IN THE SUPREME COURT OF FLORIDA

ALETHIA JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC00-2127

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Alethia V. Jones, hereinafter referred to as the appellee, was charged in Pinellas County by information CRC99-03652 with the offense of possession of cocaine, a third degree felony; the offense occurred on February 21, 1999 (R 8).

A pretrial conference hearing was held on November 3, 1999. Defense counsel, Robin Kester, advised the court that the case had been reset from October 29th, on which day a Dr. Peter Spoto testified (R 30). Counsel reminded the court that it had provided the court and the state with a copy of the case State v. Williams[1], which indicated that a defendant can be sentenced to either drug offender probation or another non-incarcerative sentence either under F.S. 948.01(13) or 948.034 that provides for a drug punishment center (R 30).

Defense counsel reminded the court that the court was unaware of a drug punishment center and that s. 948.034 has a schedule of what type of priors a defendant must have to qualify (R 30). The court was told that sales do not qualify for sentencing under s. 948.034. (R 30). This was brought to the court's attention by defense counsel. Although the defense was proceeding under the hope that the court would impose drug offender probation under s. 948.01(13), the petitioner appears to have a prior sale of heroin conviction on the score sheet. Petitioner acknowledges that this

[1] 759 So.2d 1 (Fla. 4th DCA 1998).

prior conviction was possible, although she has no recollection of it (R 30).

Defense counsel reminded the court that the court had ordered the state to provide proof - to get the judgment and sentence and prove it up (R 30). The defense then stated, "Even if we are not proceeding under that other section where she is not allowed to have the prior sale, if they can't prove it up, it needs to be taken off the score sheet." (R 30-31).

The defense counsel reminded the court that the court wanted to take time to see if s. 948.01(13) overrides the sentencing guidelines if the guidelines require a state prison sentence (R 31). The court had indicated previously that, if it was a minimum mandatory, the court could not override the minimum mandatory and impose a departure sentence (R 31). Defense counsel advised the court that this was not the situation in the instant case (R 31).

It was pointed out that the appellee was charged with possession of cocaine, in the amount of "one rock," defense counsel believed (R 31). Counsel stated that Dr. Spoto had testified - after being questioned by the court - that he felt appellee was a chronic substance abuser, a chronic drug user, pursuant to the language in s. 948.01(13)[2]. Counsel recognized that there must be

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[2] s. 948.01(13), Fla. Stat. (1999): If it appears to the court upon a hearing that the defendant is a chronic substance abuser, whose criminal conduct is a violation of chapter 893, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt; and in either case, it may stay and withhold the imposition of sentence and place the defendant on drug offender

finding by the court that the appellee is a chronic drug user for the court to consider drug offender probation (R 31).

Defense counsel told the court that appellee scored out to mandatory prison time and would so score even if the sale of heroin charge was deleted (R 31). Defense counsel stated that the court had been provided with a recommendation from PAR, which stated that appellee should attend and complete the long-term residential program at Operation PAR with aftercare to be determined by the clinical staff (R 31-32).

The prosecutor, Scott J. Rosenwasser, interrupted defense counsel, and the following discussion took place:

> MR. ROSENWASSER: The only thing I would bring up, in order for this, there is a specific type of treatment program that fits in the statute. I don't recall the exact language. It's some type of Department of Corrections punitive drug program. There are two statutes.
>
> MS. KESTER: The drug punishment, 948.01(13) -- I'm asking for 948.01(13) - does not include the drug punishment center.
>
> MR. ROSENWASSER: I have to reread that. I don't remember when I was looking at the run sheet
>
> MS. KESTER: I do have it, Judge. 948.01(13) states that if it appears to the court upon a hearing that the defendant is a chronic substance abuser whose criminal conduct is a violation of chapter 893, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt; and in either case, it may stay and

probation.

> withhold the imposition of sentence and place the defendant on drug offender probation.
>
> THE COURT: I think, once again, my concern is whether that statute is intended to allow the Court to override the sentencing guidelines.
>
> MS. KESTER: However, in this case that I have talked about, State v. Williams [23 Fla. L. Weekly D2537 (Fla. 4th DCA November 18, 1998], they address that issue. The State is complaining -- that's the wrong word -- concerned about the fact it was a departure sentence. This case acknowledges although the effect is a departure, it is not legally a departure. This is another way it goes, so to speak.

(R 32-33)

The court took a brief recess to review the case cited by defense counsel (R 33). When the court reconvened, the judge announced that he was unable to find the case. Defense counsel cited the court a sentence from the state's copy of the case:

> Sentences under section 948.034 and 948.01(13) are not technically "departures" since they are imposed completely outside of the guidelines. Footnote No. 1, violation of probation imposed under either section 948.01(13) or 948.034 may lead to a sentence under the guidelines. It says, "see Section 948.034(1)(f), and section 948.01(13)(b).

(R 33-34)

Defense counsel then stated that this meant that if the trial court agrees to do this, it is not a departure, not an official or traditional departure sentence; but that if the petitioner was to violate probation, scoring again a mandatory prison sentence under

the guidelines, he would be sentenced under the guidelines (R 34).

The prosecutor then stated:

> If I may, referring to the second page where the paragraph starts out, "The terms of drug offender probation," when we read that paragraph, it states pursuant to this section that defense counsel is raising, "require the Court to place Defendant in a program developed by Department of Corrections."[3]
>
> And speaking to the Department of Corrections, they state that the Department of Corrections does not have a program developed by them that fits the particular provision of this statute paragraph. The State acknowledges that that is addressing exactly what we are addressing in this case.
>
> "The state maintains that appellee's probation is not properly classified as "drug offender probation" under section 948.01(13) if not placed in a program developed by the Department of Corrections"[4]

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[3] Counsel is referring to the case of State v. Williams, 759 So.2d at 2, wherein the court states:

> The terms of "drug offender probation," pursuant to section 948.01(13(a), require the court to place the defendant in a program developed by the Department of Corrections "which emphasizes a combination of treatment and community supervision approaches and which includes provision for supervision of offenders in accordance with a specific treatment plan."

[4] The prosecutor is citing from State v. Williams, 759 So.2d at 2):

> The State maintains that the appellee's probation is not properly classifies as "drug offender probation" under section 948.01(13) because he was not placed in a program developed by the Department of Corrections.

> I think the PAR treatment program, which is what Defense Counsel is citing as an alternative, doesn't fit into what this statute wants. The statute wants a person who is given a chance under this provision to go to a program specifically developed by the Department of Corrections. It appears we don't have that availability in this county right now. I don't think on this case we can substitute PAR for the provisions of the statute.

(R 34-35)

Defense counsel responded that the state's argument was nothing more than "form over substance" (R 35) because the Department of Corrections routinely sends people to PAR programs even though the Department of Corrections does not have their own instituted programs (R 35). It was argued that the appellee should not be held accountable [under the guidelines assumably] just because the Department of Corrections is not the party that actually instituted the program (R 35). It was pointed out:

> ...[w]e have a perfectly good program that the Department of Corrections relies on in putting probationers into various programs whenever Your Honor imposes standard drug conditions, they are evaluated. They are not necessarily put in a "Department of Corrections Program" but various ones like RET and PAR. Those are not Department of Corrections programs. Now we are saying we can do it one way if it's not a departure, or not a situation like that, or another way. We are still trying to get someone treatment, and we can't do it.

(R 35-36)

It was argued by Mr. Manning (also an Assistant State

Attorney), that this case was similar to the previous case involving a Dr. Pennington, who was prosecuted for obtaining a controlled substance by fraud. He had been placed on a special pretrial diversion program set up by the chief judge in another county for a similar offense; but because Pinellas County's chief had not set up a similar program in this county, he was not allowed into such a diversionary in this county. The case was taken to the Second District Court of Appeal, based upon a denial of equal protection, but the conviction and sentence was affirmed[5](R 36). It was argued that the present case was analogous, that the Department of Corrections did not set up a program to comport with the statute and the court cannot use alternative programs in this county or other counties just because it would seem to fit the criteria. (R 36-37).

The trial court then stated that it was "right back to where I started" (R 37). The court said it could find some case law on s. 948.034, but that it was s. 948.01(13) that troubled the court (R 37). The court questioned about statutes that appeared to be in conflict with each other:

> ...I'll go back to whether I have statutes that are in conflict, because I have a statute that mandates a sentencing guideline, and then I have a statute that seems to provide authority for the Court to basically ignore the sentencing guidelines, I

[5] The case refereed to is John Mark Pennington v. State, 727 So.2d 926 (Fla. 2d DCA 1998). This court rendered a per curiam affirmed opinion without any written opinion or cited authority.

> don't know whether I have the power to impose a sentence other than the one that is provided under the sentencing guidelines, absent some other valid mitigating factor that would support a departure. I can tell that, as I said before, when you have a specific statute, for instance, to impose a minimum mandatory sentence, they are not going to -- there is case law on that -- that when we have two statutes that are in conflict, the later statute will take precedence, and is actually viewed of the latest expression of the legislative entity.

(R 37)

The court then stated that there was a case out of the Fourth District Court of Appeal that involved only s. 948.034, which was State v. Brown, 723 So.2d 857 (Fla. 4th DCA 1998). (R 37). The court noted in that case the defendant had violated s. 893.13 and 893.03 and was placed on community control. The state objected, arguing that it was a downward departure sentence, but the appellate court held that the legislature specifically gave trial judges the discretion to impose a sentence outside the guidelines for certain enumerated drug offenses. (R 38).

The court asked that if s. 948.01(13)(a) says that "The Department shall develop and administer a drug offender treatment program." why has the court been putting people on drug offender probation if the DOC does not have a program? (R 38). An individual from Probation and Parole responded, "Judge, we have a drug offender probation program with special conditions. We don't have a residential facility for that." (R 39). The court then

responded:

> I understand. The statute doesn't say I have to put them in a residential facility. It says I have to put them on drug offender probation.

(R 39)

The prosecutor responded that this was true for s. 948.01(13), which is the one for which the defense was making argument (R 39).

The court told the state to make its record because it was going to place the petitioner on drug offender probation with an adjudication of guilt.

The court offered two years drug offender probation (R 39).

The defense was concerned about the scoring of the prior sale of cocaine case in order to determine the exact score sheet score (R 40).

The state argued that the only additional argument it would make was that the legislature struck out as a departure reason drug abuse or drug treatment back in July or October of 1997 (R 40). The state then argued:

> The basic argument being that the statute that we are proceeding under today, 948.01(13), that does not supersede the guidelines which state that drug treatment is not a reason to depart from the guidelines because there appears to be a conflict between what this statute is saying and what the guidelines are stating that drug abuse or treatment cannot be used as a reason for departure.

(R 41)

The court responded:

> ...I understand your argument. I believe, though, that this section of Statute 948.01(13) is somewhat analogous to 948.034(2) in that the language in the statute appears to be clear and unambiguous. And trying to construe it according to its plain meaning, I don't think I have to go behind it to try and determine what the legislative intent is. And it says, quite frankly, that the Court has the authority to place someone on drug offender probation if it appears upon a hearing that the Defendant is a chronic drug offender, chronic substance abuser, and whose criminal conduct is in violation of chapter 893.
>
> In this case, Ms. Jones has been charged under 893.13 of the Florida Statutes. And I have taken in and heard testimony from Dr. Spoto that would lead the Court to conclude, based on the record, that she is a chronic substance abuser. And under the statute, the Court may either adjudge them guilty or stay and withhold adjudication of guilt. And I guess whether she is adjudicated, or there is a withhold, the Court may stay and withhold the imposition of sentence and place the Defendant on drug offender probation.
>
> Now I've made a finding, or if I have not, I will at this time, that she is a chronic substance abuser. The court would impose a sentence of two years drug offender probation.

(R 41-42)

The court asked what the appellee scored out to under the guidelines (R 42). Defense counsel responded that this depended on whether or not the prior sale of heroin was scored (R 42). Mr. Rosenwasser (prosecutor) stated that the sale of heroin was not scored and petitioner's sentencing range was 24.6 months to 5 years

(R 342). The defense disputed that calculation, saying that if the 3.6 points scored for the prior sale of heroin was deleted, the total sentence points would be 51.6. Then subtracting 28 points results in 23.6 multiplied by .75 results in the lowest recommended sentence of 17.7 (R 42). Mr. Manning, another assistant state attorney, acknowledged that this was correct (R 42). (see score sheet at R 13-15).

The court stated that it was its intention to also suspend a sentence in this case (R 42). The court offered a two years suspended sentence also, which defense counsel stated it would accept and place on the plea form (R 42-43, 9-10)

Petitioner was sworn and a plea colloquy followed (R 43-44).

The trial court adjudicated the appellee guilty and sentenced her to a suspended two year prison sentence and placed her on two years drug offender probation (R 45). The court rendered a written judgment of guilt (R 11-12) and an order of probation specifying two years drug offender (R 16) with a special condition of a two year suspended prison sentence (R 18 - condition 24) (R 16-18).

The trial court further rendered a written order finding that the appellee was charged with possession of cocaine under Chapter 893; that under the sentencing guidelines, she scored out to a mandatory prison sentence; that having heard testimony from Dr. Spoto, the court concluded that petitioner was a chronic substance abuser; that the language of s. 948.01(13) specifically grants the

trial court the discretion to order drug offender probation in lieu of a sentence under the guidelines upon a finding, after a hearing that a defendant is a chronic substance abuser pursuant to State v. Williams, 23 Fla. L. Weekly D2537 (Fla. 4th DCA November 18, 1998) and State v. Brown, 723 So.2d 857 (Fla. 4th DCA 1998); and that the appellee was adjudicated guilty and sentenced to two years drug offender probation. (R 21-22)

The State of Florida timely filed its notice of appeal (R 23). The Second District Court of Appeal reversed the drug offender probation sentence and remanded the case to the trial court to allow the petitioner an opportunity to withdraw his plea. The Second District held that "Jones" sentence of drug offender probation is a departure sentence to which the trial court failed to set forth reasons for a downward departure. State v. Jones, 25 Fla. L. Weekly D2342(Fla. 2d DCA 2000).

The Second District certified conflict with the Fourth District Court of Appeals in State v. Williams, *supra.*

The petitioner timely sought discretionary review with this court.

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing the petitioner to a suspended two year prison sentence and placing her on two years drug offender probation pursuant to s. 948.01(13), Fla. Stat. (1999) when her guidelines required a minimum sentence of 17.7 months imprisonment. The decision of the Second District Court of Appeal (based upon its dependance by analogy with this Court's reasoning in Disborw v.State, 642 So 2d 740, at 741 (Fla. 1994)] that §948.01(13) does not provide for sentencing a defendant outside the guidelines without providing written reasons, should be affirmed and the reasoning of the Fourth District Court of Appeal declared invalid insofar as it holds that, "Sentences under sections ... 948.01(13) are not technically 'departures' since they are imposed completely outside of the guidelines." The decision of the Second District can also be affirmed based upon rules of statutory construction in that s. 948.01(13) is in irreconcilable conflict with the sentencing guidelines, which specifically prohibit departures from the guidelines based upon the need for drug treatment and exemptions from the guidelines pursuant to s. 948.034, which are unavailable to the petitioner.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE PETITIONER TO DRUG OFFENDER PROBATION PURSUANT TO F.S. 948.01(13) (1999) WHEN THE SENTENCING GUIDELINES RECOMMENDED A SENTENCE OF IMPRISONMENT.

The trial erred in allowing the petitioner to enter a plea of no contest to the charge of possession of cocaine, a violation of §893.13(6)a, Fla. Stat (1999), for a suspended two year sentence and placing her on two years drug offender probation pursuant to §948.01(13), Fla. Stat. (1999).

One of the arguments made by the prosecution to the trial court was that §948.01(13), Fla. Stat. (1999) does not supercede the guidelines, which states that drug treatment is not a reason to depart from the guidelines because there is a conflict between §948.01(13) and the sentencing guidelines (R40-41).

Section 948.01, Fla. Stat. (1999) was originally enacted in 1941[6], long before the legislature enacted any sentencing guidelines. The section relied upon by the court and the defense, s. 948.01(13), Fla. Stat. (1999) was enacted in 1991[7]. S. 948.01(13) provides:

> If it appears to the court upon a hearing that the defendant is a chronic substance

[6] Ch. 20519, s. 20, Laws of Fla. (1941)

[7] Ch. 91-225, s. 14, at 2264, Laws of Fla.

> abuser whose criminal conduct is a violation of chapter 893, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt; and, in either case, it may stay and withhold the imposition of sentence and place the defendant on drug offender probation.

Prior to enactment of s. 941.01(13), the Florida Supreme Court had determined in Herrin v. State, 568 So.2d 920 (Fla. 1990), that a defendant's substance abuse and evidence of amenability to rehabilitation were grounds for departure from the guidelines. In Herrin, the defendant was convicted of purchase of cocaine within 1000 feet of a school, a violation of Chapter 893. *Id.* Subsequently the legislature in 1993, enacted s. 921.0016(4)(d), which states:

> **916.0016 Recommended sentences; departure sentences; aggravating and mitigating circumstances:**
>
> * * * *
>
> (4) Mitigating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:
>
> * * * *
>
> (d) The defendant requires specialized treatment for *addiction*, mental disorder, or physical disability, and the defendant is amenable to treatment.

(Ch. 93-406, s. 13, at 2941, 2943) (emphasis added))

However, in 1997, the legislature enacted "The Criminal Punishment Code," a comprehensive overhaul of the prior sentencing

guidelines. As a pertinent part of this new comprehensive sentencing legislation, the legislature specifically deleted specialized treatment for "addition" from s. 921.0016(4)(d) and added subsection (5), specifically stating that substance abuse or addition is not a mitigating factor under subsection (4):

> (4) Mitigating circumstances under which departure from the sentencing guidelines is reasonably justified include, but are not limited to:
>
> (D) the defendant requires specialized treatment for a ~~addiction~~ mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.
>
> (5) A defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (4) and does not, under any circumstances, justify a downward departure from the sentence recommended under the sentencing guidelines.

Ch. 97-194, s. 41, at 2332, Laws of Fla.[8]

These amendments (section 41) took effect on July 1, 1997, pursuant to Chapter 97-194, s. 44, at 2332, Laws of Fla. These subsections were renumbered and are now s. 921.0026(2(d), and 921.0026(3). Ch. 97-194, s. 8, at 2312. Appellee's offense occurred on February 21, 1999; therefore, she is subject to sentencing under the newly enacted Criminal Punishment Code.

As the Second District noted in State v, Jones, *supra*:

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[8] These subsections were renumbered and are now s. 921.0026(2(d), and 921.0026(3). Ch. 97-194, s. 8, at 2312.

> ...[i]n *Disbrow v. State*, 642 So.2d 740, 741 (Fla. 1994), the supreme court, in dicta, discussed the fact that sentencing under s. 98.01 falls within the sentencing guidelines.

In Disbrow, *id* at 741, the trial court sentenced the defendant to what this Court termed "a 'back end' or reverse split sentence."[9] This Court held that a reverse split sentence is a legal sentence under §948.01(11), Fla. Stat. (1991)[10]. This Court went on to say:

> However, we cannot accept the argument that a reverse split sentence is exempt from the guidelines **any more than other sentencing options under section 948.01, which dictates when a court may impose sentences of probation or community control. In fact this Court has made it clear that sentencing alternatives should not be used to thwart the guidelines.** *Poore v. State*, 531 So.2d 161, 165 (Fla. 1988). **When the legislature wants to exempt a sentence from the guidelines, it knows how to do it.** For example, in section 774.084, Florida Statues (1991), another statute which covers special sentences, the legislature expressly stated that the section is exempt from the sentencing guidelines. **However, such an exemption is not mentioned in section 948,01(11) or any place else in section 948.01[11].** Thus it appears that the legislature

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[9]2 years community control followed by 5 and 13 years incarceration but if the defendant complied with the conditions of community control the terms of incarceration would be modified and eliminated. *Id.*

[10]"The court may also impose a split sentence whereby the defendant is sentenced to a term of probation, which may be followed by a period of incarceration, or with respect to a felony, into community control...

[11]This Court was interpreting Ch. 948 as it existed in 1991; however, later (in 1993-1994) the legislature added §948.034 specifically providing for exceptions to the guidelines for drug treatment under specified conditions. Comments regarding this subsection are included in this brief.

> did not intend for a judge imposing reverse split sentence to disregard the sentencing guidelines.

The reasoning of this Court in Disbrow, *id.* is equally applicable to this instant case. The probation alternative provided for by s. 948.01(13) must be read in conjunction with the guidelines. Just as in Disbrow, *id.*, where this Court found that such an exemption from the guidelines is not mentioned in s. 948.01(11), so also this Court must find that such an exemption from the guidelines is not mentioned in s. 948.01(13). Just as this Court recognized in Disbrow, *id.*, that "When the legislature wants to exempt a sentence from the guidelines, it knows how to do it." and cited as an example the habitual offender statute, which expressly states that the section is exempt from the sentencing guidelines, so also, there is a section of Chapter of 948 that now specifically provides for drug treatment exemptions from the sentencing guidelines, and that is s. 948.034.

Section 948.034(1), Fla. Stat. (1999) provides in pertinent part:

> **948.034 Terms and conditions of probation; community residential drug punishment centers. -**
>
> *** * ***
>
> (2) On or after October, 1, 1993, any person who violates s. ...**893.13(6)(a) may, in the discretion of the trial court, be required to successfully complete a term of probation in lieu of serving a term of imprisonment are**

required or authorized by s. 775.084, former s. 921.001, or s. 921.002, as follows:

* * *

(c) if the person has been previously been convicted of two felony convictions of s. ...893.13(6)(a), adjudication may not be withheld and the offender may be placed on probation for not less than 24 months, as a condition of which the court shall require the offender to reside at a *community residential drug punishment center for 120 days.* The offender must comply with all rules and regulations of the center and must pay a fee for the costs of room and board and residential supervision. Placement of an offender into a community residential drug punishment center is subject to budgetary considerations and availability of drug space. If the court requires the offender to reside at a community residential drug punishment center, the court shall also require the offender to comply with one or more of the other following conditions:

1. pay a fine of not less than $1,000 nor more than $5,000 pursuant to s.775.083(1)(c).

2. Enter, regularly attend, and successfully complete a complete prescribed substance abuse treatment program provided by a treatment source licensed pursuant to chapter 397 or by a hospital licensed pursuant to chapter 395, as specified by the court. In addition, the court may refer the offender to a licensed agency for substance abuse and evaluation and, if appropriate, substance abuse treatment subject to the ability of the offender to pay for such evaluation and treatment. If such a referral is made, the offender must comply and must pay for the reasonable cost of the evaluation and treatment.

3. Perform at least 150 hours of public service.

> 4. Submit to routine and random drug testing which may be conducted during the probationary period, with the reasonable costs thereof borne by the offender.
>
> 5. Participate, at his or her own expense, in an appropriate self-help group, such as Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous, if available.

S. 948.01(4), Fla. Stat. (1999) defines the term "community residential drug treatment center":

> (4) "Community residential drug punishment center" means a residential drug punishment center designated by the Department of Corrections. The Department of Corrections shall adopt rules as necessary to define and operate such a center.

S. 948.034(5), Fla. Stat. (1999) states:

> (5) The Department of Corrections, in consultation with the Department of Children and Family Services, shall adopt rules as necessary to implement the provisions of this section relating to program standards and performance objectives of community residential drug punishment centers.

The probation and parole official advised the court that although it has a drug offender probation program with special conditions, they do not have a residential facility for that purpose (R 39); the court also was not aware of the existence of any such "drug punishment center" (R 30). Therefore, this specified exemption from the sentencing guidelines (as opposed to a downward departure, which is no longer authorized by the guidelines for drug treatment) was not available to the petitioner.

Since petitioner cannot get into a drug punishment center, since such a facility does not exist, she cannot be placed on drug offender probation based upon her need for drug treatment since such a departure from the guidelines is no longer permitted.

The reasoning of the Second District in State v. Jones, *supra*, based upon Disbrow, *supra*, is correct; and any conflict between State v. Jones, *supra*, and the Fourth District in State v. Williams, *supra*, should be resolved in favor of the Second District, which should be affirmed based upon the foregoing analysis. The Fourth District was in error insofar as it held that drug offender probation imposed under s. 948.01(13) is imposed completely outside the guidelines.

Petitioner's reliance on State v. Brown, 723 So.2d 857 (Fla. 4th DCA 1998) is also without merit because that case is clearly distinguishable. Petitioner argues that Brown, *id.*, states for the proposition that trial courts can impose drug probation even though the sentencing guidelines call for imprisonment (appellant's brief at p. 7). That statement is too general in its scope. The court in Brown, *id.*, was referring to the specific exemption from the guidelines provided under s. 948.034 not s. 948.01(13); which, based upon the foregoing argument, is not an exemption from the guidelines. Petitioner's reliance on Ringling v. State, 678 So.2d 1339 (Fla. 2d DCA 1996) is also without merit because that case is also distinguishable. The issue was never raised in that case as

to whether the drug offender probation sentence imposed under s. 948.01(13) was a departure from the guidelines mandatory prison sentence, which is the specific issue in the instant case .

This Court should affirm the reasoning of the Second District not only because of that appellate court's appropriate application by analogy of this Court's legal analysis in Disbrow, *supra.*, but also because s. 948.01(13) is irreconcilable with the provisions of s. 921.0016(4)(d) and s. 921.0016(5), Fla. Stat (1997) (now s. 921.0026(2)(d) and s. 921.0026(3) of the Criminal Punishment Code) which as stated earlier specifically deleted specialized treatment for substance abuse as reason for downward departure from the sentencing guidelines. Therefore, respondent submits that the doctrine of repeal by implication applies.[12]

Furthermore, s. 948.034, being a more specific statute dealing with probation and drug abuse treatment based upon specified violations of Chapter 893 and detailing the terms of such probation and treatment and specifically exempting such sentences from the sentencing guidelines, takes precedence over the more general comprehensive provisions of s. 948.01(11). As this Court stated in McKendry v. State, 641 So.2d 45, at 46 (Fla. 1994):

> First, a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in a more general manner. (Citations omitted).

[12]The doctrine of repeal by implication rests on the ground that the last expression of the legislative will ought to control. Florida Jur. 2d, vol.48A, §215 at 528 (2000)

> The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. (Citations omitted).
>
> Further, when two statutes are in conflict, the later promulgated statute should prevail as the last expression of the legislature. (citations omitted)

Petitioner's argument that "If the guideline provisions implicitly repeal s. 948.01(13), s. 948.034, which also provides for drug probation, would arguably also be repealed." (Petitioner's brief at p. 6). This argument is without legal merit because s. 948.034 specifically provides that such drug probation may be imposed at the discretion of the trial court, "in lieu of serving a term of imprisonment as required or authorized by s. 775.084, former s. 921.001, or s.921.002." Such probation programs do not conflict with the guidelines because they are not departures from the guidelines but exemptions from the guidelines. There is no exemption from the guidelines in s. 948.01(13) and therefore, based again upon analogy to the reasoning in Disbrow, *supra*, §948.01(13), is not an exception to the guidelines.

In addition to applying the reasoning in Disbrow, *supra*, by analogy to the statutory issues at question in the instant case, respondent submits that the Second District should also be affirmed based upon rules of statutory construction[13].

[13]Arguments regarding statutory construction were made at the trial level(R41) and on direct appeal although not commented upon by the Second District in its opinion.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kevin Briggs, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, on this 6th day of December, 2000.

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COUNSEL FOR RESPONDENT