IN THE SUPREME COURT OF FLORIDA

WILLIAM BURKE HARRIS,

Petitioner,

v. FSC CASE NO. 94,756
5TH DCA CASE NO. 97-2795

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in 12 point Courier nonproportional space font.

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STATEMENT OF THE CASE

Respondent would add to Petitioner's Statement of the Case. Although Petitioner and his mother, Mary Harris, were both charged in Counts I and II of the Information, Petitioner was tried alone for the three offenses charged. He moved that Count III be severed from Counts I and II for purposes of trial. (Vol. III 403-406, Vol. IV 424-428, 475). In that motion, he averred that Mary Harris was deposed and admitted that she sold some of the dilaudid she had been prescribed. She also admitted that she had given some to John Faulds. During his opening statement, defense counsel told the jury that Mary Harris would testify that she was taking up to seven dilaudids per day for her pain, 210 per month as prescribed. He also said that the syringes seized were used for insulin injections for her diabetes. (Vol. VII 181-183). Mary Harris was never called as a witness.

STATEMENT OF THE FACTS

John Faulds was the State's first witness. He testified that he moved in with Petitioner and his mother in December, 1994 and lived with them about a year. The mother was in a wheelchair and Faulds was to be a live-in maid. In exchange for his services taking care of Mrs. Harris and selling dilaudids, Faulds was given dilaudid for his own drug habit. Ten or more prospective dilaudid purchasers would come to the Harris residence each week and either Faulds, Petitioner or Mrs. Harris would sell the pills to them. The purchasers were usually taken to Mrs. Harris who would take their money and give them the dilaudid and a syringe. Faulds would then escort them to the kitchen where they would crush up the dilaudid tablet, mix it with warm water and then inject it. Each tablet of dilaudid was sold for from $40 to $50. The customers were not allowed to leave with the pill itself because Petitioner feared they might take it to the police.

Faulds heard Petitioner speaking on the telephone on many occasions. He used code words like "guitar strings" or "fruit" in referring to it. Faulds testified that Petitioner checked prospective buyers for wires. He also testified that Petitioner received monthly UPS shipments on the average of 200 dilaudid pills each. The pills were shipped from California. A man would call and Petitioner would send him the money via Western Union from a local convenience store, Joe's Jiffy. Faulds said he had observed

Petitioner sign for these shipments and that Petitioner opened them in his presence. The pills were in a sandwich bag inside a plastic cassette tape case. Petitioner would then divide the pills up -- some for himself, some for his mother and the rest were put in his mother's empty prescription bottles to sell. Petitioner told Faulds that they did this because his mother had a prescription for dilaudid and the police could not arrest them if they ever came to the house. (Vol. VII 186-198, 201-203).

Mrs. Harris had been getting her dilaudid from Halifax Hospital. However, when they put her on a generic equivalent, she went to another doctor on Mason Avenue who gave her dilaudid. Faulds explained that the generic does not break down and dissolve in water as well as dilaudid and could not be injected. (Vol. VII 204). When the Harris's were asleep or away, Faulds was given the pills to sell and was told how the medication was to be taken. When the customers were finished injecting the drug, the needles were broken off and the syringe was washed with bleach water. In exchange for his services, Faulds was given seven to ten or more dilaudid tablets by Petitioner and his mother each month. (Vol. VII 204-207).

Faulds said that the doctor on Mason gave Mrs. Harris a prescription for 207 dilaudid pills per month. Faulds said that he saw some of those prescription pills sold. (Vol. VII 207-208). Faulds testified that Mrs. Harris took the dilaudid on some

occasions for pain and sometimes to get high. (Vol. VII 238-239).

Captain William Hall of the South Daytona Beach Police Department was the State's second witness. He was head of the investigative unit of that department from 1991 to 1997. In November, 1995, he conducted a search of Petitioner's residence pursuant to a warrant. From Petitioner's bedroom, he retrieved a strong box, prescription bottle and a bottle containing pieces of jewelry, introduced into evidence as State's Exhibits # 1, 2 and 3. In a shoe box under the bed, he found a tape recorder, wiring and a circuit board used to record telephone conversations which were introduced into evidence as State's Exhibits # 4, 5 and 6. (Vol. VII 247-263).

Janice Hindery was a home health care nurse who went to the home of Mary Harris in South Daytona Beach on November 1, 1995. An individual who identified himself as Billy, the son of Mary Harris, told her that Mrs. Harris could be located in the first bedroom on the right. There was a man with Mrs. Harris and she was handing him a stack of money from a bank bag she placed beside her bed. Ms. Hindery reported this incident to her supervisor. (Vol. VIII 280-284).

Dr. Christopher Berchelmann, an oncologist, testified he treated Mrs. Harris for diabetes, breast cancer, back problems and chronic pain. He prescribed dilaudid for Mrs. Harris from July, 1993 to September, 1993. She had increased from 120 pills per

month to 180 after her breast cancer. He stopped seeing her when he found out that she was getting dilaudid from different doctors at the Moffett Cancer Center. He was also upset by her offer to set up a trust fund for his children. After discharging Mrs. Harris, Berchelmann received a letter from Petitioner which was introduced into evidence as State's Exhibit # 7 and in which he tried to explain why the Moffett Cancer Center had given Mrs. Harris additional dilaudid. (Vol. VIII 287-299).

Investigator William Heiser of the Volusia County Sheriff's Office testified that he worked a K-9 unit checking UPS packages for narcotics. His dog alerted to a package going to a Billy Harris of 411 Ridge Boulevard in South Daytona from a Mark West from an address in San Jose, California introduced as State's Exhibit # 8. He contacted FDLE and Officer Mark McGaha of the South Daytona Beach Police Department and gave them the package to get a search warrant. (Vol. VIII 310-315).

Owolabi Shitta was a pharmacist at the Daytona People's Pharmacy on Orange Avenue. He filled fourteen dilaudid prescriptions totaling some 2214 pills for Mary Harris from January 20, 1995 until October 24, 1995. Petitioner, Billy Harris, picked up those filled prescriptions on some occasions. They were paid for with cash most of the time. (Vol. VIII 318-323).

Chandra Davis was a special agent for FDLE who picked up the confiscated UPS package in January 1996. She opened it in the

presence of Officer McGaha, Investigator Cotton and Investigator Heiser after a search warrant was secured. It contained a cassette tape case with 197 yellow pills inside. The package was resealed and given to Special Agent Robert O'Connor who was to pose as the UPS delivery man. The envelope and its contents were introduced into evidence as state's Exhibits # 10 through 13. After the deliver, the residence was secured and a search was conducted. (Vol. VIII 346-353).

Kyle Berris was the manager of Halifax Medical Center Pharmacy. He was familiar with a William or Billy Harris who came in to pick up his mother's prescriptions for dilaudid. Berris switched to generic dilaudid for "contractual reasons" and his pharmacy filled two prescriptions with the generic. Petitioner complained, but Berris told him that these were schedule two narcotics and could not be taken back after they had left the hospital. The pharmacy records relating to the Harris prescriptions were introduced into evidence as State's Exhibit # 14. Between July, 1994 and January, 1995, they filled six prescriptions totaling 295 dilaudid or generic hydromorphone tablets. (Vol. VIII 359-369).

Special Agent Robert O'Connor of FDLE testified that, on the morning of January 26, 1996, he assumed the identity of a UPS delivery man and delivered the package in question to Petitioner at his residence. Petitioner told him he was not expecting a package

that day. Petitioner signed for the package and O'Connor left. (Vol. VIII 379-387).

Dr. Sharon Conley was an oncologist at the Halifax Medical Center. She treated Mary Harris from January, 1994 until November, 1995. She was again admitted to her care in April, 1996. Prior to 1994, Mrs. Harris had been treated by Dr. Berchelmann in the Tampa area. During 1994 and 1995, she prescribed 2600 dilaudid tablets for Mrs. Harris, 44 times for 50 tablets, three times for 100 tablets and one time each for 45 and 55 tablets. Mrs. Harris usually came to her office with her son, Billy Harris, the Petitioner. (Vol. VIII 406-410).

Dr. Conley testified that the pain medication was primarily for Mrs. Harris's back pain, not her breast cancer. Petitioner periodically requested that there be no restrictions on the prescription. In January, 1995, Dr. Conley became uncomfortable and ordered that the prescriptions be filled only at the Halifax Pharmacy and only with generic hydromorphone. Until that time, no other patient of Dr. Conley had refused the generic equivalent of dilaudid. Conley referred Mrs. Harris to an anesthesiologist, Dr. Ross Mayfield, to consider alternatives to dilaudid for relief of Harris's back pain. Mrs. Harris did not follow up on that suggestion. (Vol. VIII 411-415). Dr. Conley said that one consideration in this particular case for prescribing the generic was that it would have less street value. Conley stopped treating

Mrs. Harris when she refused the generic drug Conley offered her. (Vol. VIII 416-419).

Steven Miller, a special agent for FDLE, testified that he assisted in the execution of a search warrant at the residence of Petitioner on November 3, 1995. He searched Petitioner's bedroom and seized pill boxes, syringes and other items which were then introduced into evidence. (Vol. VIII 439-449).

Mark McGaha was a narcotics investigator with the South Daytona Beach Police Department. In July, 1995, he initiated an investigation of Petitioner. He surveilled Petitioner's residence during July and began pulling Petitioner's discarded trash from August, 1995 until January, 1996. Among the items seized were numerous syringes. The largest number seized on any one day was seventy-one syringes pulled from Petitioner's trash on August 7, 1995 and introduced into evidence as State's Exhibit # 30. Also introduced into evidence besides the numerous syringes found in the trash were a UPS envelope and a cassette tape box, State's Exhibits # 55 and 56. On January 26, 1996, McGaha participated in a controlled delivery of a UPS package of dilaudids to Petitioner. After the delivery, when the police went to arrest Petitioner, he threw down the unopened package and ran. One hundred ninety-seven dilaudids were seized in the January search of Petitioner's residence. In a search in November, one hundred and thirty-two dilaudids had been seized. (Vol. IX 463-521, 610-611).

Paul Fischer was a pharmacist from Walgreens on Beville Road in Daytona Beach. Starting on February 28, 1994, he filled twenty four prescriptions for 50 dilaudid tablets each for Mary Harris. Petitioner would pick them up for her. (Vol. IX 622-624).

Greg French was a police officer who worked for the city of South Daytona Beach. He searched a blue van registered to Mary Harris at Petitioner's residence during the execution of the January, 1996 warrant. (Vol. IX 627-634, 639).

Abdul Vanjaria owned a convenience store called Joe's Place on South Ridgewood Avenue in South Daytona. From July, 1995 until January 25, 1996, Petitioner purchased Western Union money orders at that store, copies of which were introduced into evidence as State's composite Exhibit # 70. (Vol. X 665-670).

Detective Dennis Thomas of the South Daytona Beach Police Department testified that he participated in the November 3 search of Petitioner's residence. He was assigned to search Mrs. Harris's room. She had a hidden compartment in her closet from which Exhibits # 73 and 74 were seized. Mrs. Harris told Detective Thomas she was taking only one, two or three dilaudids per day. (Vol. X 674-681). He also participated in the execution of the January search warrant and observed Petitioner throw the UPS package. (Vol. X 686-688).

Christine May was a chemist with FDLE. She tested the syringes seized from Petitioner's trash for the presence of

hydromorphone. Exhibits # 31, 33, 36, 38, 41, 44, 47, 48, 49, 50, 51 were batches of syringes, the wash from which tested positive for hydromorphone. (Vol. X 710-728). She also tested Exhibit # 71 which was a large pill bottle which contained a smaller pill bottle with 100 tablets inside it. Those pills contained hydromorphone. (Vol. X 735-738). The total weight of the pills was nine grams. (Vol. X 739). She examined State's Exhibit #13 which was 197 pills containing hydromorphone and weighing 17.6 grams. (Vol. X 740-741). State's Exhibit #64 had thirty-nine tablets containing hydromorphone and weighing 3.4 grams. (Vol. X 741-743). State's Exhibit #2 consisted of thirteen tablets containing hydromorphone and weighing 1.1 grams. (Vol. X 741-744).

John Bisland was the State's last witness. He was a special agent for FDLE and participated in the execution of the November search warrant. During the search, Petitioner told Bisland that the reason there were syringes in the house was that three diabetics lived there. He also stated that dilaudids belonging to his mother were on the nightstand in his bedroom. The other dilaudids seized he said were hidden to keep people from stealing them. (Vol. X 808-810). Bisland also participated in the January controlled delivery and search. (Vol. X 810-814). Thereafter, the State rested. (Vol. X 818).

The defense proffered the testimony of Edward Daniel Sanford, a prisoner at the county jail who claimed to have had a

conversation with John Faulds concerning his testimony against Petitioner. Sanford said that Faulds told him Petitioner never sold drugs out of his house and Faulds was lying because he was afraid of being habitualized and would get less time if he lied. (Vol. XI 910-912). On cross-examination, Sanford said the conversation occurred in the day room of the jail after lunch on the Tuesday after Faulds testified. Then, he said it occurred at Faulds cell door. He said he wrote a note from Faulds to Petitioner apologizing because Faulds could neither read nor write. Petitioner responded that Sanford should contact his lawyers. (Vol. XI 913-924).

The defense then proffered the testimony of John Faulds who said he did not know or talk to Ed Sanford and said he testified truthfully during the trial. (Vol. XI 938-939).

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal certified conflict among the District Courts on the issue of whether the gross weight of the narcotic pills should be used in determining whether to charge a defendant under the trafficking statute, Section 893.135(1)(c)1, Florida Statutes (1995). In the instant case, the trial court denied Petitioner's motion to dismiss the trafficking in hydromorphone charges filed against him and he was convicted as charged after jury trial.

In State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), review denied 694 So. 2d 737 (Fla. 1997), the Fifth District Court of Appeal concluded that one who possesses or sells four grams or more of a mixture containing any of the listed controlled substances could be prosecuted for trafficking pursuant to Section 893.135(1)(c)1, Florida Statutes (1995). Accord State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998) and Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th DCA October 28, 1998). The First District Court of Appeal in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) and the Second District Court of Appeal in State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998), concluded that a defendant could not be convicted of trafficking regardless of the number of tablets possessed or sold, because each tablet contains only a relatively small amount of the controlled substance. Those decisions completely ignore the statutory language "any mixture

containing [hydromorphone]" and the legislative intent to eliminate trafficking in narcotic pills. Accord State v. Wells, 23 Fla. L. Weekly D2000 (Fla. 2d DCA August 26, 1998) and State v. Alleman, 23 Fla. L. Weekly D2000 (Fla. 2d DCA August 26, 1998).

This Court should approve the decisions of the Fourth and Fifth District Courts of Appeal in Baxley and Hayes. The legislature clearly intended to punish severely those who traffic in substantial quantities of narcotic pills. The decisions of the First and Second District Courts in Holland and Perry and their progeny defeat that intent and should be disapproved.

In his brief, Petitioner raises two other issues raised on direct appeal, relating to evidentiary rulings at trial and the sufficiency of the evidence on the conspiracy charge. The trial court did not abuse its discretion in allowing the introduction of relevant evidence including hundreds of used syringes, prescriptions, prescription bottles, money orders and other evidence that corroborated the testimony of witnesses concerning the dilaudid sales and method of distribution. The State presented more than sufficient evidence of the existence of a conspiracy for purposes of the trial court's consideration of Petitioner's motion for judgment of acquittal and the trial court properly submitted this issue to the jury for its consideration

ARGUMENT

POINT I -- RESTATED

THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED PETITIONER'S JUDGMENTS AND SENTENCES FOR CONSPIRACY TO TRAFFIC AND TRAFFICKING IN A MIXTURE CONTAINING HYDROMORPHONE IN VIOLATION OF SECTION 893.135(1)(c)1, FLORIDA STATUTES(1995), BECAUSE THE COURT PROPERLY AGGREGATED THE WEIGHT OF ALL OF THE DILAUDID TABLETS.

Petitioner argues that each dilaudid tablet contains only four milligrams of the Schedule II controlled substance, hydromorphone, and, therefore, only that portion of each dilaudid tablet should be weighed in determining whether Petitioner trafficked in 28 grams or more of a "mixture" containing one of the enumerated controlled substances under Section 893.135(1)(c)1, Florida Statutes (1995). One of the State's witnesses at Petitioner's trial, FDLE chemist, Christine May, testified that, aside from the specific controlled substance, binders or fillers are used to actually form these tablets. (Vol. X 738-740). According to the Physician's Desk Reference, 1995 Edition, p. 1224, cited by Petitioner, a dilaudid tablet consists of the chemical compound hydromorphone hydrochloride, a hydrogenated ketone of morphine. Contrary to Petitioner's suggestion that dilaudid tablets are not a "mixture" containing hydromorphone, each tablet for oral administration contains two to four milligrams of hydromorphone hydrochloride along with a dye for color coding, lactose and magnesium stearate. Dilaudids are typical of the type of narcotic pill, the abuse of

which the legislature intended to address in enacting Chapter 95-415, Laws of Florida, amending the trafficking statute, Section 893.135(1)(c)1, Florida Statutes, effective July 1, 1995, to include hydromorphone "or 4 grams or more of any mixture containing any such substance". The 1995 legislation adding hydromorphone (among other substances) or any mixture containing hydromorphone to the trafficking statute clearly demonstrated the intent of the state legislature to stem the tide of abuse of narcotic pills by targeting and severely punishing those who would traffic in them.

In the instant case, Petitioner was charged in Count II of the Information with trafficking in four to fourteen grams of hydromorphone on November 3, 1995 as a result of the seizure of 52 dilaudid tablets having a total weight of 4.5 grams found in the bedroom of his residence. In Count III, he was charged with trafficking in 14 to 28 grams on January 26, 1996, after UPS delivered 197 more dilaudid tablets to him weighing 17.6 grams. (Vol. III 314).

In State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), review denied 694 So. 2d 737 (Fla. 1997), the Fifth District Court of Appeal held that, if the amount involved is "4 grams or more of a mixture containing hydrocodone", then the defendant may be prosecuted for trafficking in that substance pursuant to Section 893.135(1)(c)1. Accord State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998) and Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th

DCA October 28, 1998). Based upon the total weight of the tablets and given the decision of the Fifth District Court of Appeal in Baxley, the trial court in the Seventh Judicial Circuit properly denied Petitioner's motion to dismiss. Petitioner argued that the decisions of the First and Second District Courts of Appeal in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998), were bettered reasoned. However, the trial court followed the law in its District. (Vol. II 151-159, Vol. IV 559-573).

Petitioner argues that he could not be convicted under the trafficking statute unless the weight of the controlled substance itself in the tablets was more than four grams under Section 893.135(1)(c)1a for purposes of Count II of the Information and more than fourteen grams under Section 893.135(1)(c)1b for purposes of Count III. This interpretation of the law totally ignores the phrase "any mixture containing any such substance" and would require possession of literally thousands of dilaudid tablets before a defendant could be charged under the trafficking statute as amended. It ignores the legislature's clear intent in amending Section 893.135 to provide the alternative of more serious sanctions than those provided for mere possession or sale under Sections 893.03(2) and 893.13(1)(a)1 for those who traffic in narcotic pills. Petitioner asserts that one who possesses dilaudid tablets with a total aggregate weight of more than 28 grams could

be punished more harshly than one who possesses 27.9 grams of pure hydromorphone. However, there has not been an epidemic of sales of pure hydromorphone. The legislature was reacting to the widespread illegal market in prescription pills like dilaudids, lorcets and vicodins in amending Section 893.135 in 1995.

In State v. Yu, 400 So. 2d 762 (Fla. 1981), this Court noted that dangerous drugs are often marketed in a diluted or impure state. Therefore, it would not be unreasonable for the legislature to deal with the mixture or compound rather than the pure drug. This Court went on to state that the legislature has broad discretion in determining measures necessary for the protection of the public health, safety and welfare and the trafficking statute bears a reasonable relationship to that legitimate state objective. The possession of one or two tablets containing a few milligrams of hydromorphone could be prosecuted under Section 893.03(2) and 893.13(1)(a)1. However, possession and sale of a larger number of Dilaudid tablets could have just as great a potential for abuse as possession and sale of cocaine or any other Schedule II substance and should be prosecuted under the trafficking statute. See Ankiel v. State, 479 So. 2d 263 (Fla. 5th DCA 1985); State v. Garcia, 596 So. 2d 1237, 1238 (Fla. 3rd DCA 1992).

By adding mixtures containing hydromorphone to the trafficking statute without removing them from the second degree possession statute, the legislature has left prosecutors discretion to choose

under which statutory provision to charge such drug offenders. In Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed. 2d 604 (1978), the United States Supreme Court said:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Likewise, this Court has held that the prosecutor should have the discretion to decide under which statute to charge an offender. See State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1988), citing United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 775 (1979). See also State v. Bonsignore, 522 So. 2d 420 (Fla. 5th DCA 1988). This Court should approve the decisions of the Fourth and Fifth District Courts of Appeal in Baxley and Hayes and it should disapprove the decisions of the First and Second District Courts in Holland and Perry.

POINT II

THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE OF THE QUANTITY OF DILAUDID INVOLVED IN THE CONSPIRACY.

Petitioner contends that the trial court erred in denying his motion for judgment of acquittal on Count I of the Information, the conspiracy count, because the State failed to establish that it involved more than 28 grams of Dilaudid. The standard for appellate review of the correctness of a trial court's ruling on a motion for judgment of acquittal was enunciated by this Court in Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974):

> A defendant in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable [people] as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge.

The testimony at trial established that Petitioner's mother, Mary Harris, had been given prescriptions for dilaudid by Dr.

Berchelmann in the Tampa area since 1990. Petitioner would bring Mrs. Harris for her visits. Dr. Berchelmann discharged her in September, 1993 when he found out she was also getting dilaudid from a Dr. Cox at the Moffett Cancer Center. Petitioner wrote to Dr. Berchelmann attempting to explain why they were also getting dilaudid elsewhere and begging him to take his mother back as a patient. Berchelmann refused.

Starting in January, 1994, Mrs. Harris was treated by Dr. Conley at the Halifax Medical Center. During 1994 and 1995, she prescribed 2600 dilaudid tablets for Mrs. Harris. Petitioner would bring his mother to her doctor's visits. He periodically requested that there be no restrictions on her prescriptions, but, in January, 1995, Dr. Conley ordered that the prescriptions be filled only at the Halifax Medical Center Pharmacy and only with generic hydromorphone. Dr. Conley said that the generic drug had less street value and that Mrs. Harris was the only patient she had ever had who refused to accept the generic hydromorphone.

John Faulds lived with Petitioner and his mother from December, 1994 until December, 1995. He would take buyers to Mary Harris who would dispense dilaudid and a syringe to them. Each tablet was sold for $40 to $50. The buyer would be escorted to the kitchen where they would crush up the tablet, mix it with warm water and inject it. When the customer was finished, the needles were broken off and the syringe was washed with bleach water. The

customers were not allowed to leave with the tablet itself because Petitioner feared they might take it to the police. When talking about the drug on the telephone, Petitioner would use code words like "guitar strings" and "fruit". Petitioner had electronic equipment with which he would check prospective buyers for wires. Faulds testified that he and Petitioner also sold dilaudid. In exchange for his services taking care of Mrs. Harris and selling dilaudids, Faulds was given dilaudids for his own habit. Aside from Mrs. Harris's prescriptions for dilaudid filled at local pharmacies, Faulds testified that Petitioner received monthly shipments of about 200 dilaudid pills each from California via UPS. The pills were concealed inside cassette tape cases. Petitioner would count the pills and place those to be sold in his mother's empty prescription bottles. Petitioner told Faulds he did this because the police could not arrest them if they ever came to the house. Between July 3, 1995 and January 25, 1996, Petitioner sent money orders to Scott and/or Kelly Silver in San Jose, California totaling $5,624.00.

During the execution of the November search warrant, Petitioner explained to Agent Bisland that the reason there were syringes in the house was because three diabetics lived there. He told him the dilaudids were hidden to keep people from stealing them.

In January, 1996, the police intercepted a UPS package

containing a cassette box with 197 dilaudid tablets inside it addressed to Petitioner from a Mark West of San Jose. When the package of dilaudid was delivered to Petitioner and the police arrived, Petitioner threw the package to the ground and ran.

FDLE chemist Cristine May tested the batches of syringes seized from Petitioner's trash. Eleven batches of syringes tested positive for the presence of hydromorphone. She also weighed the pills containing hydromorphone seized at the residence at more than 30 grams. Given all of this evidence, it cannot be said that the trial court erred in denying Petitioner's motion for judgment of acquittal based upon an asserted lack of evidence that the conspiracy involved more than 28 grams of dilaudids.

POINT III -- RESTATED

THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S RULINGS ON THE ADMISSIBILITY OF EVIDENCE.

Petitioner argues that much of the physical evidence seized at Petitioner's residence should not have been introduced at trial because it was irrelevant or cumulative and tended to confuse the issues and mislead the jury. The trial court allowed 327 syringes to be introduced into evidence by the State. Most of the used syringes were collected in trash pulls from Petitioner's residence between August, 1995 and January, 1996. Eleven batches consisting of 84 of those syringes tested positive for the presence of hydromorphone. John Faulds testified that each customer was dispensed a syringe along with their dilaudid purchase. After the customer injected the dilaudid mixture, the used syringe was then washed with bleach water. Petitioner told Agent Bisland that the syringes were for the treatment of diabetes. The fact that there were so many syringes with hydromorphone residue in Petitioner's trash was relevant to confirm the testimony of Faulds, to show the volume of sales and to refute Petitioner's assertion that the syringes were for insulin injections.

Petitioner also contends that the trial court erred in allowing the introduction into evidence of numerous other items seized during the searches of Petitioner's residence. Among those items were copies of prescriptions for dilaudid, empty prescription

bottles, boxes of syringes, full and empty, a bill for bottled water and copies of money orders. Without elaboration, Petitioner simply asserts that all of these items were irrelevant and highly prejudicial. These items were relevant to corroborate the testimony of John Faulds about the dilaudid sales, the procedure used in dispensing and injecting the diluted mixture, the money orders for dilaudid purchases from California and the repackaging of the dilaudids in used prescription bottles when they arrived.

Pursuant to Sections 90.402 and 90.403, Florida Statutes (1995), relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. Such determinations are left to the discretion of the trial court judge which will not be overturned absent a clear abuse of that discretion. Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991); Lewis v. State, 570 So. 2d 412, 415 (Fla. 1st DCA 1990).

Petitioner's primary complaint relates to the admission of 327 syringes found in trash pulls at Petitioner's residence in the months prior to his arrest in January, 1996. Petitioner contends that each of those syringes should have been individually tested for the presence of hydromorphone rather than being tested in batches. However, as the FDLE chemist explained at trial, the used syringes had come in contact with each other and there was a possibility of cross-contamination. Therefore, she treated each group of syringes in a batch as one item and used a methanol wash

for the entire batch. (Vol. X 709-713). The number of syringes in each batch varied depending on how many were found in each trash pull. (See Petitioner's Appendix A). Even if some of the syringes were used for insulin injections as Petitioner suggests, the large number of syringes that did contain some hydromorphone residue corroborated Fauld's testimony concerning the method of sale and distribution used at the Harris residence. In any event, the introduction of the syringes was not pivotal to the State's case and, even if they had not been introduced into evidence, the result of the trial would have been the same. The jury could still have found the testimony and other evidence sufficient to establish Petitioner's guilt beyond a reasonable doubt of the offenses charged. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the Fifth District Court of Appeal in State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996) and the decisions of the Fourth District Court of Appeal in Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th DCA October 28, 1998) and State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), and affirm Petitioner's judgments and sentences in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been mailed to Dee Ball, Esquire, Office of the Public Defender, Counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this ____ day of March, 1999.

Belle B. Turner
Assistant Attorney General