IN THE SUPREME COURT OF FLORIDA

DONALD F. SWIHART,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94,677
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0259918
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367
COUNSEL FOR PETITIONER

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TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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STATEMENT OF CASE AND FACTS

On December 5, 1996, the State filed an information charging Petitioner with one count of trafficking in hydrocodone, a controlled substance, in violation of Sections 893.03 (1)(b) and 893.135 (1)(c)1, Florida Statutes (1995), one count of possession of lorazepam, a controlled substance, in violation of Sections 893.03 (4)(ee) and 893.13 (6)(a), Florida Statutes (1995) and one count of possession of cocaine, a controlled substance, in violation of Sections 893.03 (2)(a) 4, and 893.13 (6)(a), Florida Statutes (1995). (R 68-69) On September 17, 1997, Petitioner filed a motion to declare Section 893.135 (1)(c) 1, Florida Statutes (1995) unconstitutional and a motion to suppress. (R 148-149, 143-147)

On September 19, 1997, a hearing on the motion to dismiss was held before the Honorable Jere E. Lober, Circuit Judge. (R 48-67) At that hearing, the parties stipulated that the basis for the motion was that under the trafficking statutes, the State must prove that the accused possessed between 4 and 14 grams of any mixture containing hydrocodone and that in cases involving pills, the amount of the active ingredient of hydrocodone was irrelevant so long as the total weight of the pills exceeded the 4 grams under the statute. (R 48-61) For purposes of the motion, the parties stipulated that the total weight of 15 tablets of Lortab was 12.3 grams but that the actual amount of hydrocodone was less than 1 gram. (R 62-63) The parties further acknowledged that there was conflict on this issue between the Fifth District Court of Appeal and the First District Court of Appeal. (R 58-61) Judge Lober, while agreeing with the rationale of the First District, nevertheless yielded to the authority of the Fifth District Court of Appeal and denied the motion to dismiss. (R 63-64, 151-152)

On September 30, 1997, Petitioner appeared before Judge Lober and entered a plea of no contest to the trafficking charge, specifically reserving his right to appeal the denial of the motion to dismiss which all parties agreed was dispositive

of guilt.[1] (R 1-21) Judge Lober accepted the pleas[2] and released Petitioner pending sentencing pursuant to a ***Quarterman***[3] agreement. (R 17-20) On February 20, 1998, Petitioner appeared before Judge Lober for sentencing. (R 23-47) Judge Lober determined that Petitioner violated the terms of his ***Quarterman*** agreement by failing to appear for his originally-scheduled sentencing. (R 38-40) Judge Lober adjudicated Petitioner guilty, sentenced Petitioner to 129 months in prison on the trafficking charge and dismissed the remaining two counts.[4] (R 41-42, 185-190)

Petitioner filed a timely notice of appeal on February 20, 1998. (R 191) Petitioner was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 196)

On December 11, 1998, the Fifth District Court of Appeal affirmed petitioner's conviction on the authority of ***State v. Baxley***, 684 So.2d 831 (Fla. 5th DCA 1996); ***rev***. ***denied***, 694 So.2d 737 (Fla. 1997). The court further certified

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[1] At the same time, Petitioner admitted to violating probation in two unrelated cases which are not subject of this appeal.

[2] Petitioner abandoned his motion to suppress. (R 14)

[3] ***Quarterman v. State***, 527 So.2d 1380 (Fla. 1988)

[4] On the two unrelated violation of probation charges, Judge Lober simply terminated the probation and sentenced Petitioner to time served. (R 41)

that its decision is in conflict with ***State v. Holland***, 689 So.2d 1268 (Fla. 1st DCA 1997) and ***State v. Perry***, 716 So.2d 327 (Fla. 2nd DCA 1998). (copy of opinion attached as appendix hereto) Petitioner timely filed his notice to invoke discretionary jurisdiction and on January 13, 1999 this Court issued an order postponing a decision on jurisdiction but setting a briefing schedule.

SUMMARY OF ARGUMENT

In determining whether a prosecution for trafficking in hydrocodone is permissible, the amount of hydrocodone per dosage unit and not the aggregate weight or amount controls. This Court should adopt the rationale of the First District in ***State v. Holland***, 689 So.2d 1268 (Fla. 1st DCA 1997) and the Second District in ***State v. Perry***, 716 So.2d 327 (Fla. 2nd DCA 1998) and disapprove the decisions of the 5th DCA as well as in ***State v. Baxley***, 684 So.2d 831 (Fla. 5th DCA 1996), ***rev***. ***denied*** 694 So.2d 737 (Fla. 1997) and also the Fourth District Court of Appeal in ***State v. Hayes***, 720 So.2d 1095 (Fla. 4th DCA 1998).

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL IMPROPERLY RULED THAT FOR PURPOSES OF THE TRAFFICKING STATUTE, THE AGGREGATE WEIGHT OF HYDROCODONE PLUS ITS PACKAGING CAN BE CONSIDERED.

Petitioner filed a motion to dismiss arguing that Section 893.135 (1)(c)1, Florida Statutes (1995) was unconstitutional as applied to Petitioner who was prosecuted based on his possession of 15 tablets of Lortab which includes the controlled substance hydrocodone. (R 148-149) At the hearing on the motion to dismiss certain facts were stipulated to by the parties:

> 1) Petitioner was in possession of 15 tablets of Lortab. (R 59-60)
>
> 2) The amount of hydrocodone contained in each tablet was no more that 10 milligrams. (R 62-63)
>
> 3) The total amount of hydrocodone possessed by Petitioner was "well below four grams." (R 62)
>
> 4) The total weight of the 15 tablets was 12.3 grams (R 62)

Hydrocodone is a controlled substance listed as both a Schedule II and a Schedule III narcotic. See Section 893.03 (2)(a)1, Florida Statutes (1995) and Section 893.03 (3)(c)4, Florida Statutes (1995). Hydrocodone is a narcotic and the active ingredient in several prescription drugs manufactured under such names as Lortab. Typically each tablet of Lortab contains no more that 10 milligrams of hydrocodone. Unlawful possession of hydrocodone is a third degree felony. Section 893.13 (1)(a), Florida Statutes (1995) provides that trafficking in 4 grams or more of any mixture containing hydrocodone is a first degree felony. This creates a seeming anomaly in the

law whereby possession of small amounts of hydrocodone can be prosecuted as trafficking solely because of the way it may be packaged. This issue has been considered by four District Courts of Appeal with those courts evenly split on the matter.

In ***State v. Baxley***, 684 So.2d 831 (Fla. 5th DCA 1996) ***rev. denied*** 694 So.2d 737 (Fla. 1997) the Court approved a prosecution for trafficking in hydrocodone and held that in determining the threshold for charging trafficking the key is whether the aggregate weight of the mixture of hydrocodone is 4 grams or more. Thus, even though the actual amount of hydrocodone may be less than 4 grams, if the weight of the total amount of pills containing hydrocodone exceeds four grams prosecution for trafficking is permitted. The Fourth District Court of Appeal has aligned itself with the Fifth District in ***State v. Hayes***, 720 So.2d 1095 (Fla. 4th DCA 1998).

However, in ***State v. Holland***, 689 So.2d 1268 (Fla. 1st DCA 1997), the Court ruled that where prosecution is predicated upon possession of pills containing hydrocodone, one must consider the amount of hydrocodone per dosage unit and not the aggregate amount or weight to determine whether a prosecution for trafficking is permissible. Thus, the Court reasoned, for purposes of determining the viability of prosecution for trafficking in hydrocodone, you do not simply weigh the number of pills seized if each individual pill falls under the prescribed amounts listed in Section 893.03 (3)(c)4, Florida Statutes (1995). The Second District Court of Appeal has aligned itself with the First District in ***State v. Perry***, 716 So.2d 327 (Fla. 2nd DCA 1998).

Thus, this Court is presented with the opportunity to resolve this conflict. Petitioner contends that the ***Holland*** decision is better reasoned and urges this Court to adopt that reasoning and disapprove the Fifth and Fourth District Courts of Appeal. Certain basic rules of statutory

construction are applicable and mandate such a result:

First, criminal statutes must be strictly construed. Section 775.021 (1), Florida Statutes (1995); ***Perkins v. State***, 576 So.2d 1310 (Fla. 1991). When the language of a criminal statute is susceptible to differing constructions, the statute must be construed most favorably to the accused. ***Johnson v. State***, 602 So.2d 1288 (Fla. 1992).

Second, courts must avoid interpreting statutes in such a manner that could lead to absurd results. ***State v. Goodson***, 403 So.2d 1337 (Fla. 1981). In the instant case, as pointed out by the trial court, under the court's ruling in ***Baxley*** an accused could be convicted of trafficking base upon possession of a single milligram of hydrocodone mixed in a quantity of water such that the total weight was more than four grams. (R 60-63) Unquestionably, this result is extreme and absurd, yet logical under ***Baxley***.

Third, no statute should be so strictly construed as to defeat the intention of the legislature and when two statutes are apparently in conflict, the more specific controls over the more general. ***Lincoln v. Florida Parole Commission***, 643 So.2d 668 (Fla.1st DCA 1994) In ***Adams v. Culver***, 111 So.2d 665 (Fla. 1959) this Court held that a prosecution under the more serious and general Florida Statute 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 Florida Statutes 847.01(1) where arguably the conduct could be prosecuted under either statute. This Court 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.

Id. at 667. Specific precise inclusion of the pills in question under Section 893.03(3)(c)4 as a schedule III substance, the possession of which is a third degree felony, prohibits a more serious trafficking prosecution under Section 893.135(c) by virtue of the general schedule II definition contained in Section 893.03(2)(a)j. All the other substances included in the trafficking prohibition are either schedule I or schedule II substances. Marijuana and Methaqualone are schedule I substances. Section 893.03(1), Florida Statutes (1995) Cocaine, Phencyclidine and Amphetamine are schedule II substances. Section 893.03(2), Florida Statutes (1995) None of these substances, even in limited quantities, are listed under schedule III. No other schedule substance is prohibited by the trafficking statute.

The decisions of the Fifth District and Fourth District Courts of Appeal cannot be sustained under the rules of statutory construction, logic and due process. This Court should take this opportunity to resolve the conflict and disapprove the decision below.

CONCLUSION

For the foregoing reasons, petitioner urges this Court to adopt the reasoning of the First and the Second District Courts of Appeal in interpreting the trafficking and hydrocodone offense. Petitioner further requests this Honorable Court to quash the decision below, thereby disapproving of the Fifth Districts interpretation of the statutes in question and to remand the cause with instructions to discharge petitioner.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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MICHAEL S. BECKER for
Fla. Bar No. 0267082

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0259918
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Donald F. Swihart, DC#702964, Hardee Correctional Institution, 6901 State Rd. 62, Bowling Green, FL. 33834, this 17th day of February, 1999. .

MICHAEL S. BECKER for

_____

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14 pt.

MICHAEL S. BECKER for

_____

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER