or total actual amount of the controlled substance possessed is less than 14 grams, the charge should be reduced to the lesser included offense of trafficking in a controlled substance less than 14 grams.

5. In the alternative, the punishments are unconstitutional. Regarding count 1, the punishment does not fit the crime. The penalties imposed are excessive, and/or the punishments are not rationally related to the criminal act. Count 1 charges the Defendant with possession of 1500 tablets of a FDA approved prescription drug. The only crimes in Florida

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[2] The police evidence receipt lists 1500 tablets.

with a more severe mandatory minimum punishment are violent crimes, or crimes against persons. First degree murder is punishable by death or life imprisonment without parole. Sexual battery on a minor child is punishable by life imprisonment. A mandatory minimum prison term of 25 years is arbitrary and capricious and/or grossly disproportionate when compared to the punishment for serious violent crimes which pose a greater threat to the health, safety, and welfare of society. There is no mandatory minimum jail term for these offenses: Second Degree Murder, Manslaughter, Sexual Battery, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnapping, or Discharging a Bomb Resulting in Serious Injury.

6. Regarding count 1, a mandatory fine of $500,000 is arbitrary and capricious, and/or grossly disproportionate and excessive. Consider, the punishment for the following serious violent crimes which pose a greater threat to the health, safety, and welfare of society. There is no mandatory fine for these offenses: Second Degree Murder, Manslaughter, Sexual Battery, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnapping, or Discharging a Bomb Resulting in Serious Injury. A fine must be rationally related to the offense, and if a fine is excessive or grossly disproportionate, then it is unconstitutional.

Memorandum of Law

Point 1

The tablets are a Schedule III substance such that possession of it is a third degree felony, regulated by 893.13(1)(a)(2), Fla. Stat. (1993).

Brown raises the same argument raised in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997). Brown is charged with trafficking in hydrocodone:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4

> grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of any 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, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs. s. 893.135(1)(c)(1), Fla. Stat. (1993)

In contrast, s. 893.03(3), Fla. Stat., titled "SCHEDULE III," provides:

> A substance in Schedule III has a potential for abuse less than the substances contained in Schedules 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 or, in the case of anabolic steroids, may lead to physical damage. The following substances are controlled in Schedule III:
>
> * * *
>
> (c) unless specifically exempted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited qualities of any of the following controlled substances or any salts thereof:
>
> * * *
>
> 3. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
>
> 4. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, **with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.** (emphasis added)

In the case sub judice, each tablet contains 7.5 mg of hydrocodone and 750 mg of acetaminophen, which is a recognized therapeutic amount of a non-prescription drug. When Brown was arrested, the police correctly charged her with possession of hydrocodone and acetaminophen, a Schedule III substance in violation of s. 893.13. Later, the State Attorney's Office increased the severity of the charge to trafficking in hydrocodone.

Two rules of statutory construction apply in analyzing the inter-relationship between the offense of trafficking in hydrocodone and the offense of unlawful possession of a Schedule III substance. First, penal statutes are strictly construed in favor of the defendant. Carawan v.

State, 515 So.2d 161 (Fla. 1987). This rule of construction was codified by the Legislature:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of different constructions, it shall be construed most favorably to the accused. s. 775.02(1) Fla. Stat. (1985).

Second, a specific statute controls over a more general statute.

It is undisputed that the 1500 tablets do not contain more than 28 grams of the actual substance hydrocodone. The total or aggregate amount of hydrocodone in 1500 tablets is 11,250 mg, or 11.25 grams (i.e. 1500 tablets x 7.5 mg of hydrocodone per tablet = 11,250 mg or 11.25 grams of hydrocodone). In order to charge the offense of trafficking, the State Attorney has derived the weight from the gross weight of the tablets, including the non-controlled substance acetaminophen. The State Attorney justifies its method of calculating the weight by that portion of the trafficking statute, which contains the language, "... 4 grams or more or **any mixture containing any such substance**." The State Attorney opines that the "mixture" of hydrocodone and acetaminophen weighs over 28 grams; hence the trafficking statute applies. (emphasis added)

The State Attorney's "mixture" calculation ignores the clear language of s. 893.03 (3)(c)(4) Fla. Stat. (1993), which defines a Schedule III substance as:

> Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, **with recognized therapeutic amounts of one or more active ingredients which are not controlled substances. (emphasis added)**

The aforestated language clearly recognizes that the hydrocodone will be "mixed" with one or more substances. If the hydrocodone is "mixed" with a therapeutic amount of one or more active ingredients, which is not a controlled substance, then it is a Schedule III substance. In our case, the hydrocodone is "mixed" with a therapeutic amount (i.e. 750 mg) of acetaminophen, which is an over-the-counter pain medication. Thus, when hydrocodone, within the prescribed amounts, is found in a tablet containing acetaminophen, it is a pharmaceutical drug within the

definition of Schedule III. Consequently, any unlawful possession of such tablets is a third degree felony, regulated by s. 893.13(1)(a)(2), Fla. Stat. (1993).

The offense of trafficking in hydrocodone must be dismissed. The State Attorney should be given fifteen (15) days to amend the Information to charge Brown with the offense of unlawful possession of a Schedule III substance in violation of s. 893.03(3)(c)(4), and s. 893.13 (1)(a)(2), Fla. Stat. (1993).

Point 2

When the controlled substance is contained in a commercially manufactured pharmaceutical tablet and the amount of the controlled substance is known or readily ascertainable, the actual weight of the controlled substance determines the applicable penalty.

The Defendant asserts that the Trafficking Statute must be strictly construed in her favor. Thus, when the specific amount of the controlled substance is known, or readily ascertainable, the actual weight of the controlled substance determines punishment. The rules of statutory construction require penal statutes to be strictly construed. State v. Camp, 596 So.2d 1055 (Fla. 1992). Further, when a statute is 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). This principle has been codified by the Florida Legislature. Section 775.021(1), Fla. Stat. (1989), provides, "(t)he provisions of this code and offenses defined by other statutes shall be strictly construed; **when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.**" (emphasis added)

The Defendant is charged with violating Subsection (c) of the Trafficking Statute [s. 893.135(c)(1), Fla. Stat. (1995)]. Subsection (c) is worded in the alternative. First, it provides, "(a)ny person...who is knowingly in actual or construction possession of, 4 grams or more of any...hydrocodone, ... or any salt, derivative, isomer, or salt of an isomer thereof,

including heroin, as described in s. 893.03(1)(b) or (2)(a), ... but less than 30 kilograms of the substance...commits a felony of the first degree, which shall be known as 'trafficking in illegal drugs.'" Second, in the alternative, Subsection (c) provides that any person who is knowingly in actual or construction possession of, 4 grams or more of any mixture containing any hydrocodone, or any salt, derivative, isomer, or salt of an isomer thereof, but less than 30 kilograms of such mixture, commits the felony of the first degree, which felony shall be known as "trafficking in illegal drugs." (emphasis added)

In our case, the Defendant is charged with being in actual or constructive possession of hydrocodone. According to Subsection (c), if the Defendant was in possession of 4 grams or more of the actual substance, then she has committed the offense of trafficking in illegal drugs. In the alternative, the State Attorney alleges that if the Defendant was in possession of 4 grams or more of any mixture containing the controlled substance, then she has committed the offense of trafficking in illegal drugs.

The questions presented are: (1) When does the "mixture" provision apply? and (2) Is it applicable given the facts of this case? The Defendant is charged with trafficking in hydrocodone by being in possession of 1500 Vicodin tablets, which are a prescription drugs, with a recognized medical purpose, manufactured by a licensed pharmaceutical firm under the strict supervision of the FDA.[3]

The "mixture" provision is appropriate in cases involving street drugs, such as cocaine or heroin, which are not manufactured under government supervision, and which are not manufactured under conditions with strict quality and quantity control. Additionally, "street drugs" are purposely "cut" or "mixed" or "diluted" to increase the amount of the product to be sold, and thereby increase the value. For example, pure cocaine is "mixed" to make more of

the substance, to increase the amount of the substance for distribution, which means there is more to sell. The opposite is true of commercially manufactured pharmaceuticals, such as Vicodin, which are sold in their pure, unadulterated form. Brown agrees, the government should not be required to perform a quantitative or qualitative analysis on street drugs "mixed" by an amateur chemist.

In our case, the State Attorney, the police, and the forensic chemist opine the tablets are genuine, commercially manufactured pharmaceutical drugs. After-all, the Defendant is charged with taking them from the pharmaceutical company she worked for. A simple visual observation of the tablets reveals they are identical to the tablets pictured in the Physician's Desk Reference, a nationally recognized authoritative source, and the tablets have the identifying "markings" as codified in the DEA publication. Given that these publications reflect the exact amount or weight of hydrocodone in each tablet, the exact amount of the controlled substance is known, or readily ascertainable. Given that penal statutes are strictly construed in favor of the accused, the actual weight of the hydrocodone determines the applicable penalty.

Point 3

The punishment does not fit the crime.

If the Court denies the relief in points 1 and 2, the Defendant challenges that the mandatory minimum sentence and the mandatory fine are unconstitutional.

The mandatory minimum sentences:

Regarding count 1, the mandatory prison term, as applied to the facts of this case, is cruel and unusual punishment. Count 1 charges the Defendant with possession of 1500 Vicodin ES tablets, which is an FDA approved prescription drug. The Defendant is facing a

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[3] The FDA is the United States government Food and Drug Administration.

mandatory minimum prison term of 25 years for possessing a prescription drug without a prescription. The only crimes in Florida with a more severe mandatory minimum punishment are violent crimes, or crimes against persons. First degree murder is punishable by death or life imprisonment without parole. Sexual battery on a minor child is punishable by life imprisonment. A mandatory minimum prison term of 25 years is arbitrary and capricious and/or grossly disproportionate when compared to the punishment for serious violent crimes which pose a greater threat to the health, safety, and welfare of society. There is no mandatory minimum jail term for these offenses: Second Degree Murder, Manslaughter, sexual Battery, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnapping, or Discharging a Bomb Resulting in Serious Injury.

Is it proportional and rational to punish the possession of 11 grams of hydrocodone, which is a prescription substance with a recognized medical purpose, more severely than killing a child, or savagely beating and raping a teenage girl? A second degree murder of a child can result in a sentence of less than 25 years, and a sentence which does not impose a mandatory minimum term of incarceration.

It is cruel and unusual punishment and constitutionally irrational to punish possession of 1500 tablets of a prescription drug with a recognized medical use, more severely than murder and rape. However, voiding the mandatory minimum sentence of 25 years does not mean the Defendant goes unpunished. Given the severability clause, which is standard to all legislation, the Court could impose the punishment applicable for a first degree felony as modified by the sentencing guidelines.

The mandatory fines:

The mandatory fines violate the Excessive Fines Clauses and the Equal Protection Clauses of the United States and Florida Constitutions. The Defendant is charged with

possession of in excess of 28 grams of the controlled substance, and seeking to levy a $500,000 fine.

The purpose of the Eighth Amendment was to limit the government's power to punish. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 106 L.Ed2d 219, 109 S.Ct. 2909 (1989). The Cruel and Unusual Punishments Clause is concerned with punishment, and the Excessive Fines Clause limits the government's power to extract monetary payments as punishment. Id. at 265. The United States Eleventh Circuit Court of Appeal holds that the appropriate inquiry with respect to the Excessive Fines Clause is, and is only, a proportionality test. The Excessive Fines Clause on its face prohibits fines which are "excessive" - - fines that are in amount just too much. The determination of excessiveness is based at least in part on whether the fine imposed is disproportionate to the crime committed. The Court must ask: Given the offense for which the accused is being punished, is the fine excessive? The core of proportionality review is a comparison of the severity of the fine with the seriousness of the underlying offense. See U.S. v. One Parcel Property located at 427 and 429 Hall Street, Montgomery County, Alabama, 74 F.3d 1165 (11th Cir. 1996).

The recent case law regarding forfeitures is instructive. The Excessive Fines Clause is now being applied to forfeitures derived from criminal activity. See Austin v. U.S., U.S., 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). In City of Tampa Police Department v. Acosta, 645 So.2d 551 (Fla. 2nd DCA 1994), the Tampa Police Department sought the forfeiture of a 1993 Dodge Intrepid automobile used to drive to a location where the driver purchased $20 worth of crack cocaine. The district court, relying on the Excessive Fines Clause, affirmed the trial court's refusal to forfeit the car. See Austin v. U.S., 113 S.Ct. 2801, 125 L.Ed2d 488 (1983).' If the forfeiture of a $20,000 car used in the commission of the crime is considered too severe a monetary punishment and an excessive fine, then a $500,000 million fine for possessing 1500

tablets of a prescription drug without a prescription must be an excessive fine.

In U.S. v. Dean, 87 F.3d 1212 (11th Cir. 1996), Dean was charge with attempting to transport thousands of dollars ($140,000) out of the country without informing the government in violation of 31 U.S.C. 5316(a)(1)(A) and 5322(a) and 31 C.F.R. 103.23. Dean was arrested at the West Pam Beach International Airport by U.S. Customs Service agents for failing to notify the government that he was transporting in excess of $10,000 out of the country, to wit: $140,000. The government filed criminal charges and a forfeiture action. In accord with the plea agreement he entered into with the government, Dean plead guilty to attempting to transport currency in excess of $10,000 out of the country, and agreed to withdraw his claim to the $140,000. Judge Roettger, on his own motion, declared that forfeiture provision of the plea agreement constituted an excessive fine. Judge Roettger mitigated the forfeiture to $5,000, and ordered the government to return the remainder of the funds. The Eleventh Circuit, relying on the Austin decision, affirmed Judge Roettger's ruling.

In U.S. v. One Single Family Residence located at 18755 North Bay Road, Miami, 13 F.3d 1493 (11th Cir. 1994), the government sought to forfeit a single-family residence worth approximately $150,000. The forfeiture action resulted from the government's investigation of poker games conducted at the residence. After observing the poker games on numerous occasions, the agents served a search warrant on the residence, and seized gambling records, poker tables, poker chips, decks of cards and cash. One of the owners of the property, the husband, was charged with operating an illegal gambling operation in violation of 18 U.S.C. 1955(b). The owner of the property was convicted of all counts of conducting an illegal gambling operation. In denying the forfeiture, the Eleventh Circuit wrote:

> In Austin, the owner of real property occupied by his mobile home and auto-body shop sold two ounces of cocaine on the premises. The subsequent search of the premises revealed small amounts of marijuana and cocaine, drug

> paraphernalia, a gun and $4,700 in cash. The owner pled guilty to state criminal charges. The United States instituted civil forfeiture proceedings against the real property. The owner defended upon the grounds that the forfeiture of his property was so grossly disproportionate to the offense, as to violate the Eighth Amendment Excessive Fines Clause. The Supreme Court held that a forfeiture of real property is subject to the limitations of the Eighth Amendment.
>
> ... Examining this case through the lens of Austin, and accepting the fact that Emilio Delio used his home for a gambling operation in violation of 18 U.S.C. 1995, **we conclude, under the particular facts of this case, that the forfeiture of his home, of an arguable value of $150,000 is an imposition of a disproportionate penalty.** Id. 13 F.3d at 1498. (emphasis added)

The common theme of all these decisions is that the monetary punishment must be in proportion to the wrong-doing. In this case, a mandatory fine of $½ million for possessing 1500 Vicodin ES tablets is disproportionate.

The problem lies with the fixed, mandatory nature of the fine. If the amount of the controlled substance possessed is 28 grams, but less than 30 kilograms, the mandatory fine is $½ million. The mandatory fine remains the same whether the accused possesses an ounce (28 grams), or possesses 65.99 pounds (29.99 kilograms) of the controlled substance. The fine should in some way be proportional to the amount of the controlled substance possessed. While a mandatory fine of $500,000 may not be excessive for possession of 65.99 pounds of the controlled substance, it is excessive for possession of less than an ounce of the controlled substance. It is an excessive, disproportionate monetary punishment for the possession of less than an ounce of a prescription drug to be the same as possession of 65.9 pounds of the prescription drug.

Aside from being disproportionate, the statute's scheme of mandatory fines is constitutionally irrational, such that it violates the Equal Protection Clauses of the United States and Florida Constitutions. The irrationality is amply demonstrated. First, consider, the punishment for the following serious violent crimes which pose a greater threat to the health, safety, and welfare of society. There is no mandatory fine for these offenses: Second Degree

Murder, Manslaughter, Sexual Battery, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnapping, or Discharging a Bomb Resulting in Serious Injury.

Second, the possession of a ton (2000 pounds) of the controlled substance has no mandatory fine. Possession of a ton of the controlled substance subjects the accused to a mandatory life sentence, but no mandatory fine. See s. 893.135(1)(c)(2), Fla. Stat., (1995). Is it constitutionally rational for an offender with an ounce of the substance to have a mandatory $500,000 fine, but the offender with a ton of the substance to have no mandatory fine.

The absurdity is further amplified by the following outcome which is legally possible. An accused could be charged with possessing a ton (over 30 kilograms) of hydrocodone, which is punishable by a mandatory minimum sentence of life imprisonment, but no mandatory fine. The accused could provide "substantial assistance." The prosecutor could move the sentencing court to reduce or suspend his sentence, and the accused could be placed on probation. The accused would not have to worry about the sentencing court reducing or suspending a mandatory fine, because there is none for possessing 30 kilograms, or more of hydrocodone. In contrast, an accused could be charged with possession of an ounce (28 grams) of hydrocodone, which subjects him to a mandatory minimum term of imprisonment of 25 years and a mandatory $500,000 fine. The accused could provide "substantial assistance." The prosecutor could move the sentencing court to reduce or suspend his sentence. The court could place the accused on probation, but refuse to reduce or suspend the mandatory $500,000 fine. This potential outcome comes about because the legislature created a statute which has no mandatory fine for possession of a ton of the controlled substance, but imposes a mandatory fine of $500,000 for possession of an ounce of the controlled substance. This is constitutionally irrational.

The Defendant is facing a mandatory fine of $500,000 for possessing 1500 tablets of prescription drugs without a prescription. The Legislature's zeal to punish drug offenders has resulted in a statutory scheme of mandatory fines that must be stricken as being both disproportionate and constitutionally irrational. However, the striking of the mandatory fines does not mean the court cannot fine the Defendant. Given the severability clause, which is standard to all legislation, the Court may fine the Defendant in accord with s. 775.083, Fla. Stat. (1996), which sets forth the fines for first degree felonies.

Conclusion

The Defendant prays the Court grant the following relief: (1) dismiss count 1, and allow the State Attorney to refile the charge as a third degree felony; (2) in the alternative, reduce the charge to the lesser included offense of trafficking in hydrocodone less than 14 grams; (3) or, in the alternative, declare the mandatory term of imprisonment unconstitutional and calculate the applicable sentence for a first degree felony per the sentencing guidelines. Lastly, declare the mandatory fine unconstitutional, and apply the statutory fine applicable for a first degree felony.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed and/or hand-delivered and/or faxed to the Office of the State Attorney, 201 S.E. 6th Street, Fort Lauderdale, Florida, 33301, on May 21, 1997.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1998

STATE OF FLORIDA,

Appellant,

v.

STEPHEN FALKENSTEIN and LISA BROWN,

Appellees.

CASE NO. 97-3931

Opinion filed November 12, 1998

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Sheldon M. Schapiro, Judge; L.T. Case No. 96-9875 CF10A & 96-9875 CF10B.

Robert A. Butterworth, Attorney General, Tallahassee, and Barbra Amron Weisberg, Assistant Attorney General, West Palm Beach, for appellant.

Edward M. Kay of Edward M. Kay, P.A., Fort Lauderdale, for Appellee-Stephen Falkenstein, and Bradley R. Stark, Miami, for Appellee-Lisa Brown.

SHAHOOD, J.

The state appeals the dismissal of drug trafficking charges against appellees, Stephen Falkenstein and Lisa Brown. We reverse.

Appellees were charged with Trafficking in Hydrocodone in violation of Florida Statute section 893.135(1)(c)1, and Grand Theft. They moved to dismiss the charges arguing that although they were in possession of 1500 Vicodin tablets (a prescription pain reliever), which contained an aggregate amount of 11.25 grams of hydrocodone, they could not be prosecuted under section 893.135 since each individual tablet contained less than four grams of the controlled substance. The trial court granted the motions to dismiss based on the rule of statutory construction that when language is susceptible of differing constructions, it shall be construed strictly, in favor of the accused. The court stated that it was therefore compelled to follow State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997).

We recently rejected a similar argument and conclusion in Johnson v. State, No. 97-3013 (Fla. 4th DCA Oct. 28, 1998) and State v. Hayes, No. 97-2014 (Fla. 4th DCA Sept. 23, 1998). In those cases, we held that where the hydrocodone has been mixed or commingled with a substance which is capable of being consumed along with the hydrocodone, or which facilitates the use, marketing and access of the hydrocodone, the aggregate weight of the tablets seized, and not the amount of hydrocodone per dosage unit, is the determinative weight for prosecution under section 893.135(1)(c)1, Florida Statutes (1996). Hayes (citing Chapman v. United States, 500 U.S. 453 (1991), superseded by statute on other grounds as stated in, United States v. Turner, 59 F.3d 481 (4th Cir. 1995)); Johnson; see also State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So. 2d 737 (Fla. 1997).

Accordingly, we reverse the order of dismissal and remand with directions that the charges be reinstated. As in Hayes and Johnson, we certify conflict with the First District's holding in Holland and the Second District's holding in State v. Perry, 23 Fla. L. Weekly D1908 (Fla. 2d DCA Aug. 14, 1998).

REVERSED AND REMANDED.

DELL and FARMER, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

CERTIFICATE OF FONT SIZE AND TYPE

The size and type used in the petitioner's brief is fourteen point Times New Roman.

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