IN THE SUPREME COURT OF FLORIDA

RICARDO JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94,801
	)	DCA Case No. 97-03013
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA CONSTITUTION

UNITED STATES CONSTITUTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and he was the appellant in the District Court of Appeal, Fourth District. He will be referred to as Petitioner in this brief.

Attached hereto is a conformed copy of the decision below which is deemed necessary to reflect the jurisdiction of this Court.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE

Petitioner was charged in a two count information with trafficking in hydrocodone in excess of 28 grams and with petty theft (R 2). He was convicted of each offense following a jury trial (R 29-30). Petitioner was adjudged guilty of each (T 304), and sentenced to time served for petty theft (R 44). Although he had absolutely no prior record and the guidelines recommended a sentence between four and seven years (R 36-37), the trial court had no option but to sentence petitioner to 25 years imprisonment, the minimum mandatory for trafficking in hydrocodone (R 41-43). Notice of appeal was timely filed (R 48).

In the district court petitioner argued that the evidence presented at trial affirmatively showed the offense petitioner committed was not trafficking but possession of a controlled substance because the hydrocodone in petitioner's possession was a schedule III drug, not the hydrocodone referred to in the trafficking statute. Petitioner also argued that his sentence violated both the state prohibition against cruel or unusual punishment and the federal prohibition against cruel and unusual punishment. The district court affirmed relying on its previous opinion in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998). Johnson v. State, 23 Fla. Law Weekly D2419 (Fla. 4th DCA October 28, 1998)(appendix). The district court certified conflict with State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), and State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998). Petitioner's second argument was rejected without discussion. Johnson v. State, supra.

Notice of intent to invoke this Court’s discretionary jurisdiction was timely filed.

STATEMENT OF THE FACTS

The evidence presented at trial showed that petitioner had worked approximately four years as a pharmacy technician at Eckerd's (T 210-211). On December 5, 1996, petitioner was observed by a hidden camera taking bottles of prescription drugs from the pharmacy (T 80-83). He was confronted outside the store by other Eckerd's employees and the four bottles, with a retail value of $285.76, were recovered (T 83-84).

Chemist Greenspan examined and tested the recovered drugs (T 115, 119). Petitioner took two bottles of Vicodin ES, each containing 100 tablets with total weight per bottle of 85.7 grams and 85.6 grams, and two 100 tablet bottles of Lorcet, one weighing 86 grams, the second weighing 87.3 grams (T 120, 124). Greenspan tested one tablet from each bottle; each bottle was still factory sealed when he received it (T 125). The bottles are labeled as Schedule III drugs (state exhibit 5). Greenspan testified the controlled substance in Vicodin ES and Lorcet is hydrocodone (T 120). Each Vicodin ES tablet contains 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, commonly known as Tylenol (T 121). Each Lorcet tablet contains 10 milligrams of hydrocodone and 650 milligrams of acetaminophen (T 121-122). The total amount of all the hydrocodone contained within the tablets in the four bottles possessed by appellant was 3.5 grams. The total weight of the acetaminophen was 280 grams. The total weight of the

pills was 344.6 grams.[1]

Petitioner moved for a judgment of acquittal arguing the pills are not a mixture but should be considered individually so that the total controlled substance possessed by petitioner was not a trafficking weight but only 3.5 total grams (T 126). The motion was denied (T 127). Petitioner presented a duress/coercion defense then renewed his previous motion for judgment of acquittal, which was again denied (T 246).

[1] The chemist did not identify the substances which made up the other 61.6 grams in the pills.

SUMMARY OF ARGUMENT

Petitioner was charged with trafficking in Hydrocodone or a mixture containing hydrocodone in excess of 28 grams based on his possession of two 100 tablet bottles of Vicodin ES and two 100 tablet bottles of Lorcet. Vicodin ES and Lorcet are brand names of pain relievers which contain a small amount of hydrocodone and a large amount of acetaminophen. Hydrocodone is a controlled substance regulated under both § 893.03(2)(a)1 j, Florida Statutes (Supp. 1996) ("Schedule II"), and § 893.03(3)(c)4, Florida Statutes (Supp. 1996) ("Schedule III"). The felony known as "trafficking" applies to Schedule I and II narcotics only. Because the hydrocodone possessed by petitioner was a Schedule III rather than a Schedule II narcotic, there is insufficient evidence to sustain his conviction for trafficking in hydrocodone. It is fundamental error to convict a defendant for an offense for which insufficient evidence exists; indeed, the evidence in the record affirmatively demonstrates petitioner committed only the lesser offense of possession a third degree felony. His conviction and sentence must be vacated and the charge reduced to the lesser offense.

Second, even if there is sufficient evidence in the record to sustain a conviction, the mandatory minimum sentence of 25 years incarceration violates the Eighth Amendment prohibition against cruel and unusual punishment and Florida's prohibition against cruel or unusual punishment as well because such punishment is disproportionate to the offense. Since the trafficking statute's penalty is unconstitutional as applied to petitioner, the convic-

tion and sentence must be reversed.

ARGUMENT

POINT I

THE FOURTH DISTRICT WRONGLY CONSTRUED FLORIDA STATUTES 893.03(3) AND 893.135 TO CONCLUDE THAT PETITIONER COULD BE PROSECUTED UNDER THE DRUG TRAFFICKING STATUTE BASED ON HIS POSSESSION OF LEGALLY MANUFACTURED HYDROCODONE TABLETS DESCRIBED IN 893.03(3)(c)(4).

Petitioner was charged with trafficking in hydrocodone or a mixture containing hydrocodone in an amount of 28 grams or more based on his possession of four sealed bottles of Vicodin ES and Lorcet, prescription drugs containing a small set amount of hydrocodone, a controlled substance, manufactured with a much larger set amount of acetaminophen, commonly known as Tylenol.[2] The state's theory of prosecution was that these drugs are a mixture containing hydrocodone within the meaning of the trafficking statute. The fourth district agreed but acknowledged that the first and second districts have reached the opposite conclusion. Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th DCA Oct. 28, 1998) (attached as appendix). The issue presented in this case is whether petitioner's possession, without a prescription, of Vicodin ES and Lorcet tablets constituted trafficking in hydrocodone, a first degree felony with a 25 year mandatory minimum sentence, or

[2] Hydrocodone is a semisynthetic narcotic pain-reliever and cough suppressant similar to codeine. Barnhart Edward, R., Physicians' Desk Reference 1158 (45th ed. 1991). It is prescribed for the relief of moderate to moderately severe pain. Id. Vicodin ES tablets contain 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen ("7.5/750") (T 121). Lorcet tablets contain 10 milligrams of hydrocodone and 650 milligrams of acetaminophen ("10/650") (T 121-122).

possession of hydrocodone, a third degree felony punishable under the guidelines.

There are three principle statutes which affect the issue presented sub judice: §§ 893.03, 893.13, and 893.135, Florida Statutes (Supp. 1996).

Florida Statute 893.03 provides, "The substances enumerated in this section are controlled by this chapter." § 893.03, Fla. Stat. (Supp. 1996). The statute then divides itself into five sections called schedules, each containing subsections listing the controlled substances within the particular schedule. Most of the subsections begin with the statement, "unless specifically excepted *or unless listed in another schedule*, any material, compound, mixture, or preparation which contains any quantity ...." and then list the controlled substances included. See e.g. §§ 893.03(1)(c), (1)(d), (2)(c), (2)(d), & (3)(a), Fla. Stat. (Supp. 1996)(emphasis added). The schedules are arranged in descending order based on the potential for abuse of the controlled substances listed. Controlled substances listed in Schedules I and II have the highest abuse potential. §§ 893.03(1) & (2), Fla. Stat. (Supp. 1996).

Hydrocodone, but not compounds, mixtures, or preparations containing hydrocodone, see §893.03(2)(a), Fla. Stat. (Supp. 1996),) is first listed as a Schedule II substance under § 893.03(2). That statute provides,

> (a) Unless specifically excepted or *unless listed in another schedule, any of the following substances*, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:

> 1. Opium and any salt, compound, derivative, or preparation of opium, except nalmefene or isoquinoline alkaloids of opium, including, including but not limited to, the following:
>
> * * *
>
> j. Hydrocodone

are Schedule II controlled substances.

The next section of the statute, § 893.03(3), lists the Schedule III controlled substances. Hydrocodone is again included, this time as a Schedule III controlled substance, if it is in combination as described in §893.03(3)(c)4:

> (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation *containing limited quantities* of any of the following controlled substances or any salts thereof:
>
> ***
>
> 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.

See also § 893.03(3)(c)3, Fla. Stat. (Supp. 1996)(controlling hydrocodone combined with isoquioline alkaloid of opium). Between the two schedules of the statute, both of which regulate hydrocodone, §§ 893.03(3)(c) 3 & 4 are obviously the more specific since they describe particular dosage units and combinations. When a defendant's acts are covered by a specific statute, the specific statute generally controls over a more general statute on the same subject. See Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959); Burnett v. State, 23 Fla. L. Weekly D2342 (Fla. 1st DCA Oct. 15, 1998).

Vicodin ES and Lorcet both fall within the parameters of subsection (c)(4), as one contains 7.5 milligrams of hydrocodone and the other 10 milligrams of hydrocodone, both combined with therapeutic amounts of acetaminophen. Based on the weights given by chemist Greenspan, each pill would weigh just over 800 milligrams. Thus, each Vicodin ES tablet also contains approximately 50 milligrams of fillers while each Lorcet tablet contains approximately 140 milligrams of fillers.[3]

That hydrocodone combined with acetaminophen is a Schedule III drug has been repeatedly recognized by the State of Florida through the Agency for Health Care Administration Department of Health. e.g. Agency for Health Care Administration v. Ralph A. Shutterly, case 95-2139, 1995 Fla. Div. Adm. Hear. LEXIS 585 (Dec. 22, 1995); Agency for Health Care Administration, Board of Medicine v. Jeri-Lin Furlow Burton, M.D., case 93-3096, 1995 Fla. Div. Adm. Hear. LEXIS 21 (April 21, 1995); Department of Health, Board of Medicine v. Samir Najjar, M.D., case 97-33663, 97-3442, 1998 Fla. Div. Adm. Hear. LEXIS 372 (August 18, 1998). In addition, the bottles which the state entered in evidence in this case bear the Schedule III mark (state's exhibit 5). Even the court in Baxley v. State, 684 So. 2d 831 (Fla. 5th DCA 1996), agreed the individual tablets involved in that case were Schedule III substances. There can, therefore, be no real dispute that the tablets which petitioner

[3] These other ingredients, such as corn starch, are added so that the ingredients will adhere together in tablet form or to add size or color for marketing purposes.

possessed are indeed Schedule III drugs.

Florida Statute 893.13, and specifically subsection (6)(a) make it unlawful to possess a controlled substance without a valid prescription. §893.13(6)(a), Fla. Stat. (Supp. 1996). On the date of this incident that offense was a third degree felony, §893.13(6)(a), Fla. Stat. (Supp.1996), as was sale or possession with intent to sell a substance described in §893.03(3). §893.13(1)(a)2, Fla. Stat. (Supp. 1996).

Petitioner admits a jury could have found him guilty of a violation of section 893.13. He was convicted, however, for a violation of Florida Statute 893.135(1)(c)1, drug trafficking. The statute under which petitioner was prosecuted provides,

> (c)1. Any person who ... is knowingly in actual or constructive possession of 4 grams or more of any morphine, opium, oxycodone, 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)*, or 4 grams or more of any mixture containing *any such substance*, ... commits a felony ... known as "trafficking in illegal drugs."

Petitioner argued to the district court that the plain meaning of this statute is that a person can only traffick in substances "*as described* in s.893.03(1)(b) or (2)(a)." Petitioner further argued that the words "any such substance" in the phrase "4 grams or more of any mixture containing any such substance" refers back to "as described in s. 893.03(1)(b) or (2)(a)." Neither Vicodin ES nor Lorcet are substances "as described in s.893.03(1)(b) or (2)(a)" because they are contained within the more specific provision of

§893.03(3)(c)4.

Petitioner is in good company when he contends §893.135(1)(c)1 has a plain meaning: the first district so held in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997). There a defendant was charged with trafficking under the same provision of the statute as petitioner here. The charge was based on Holland's sale of Lortab and Vicodin tablets. Holland moved to dismiss, offering proof that the tablets contained less than 15 milligrams per dosage unit. The state argued that despite the dosage and Schedule III, it could consider the total weight of the tablets under the mixture provision of § 893.135(1)(c). The district court rejected that argument.

> Reading sections 893.135(1)(c)1 and 893.03 (3)(c)4 in concert, it is clear to us that, if a mixture containing the controlled substance falls within the parameters set forth in Schedule III, the amount of the controlled substance per dosage unit, not the aggregate amount of weight, determines whether the defendant may be charged with violating section 893.135(1)(c)1, Florida Statutes.

689 So. 2d at 1270. The second district in State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998), and subsequent cases agreed.

Even the fifth district in State v. Baxley, supra, and the fourth district in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), and Johnson v. State, supra, agreed that the trafficking statute limits itself to Schedule I and II substances. They both disagreed with Holland's conclusion, however, though their analysis of how Vicodin ES and Lorcet, both Schedule III drugs, can be the subject of the trafficking statute differs.

According to Baxley, "if the amount involved is 4 grams or more of hydrocodone or 4 grams or more of a mixture containing hydrocodone then hydrocodone becomes a SCHEDULE II substance." 684 So. 2d at 832. But where does §893.03 or §893.135 say anything about transferring substances from one schedule to another? If the legislature intended weight to control the schedules, surely the legislature would have mentioned that fact when it assigned substances to schedules. Not only was weight not mentioned as a factor in scheduling hydrocodone, the legislature chose not to include compounds, mixtures, or preparations as part of §893.03(2)(a) at all. It also excluded from Schedule II any drug, such as hydrocodone, which has been listed in another schedule. §893.03(2)(a), Fla. Stat. (Supp. 1996). The legislature no doubt made those choices because it knew it was including compounds, mixtures or preparations containing limited small amounts of hydrocodone with large amounts of ingredients such as acetaminophen in another schedule, Schedule III. If the legislature had intended the courts to reassign the schedules based on weight, it would have done so more clearly or directly than by the language found in §893.135(1)(c)1, the drug trafficking statute.

The Baxley court says its interpretation makes sense because "SCHEDULE III substances include hydrocodone or hydrocodone mixtures which meet the section 893.03(3)(c)4 limitation and SCHEDULE II includes all other hydrocodone." 684 So. 2d at 832. In the first place, Schedule III only contains the specified hydrocodone mixtures; it does not contain plain hydrocodone which

is always in Schedule II. Second, that statement explains nothing. The simple fact is that each Vicodin ES or Lorcet tablet is exactly what is described in subsection (c)4, whether there is one tablet or two tablets, five tablets or ten tablets. Under Baxley's rationale, any time two or more tablets are present they would convert to Schedule II drugs since only a single tablet meets the section 893.03(3)(c)4 limitation. According to Baxley then, anytime a pharmacist fills a standard prescription for 20 Vicodin ES or Lorcet the pharmacist is providing a Schedule II drug rather than a Schedule III drug. Finally, that rationale breaks down altogether when one considers that subsection (4)(c) also includes liquid preparations containing hydrocodone. Depending on the density of the liquid used in the preparation, a few teaspoons of cough syrup containing hydrocodone would also be considered a Schedule II drug, rather than a Schedule III drug, and subject the person in possession to drug trafficker status.[4]

Besides the actual language of the statute, that the legislature never intended this cross-scheduling should be clear from the reasons underlying the assignment of schedules to begin with. The legislature found that Schedule II drugs, such as cocaine, have a "*high* potential for abuse and (have) currently accepted but *severely restricted medical use* in treatment in the United States,

[4] While it may seem farfetched to think this would ever happen, State v. John Patrick Mills, case no. 97-2678, currently pending in the second district involves a charge of trafficking in 14 to 28 grams of hydrocodone based on possession of six teaspoons of cough syrup.

and abuse of the substance may lead to *severe* psychological or physical dependence." §893.03(2), Fla. Stat. (Supp. 1996). By comparison, a Schedule III controlled substance such as Vicodin ES or Lorcet have a potential for abuse *less than* Schedule I or II substances, have *currently accepted uses* in the United States, and "abuse of the substances may lead to *moderate or low* physical dependence or high psychological dependence ...." §893.03(3), Fla. Stat. (Supp. 1996). The fact that a person has in his or her possession 8 tablets of Vicoden ES rather than 5 tablets does not in any way alter the potential for abuse, the current medical use of the substance, nor its potential for psychological or physical dependence.[5] Yet, possessing over 5 or 6 of the tablets, the recommended daily dosage is, according to the Baxley and Hayes courts, the difference between being a drug trafficker and not being a drug trafficker.

The fourth district in State v. Hayes and thus in the case sub judice reached the same result as the Baxley court but took a different approach. Although petitioner argued §893.135 has a plain meaning when read in connection with the other statutes, the district court found it was

> unclear ... which quantities of hydrocodone, or any mixture thereof, fall within the Schedule II classification, thus activating the trafficking statute, and which retain the

[5] The recommended dosage of Vicodin ES is one tablet every four to six hours. PDR at 1159. However, on occasion physicians prescribe significantly more than that for those with chronic pain. See e.g. Dept. of Health v. Najjar, LEXIS 372 (Lorcet Plus prescriptions of 90-100 pills refilled monthly.)

> Schedule III classification, which is outside the scope of the statute.

23 Fla. Law Weekly at D2185. But if indeed the statute is unclear, then rules of statutory construction required not that the ambiguity be resolved in favor of the more serious offense as the Hayes court did, but rather in favor of the citizen accused. "...when the language [of a criminal statute] is susceptible of differing constructions, it shall be construed most favorably to the accused." §775.021(1), Fla. Stat. (1997).

If these statutes need to be construed, then another principle of statutory construction is that it will be assumed the legislature did not intend an unusually harsh, unreasonable or absurd result. State v. Iacovone, 660 So. 2d 1317 (Fla. 1995); Williams v. State, 492 So. 2d 1051 (Fla. 1986); R.F.R. v. State, 558 So. 2d 1084 (Fla. 1st DCA 1990).

Normally large amounts of drugs are required as the threshold for drug trafficking prosecutions. Under the state's proposed reading of §893.135, however, prosecutions for drug trafficking based upon Vicodin ES or Lorcet would require just a few pills. Both Vicodin ES and Lorcet tablets weigh approximately 800 milligrams due to the fillers added to them.[6] The threshold 4 gram trafficking weight is thus just 5 or possibly 6 pills. A person in unlawful possession of approximately 35 pills would meet the 28

[6] Lorcet contains approximately 140 milligrams of starches and similar substances. At 140 milligrams extra per Lorcet tablet, one gram is added to the total weight with each additional 8 tablets.

gram threshold and be subject to at least a 25 year mandatory minimum term of imprisonment and a $500,000 fine regardless of prior record or any other circumstance. §893.135(1)(c)1 c, Fla. Stat. (Supp. 1996). Under the state's interpretation of these statutes, trafficking in cocaine is a much better gamble for drug users. A first time offender in possession of 28 grams of a mixture containing cocaine, the threshold for trafficking, is subject to the guidelines with little or no jail time required. §893.135(1)(b)1 a, Fla. Stat. (Supp. 1996). No one would likely argue that a person in possession of 149 kilograms of cocaine is not a drug trafficker, but the mandatory minimum is 10 years less than for the person with 40 tablets of Vicodin ES. §893.135(1)(b)1c, Fla. Stat. (Supp. 1996). All this despite the legislative findings that a Schedule II drug such as cocaine has "a high potential for abuse," has "severely restricted medical use," and may lead to "severe psychological or physical dependence," §893.03(2), Fla. Stat. (Supp. 1996), whereas Vicodin ES has a less potential for abuse or dependence and has currently accepted medical uses. §893.03(3) Fla. Stat. (Supp. 1996). Or how about cannabis, a schedule I drug with *no* accepted medical use and a high potential for abuse? It takes 50 pounds to reach a trafficking weight, again resulting in a guidelines sentence for possession up to 9,999 pounds. §893.135(1)(a)1 & 2, Fla. Stat. (Supp. 1996). 10,000 pounds or more will get the drug trafficker a 15 year mandatory sentence, again 10 years less than the penalty petitioner received. §893.135(1)(a)3, Fla. Stat. (Supp. 1996). If this

construction is not absurd, then nothing will ever meet the test. The construction reached by the Holland court, by comparison, would require a person be in possession of about 500 Vicodin ES to qualify as a drug trafficker, a result far more in line with the quantities required for Schedule I and II controlled substances.

Another absurd result dictated by both the Baxley and Hayes courts' cross-scheduling: This same statute, §893.135(1)(c)1, includes a prohibition against possession or sale of more than 4 grams of opium or 4 grams or more of a mixture containing opium "as described" in Schedule I or II. Like hydrocodone, opium is dual scheduled, appearing first in a variety of forms in Schedule II (a)(1)a-f. Opium also appears in Schedule V in compounds, mixtures, or preparations of not more than 100 milligrams of opium per 100 milliliters or per 100 grams. §893.03(5)(a)5, Fla. Stat. (Supp. 1966). Parepectolin is a liquid sold for controlling diarrhea which does not require a prescription to obtain from a pharmacist. It contains a quarter grain (15 milligrams) of opium combined with paregoric, pectin, and kaolin. Physician's Desk Reference at 1777. Reaching the 4 gram trafficking limit for opium mixtures then would be as simple as possession of a few teaspoons of parepectolin.

The statute as written does not require such an expansive approach. In short, based on reading of the statute as a whole it is an absurd result to conclude that the legislature intended to punish trafficking in Schedule III hydrocodone, which in this case 98 3/4% or 99% noncontrolled substances, substantially more

severely than trafficking in either a Schedule I or II substance.

This Court should therefore quash the decision in this case, adopt the reasoning in Holland, and remand for entry of the lesser judgment.

POINT II

PETITIONER'S 25 YEAR MINIMUM MANDATORY PRISON SENTENCE FOR POSSESSION OF FOUR BOTTLES OF ACETAMINOPHEN CONTAINING 1.5% OR LESS HYDROCODONE AND WORTH LESS THAN $300 VIOLATES THE FLORIDA AND FEDERAL CONSTITUTIONS' PROHIBITION AGAINST CRUEL OR/AND UNUSUAL PUNISHMENT.

Petitioner received a mandatory sentence of 25 years imprisonment and $500,000 fine despite the fact that: a) he had never been convicted of a crime before the case at bar, b) he possessed a total of only 3.5 grams of hydrocodone manufactured in a compound with 280 grams of acetaminophen, c) the tablets possessed contained approximately 98.75% to 99% acetaminophen and filler products and only 1.25% hydrocodone in concentrations less than 15 milligrams per dosage, and, d) the retail value of the tablets was only $285.76. The trial court had no discretion in the sentence imposed.

The Eighth Amendment to the federal constitution prohibits cruel and unusual punishment. The amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 284, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983). Article I, section 17 of the Florida Constitution prohibits cruel *or* unusual punishment, an arguably broader protection. See Hale v. State, 630 So. 2d 521 (Fla. 1993). Although this Court has not yet "delineate(d) the precise contours of the Florida guarantee," 630 So. 2d at 526, it has determined that an appellate court can undertake proportionality review of a non-death sentence. Hale v. State, supra; Williams

v. State, 630 So. 2d 534 (Fla. 1993). Hale further held that the federal constitution provides a guarantee of proportionality which acts as a minimum standard. 630 So. 2d at 525.

To determine whether a sentence violates the Eighth Amendment bar against cruel and unusual punishment, a court is to consider three factors: first, the gravity of the offense and the harshness of the penalty; second, a comparison of the sentence imposed on other criminals in the same jurisdiction, and third, a comparison of the sentences imposed in other jurisdictions. Solem v. Helm, supra. In that case, the U.S. Supreme Court held that a sentence of life imprisonment without possibility of parole imposed under a recidivist statute upon a defendant convicted of uttering a no account check in the amount of $100, who had three prior convictions for burglary, one prior conviction for false pretense, one for grand theft and one for driving while intoxicated was significantly disproportionate to his crime and thus violated the Eighth Amendment.

Under § 893.135(1)(c)1 c, the trial court had no choice but to sentence Mr. Johnson to a mandatory minimum term of 25 calendar years imprisonment, a punishment similar to that doled out until most recently for convictions of first degree murder not resulting in the death penalty. Had petitioner possessed 300 pounds of cocaine instead of these tablets, his required sentence would have been only 15 years imprisonment, 10 years less than the one he got here. § 893.135(1)(b)1 c, Fla. Stat. (Supp. 1996). Likewise, had Mr. Johnson possessed 10,000 pounds of marijuana, his maximum

required penalty would have been 15 years imprisonment, again 10 years less than the sentence required and imposed here. § 893.135(1)(a)3, Fla. Stat. (Supp. 1996). Mr. Johnson's punishment is disproportionate and unduly harsh in violation of the prohibition against cruel and unusual punishment mandated by the Eighth Amendment of the United States Constitution and Article I, Section 17, Florida Constitution. This Court must vacate the illegal sentence on the grounds cited herein.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court exercise its discretion to review the decision and resolve the issues presented in this case in accordance with the district court's decisions in Holland and Perry.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to Debra Rescigno, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this _____ day of March, 1999.

_____
Counsel for Petitioner