IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,528

LISA BROWN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court below and the appellee in the Fourth District Court of Appeal and will be referred to herein as "Petitioner." Respondent, the State of Florida, was the prosecution in the trial court below and the appellant in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State." Reference to the record on appeal will be by the symbol "R," reference to the transcripts will be by the symbol "T," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.]," and reference to Petitioner's brief will be by the symbol "IB," followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal, subject to the following additions, corrections, and/or clarifications here and in the brief.

1. On May 30, 1996, Petitioner was arrested after leaving her job at Medic Choice, a pharmaceutical wholesale company, with three (3) bottles of Vicodin ES, for a total of 1500 tablets. (T 4). Each Vicodin ES tablet contains 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen. (T 4-5).

Petitioner was charged by Information with trafficking in hydrocodone and grand theft. (R. 40-41). Petitioner filed an "Amended Motion to Dismiss Re: Trafficking Count, and Incorporated Memorandum of Law arguing that 1) the tablets are a Schedule III substance and thus, possession of them is a third degree felony; 2) when the controlled substance is contained in a commercially manufactured pharmaceutical tablet and the amount of the controlled substance is known or readily ascertainable, the actual weight of the controlled substance should determine the applicable penalty; and 3) the punishment does not fit the crime. (R. 63-76).

A hearing was held on the motion to dismiss. (T. 1-25). Petitioner relied upon State v. Holland, 689 So. 2d 1268 (Fla. 1997), arguing that because each tablet contained 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, they were a

Schedule III substance, regulated by Section 893.03(3)(c) or (4), Florida Statutes (1993) and thus, possession of same is a third degree felony. The State argued that under State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA), review denied, 694 So. 2d 737 (1997),[1] Petitioner was properly charged under Section 893.135(1)(c), Florida Statutes, because the tablets contained 4 grams or more of a mixture of hydrocodone. The trial court granted the motions to dismiss count I of the Information finding it was "compelled to adopt the reasoning set forth by the 1st District Court of Appeals" because pursuant to Section 775.021, Florida Statutes, "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.". (T. 21-22)(R. 38).

On appeal to the Fourth District, the dismissal was reversed, holding that "where the hydrocodone has been mixed or commingled with a substance which is capable of being consumed along with the hydrocodone, or which facilitates the use, marketing and access of the hydrocodone, the aggregate weight of the tablets seized, and not the amount of hydrocodone per dosage unit, is the determinative weight for prosecution under section 893.135(l)(c)1, Florida Statutes (1996)."

[1] The Fourth District had not ruled upon the issue at the time.

SUMMARY OF THE ARGUMENT

The Fourth District's decision reversing the trial court's dismissal of Count I should be AFFIRMED. Based upon a plain reading of section 893.135(1)(c)1, a review of its legislative history and the United States Supreme Court's reading of the federal statute upon which section 893.135(1)(c)1 is based, it is clear that Petitioner was properly charged with trafficking.

ARGUMENT

THE FOURTH DISTRICT PROPERLY REVERSED THE TRIAL COURT'S DISMISSAL OF COUNT I OF THE INFORMATION. (Restated).

Petitioner argues the Fourth District erred by reversing the trial court's dismissal of Count I because section 893.135(1)(c)1 is inapplicable to this case. The State disagrees.

Petitioner was charged with violating section 893.135(1)(c)1, Florida Statutes (1997), which states in pertinent part:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of 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 of the first degree, which felony shall be known as "trafficking in illegal drugs."

A plain reading of the statute shows it applies in three (3) separate instances: (1) when a person has 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone **or**; (2) when a person has 4 grams or more of any salt, derivative, isomer, or salt of an isomer thereof, as described in Schedule I and Schedule II **or**; (3) when a person has **4 grams or more of any mixture containing any such substance**.

"Any such substance" refers to both those drugs expressly listed in section 893.135(1)(c), i.e., morphine, opium, oxycodone,

hydrocodone and hydromorphone **and** those listed in Schedule I and II, i.e., section 893.03(1)(b) and (2)(a). Further, **"any mixture"** means **all** mixtures containing any one of the foregoing substances **regardless** of the amount of the prohibited substance contained in the mixture. Cf. State v. Yu, 400 So. 2d 762, 765 (Fla. 1981) (upholding constitutionality of Section 893.135(1)(b), Florida Statutes, the cocaine trafficking provision, and holding that "[t]he legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine and thus could pose a greater potential for harm to the public"); Velunza v. State, 504 So. 2d 780 (Fla. 3d DCA 1987).

Thus, **it is a crime to possess** 4 or more grams of **any mixture** containing hydrocodone. Here, it is not disputed that Petitioner was in possession of 1500 Vicodin ES tablets, which contain hydrocodone. The Petitioner does not argue that the total or aggregate weight of the tablets is less than 4 grams. Thus, it is clear that Petitioner was properly charged under the trafficking statute.

It is a fundamental principle of statutory construction that where the language of a statute is clear and unambiguous and conveys a definite meaning, the language of the statute must control and there is no need for judicial interpretation. *See e.g.* State v. Dugan, 685 So. 2d 1210 (Fla. 1996)(when interpreting

statute, courts must determine legislative intent from plain meaning of statute; if language of statute is clear and unambiguous, court must derive legislative intent from words used without involving rules of construction or speculating what legislature intended).

The only meaning that can be gleaned from the language of section 893.135(1)(c) is that **it is a crime to possess** 4 or more grams of **any mixture** containing morphine, opium, oxycodone, hydrocodone, or hydromorphone. The legislature is presumed to know the meaning of the words employed in the statute. Thus, by employing the broad word "any" in describing the type of mixtures that fall under the statute demonstrates it was casting a wide-net and intended to cover **"all mixtures"** containing hydrocodone, including prescription drugs like Vicodin ES.

Support for the State's "plain reading" of the statute is found in its legislative history. Effective July 1, 1995, section 893.135(1)(c)1 was amended to include hydrocodone "or 4 grams or more of any mixture containing any such substance." This most recent pronouncement of the legislature establishes its clear intention to create the offense of trafficking in 4 or more grams of **any mixture** containing hydrocodone and to make it punishable under the trafficking statute. "The change was brought about by the rise in court cases in Florida in which people had avoided conviction for trafficking in substances not listed in the

statute." State v. Hayes, 720 So.2d 1095, 1096 (Fla. 4th DCA 1998) (citing the staff report). "The obvious intent of the legislators, therefore, was to broaden the scope of the trafficking statute to allow the state to prosecute persons, . . ., who previously escaped conviction and punishment." Id. at 1096. The obvious purpose was also to target the growing and overwhelming trafficking in **prescription drugs**.[2]

The basic flaw in Petitioner's argument is that she has failed to demonstrate how section 893.135(1)(c)1 is ambiguous. Instead, she **assumes** the statute is **ambiguous** and needs interpretation by resort to other statutes. Contrary to Petitioner's assertions, section 893.135(1)(c)1 is plain and unambiguous. Thus, there is no need to look to section 893. 03, as Petitioner requests, to create an ambiguity. Section 893.03(2)(a) lists Schedule II drugs, which are described as follows:

> 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

[2] Even if this Court finds an ambiguity in section 893.135(1)(c), the "rule of lenity" would not come into play. The court's **primary** duty in statutory interpretation is to give effect to the legislative intent of the statute. State v. Iacovone, 660 So.2d 1371 (Fla. 1995). The legislative intent is the polestar by which a court must be guided in interpreting statutes and all other rules of statutory construction are **subordinate** to it. American Bakeries Co. v. Haines, 180 So. 524 (1938). This Court has already **rejected** the notion that the "rule of lenity" supersedes legislative intent in construing statutes. Deason v. State, 705 So.2d 1374 (Fla. 1998).

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

(Emphasis added)

Hydrocodone is also listed as a schedule III drug under Section 893.03(3)(c), which includes:

> 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.

In State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), the First District, without finding an ambiguity in section 893.135(1)(c)1, agreed that section 893.03 should be consulted in determining whether one could be charged with trafficking. The First District held that if a mixture containing the controlled substance falls into schedule III, then the amount per dosage unit, not the aggregate amount or weight determines whether the defendant can be charged with trafficking. The Holland court's reasoning appears to be that because Section 893.03(2)(a) exempts substances

"listed in any other schedule," and because hydrocodone is listed in schedule III as well, these drugs are exempted from the trafficking statute and one can never be convicted for trafficking in Vicodin or hydrocodone.

Thus, according to Holland, one could never traffic in Vicodin. If an individual possessed or sold a billion Vicodin pills, each containing 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, pursuant to the ruling of the Holland court, that person could not be charged with trafficking. The court plainly states "the concentration of hydrocodone per dosage unit will remain below this threshold regardless of the number of tablets sold." Id. at 1270. The opinion in Holland insults efforts to stop drug abuse and is logically and legally unreasonable. As such, it is not surprising that it was rejected by the Fourth and Fifth Districts.

The listing of hydrocodone as both a Schedule II and Schedule III drug **cannot and does not have any effect upon** the trafficking statute. Because it is clear from the face of the trafficking statute that it applies to **any** mixture containing hydrocodone, there is no need to look behind the provision's plain language to determine legislative intent. See Coleman v. Coleman, 629 So. 2d 103 (Fla. 1993); City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993). Thus, even though the Vicodin ES tablets involved in this case are listed as a Schedule III, they are still covered by

the trafficking statute because they are a "mixture" containing hydrocodone.

In State v. Hayes, 720 So.2d 1095 (Fla. 4th DCA 1998), the Fourth District Court of Appeal addressed the **identical** issue raised here- whether a defendant may be charged with trafficking under section 893.135(1)(c) where the amount of hydrocodone in each **individual** tablet is less than 15 milligrams, making it a Schedule III drug under section 893.03(3), but where the **aggregate weight** of all the tablets is more than 4 grams.

Based upon its reading of section 893.135 (1)(c), the legislative history of section 893.135 (1)(c) and the United States Supreme Court's interpretation of the federal law upon which section 893.135(1)(c) is premised, the Hayes court held it is the aggregate weight of the tablets and not the amount of hydrocodone per dosage unit which determines the weight for prosecution under section 893.135(1)(c). See also Johnson v. State, 23 Fla.L.Weekly D2419 (Fla. October 28, 1998). In so holding, the Hayes court followed State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So.2d 737 (Fla. 1997) and certified conflict with Holland, 689 So.2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 23 Fla.L.Weekly D1908 (Fla. 2d DCA August 14, 1998). The Hayes court explained how the plain reading of section 893.135(1)(c) is in accord with the United State Supreme Court's interpretation of the federal law upon which our statute is based, as follows:

In Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), superseded by statute on other grounds as stated in, United States v. Turner, 59 F.3d 481 (4th Cir.1995), the defendant was convicted of selling 10 sheets of blotter paper containing 1,000 doses of LSD in violation of 21 U.S.C. S 841(a). The law called for "a mandatory minimum sentence of five years for the offense of distributing more than one gram of a 'mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD).' " The Supreme Court held that the weight of the blotter paper, and not just the weight of the pure LSD which the paper contained was to be used in determining the sentence. The Court concluded that this interpretation was compatible with Congress' " 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence."

Noting that neither the statute nor the sentencing guidelines defined either "mixture" or "substance", the Chapman court deciphered their meaning within the scheme of the drug laws, by first consulting various dictionaries:

A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." Webster's Third New International Dictionary 1449 (1986). A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 Oxford English Dictionary 921 (2d ed.1989).

Applying these definitions to the blotter papers containing LSD, the court decided that since the drug was dissolved onto the paper, the drug and paper had "mixed" or "commingled", but the LSD had not chemically

> combined with the paper. Although the two could be separated, they could also be ingested together like cocaine or heroine mixed with cutting agents; therefore, it was logical to include the weight of the paper in calculating the total weight of the controlled substance. Conversely, the court held that the weights of containers or packaging materials, which clearly do not mix with the drug and are not consumable along with the drug, could not logically be included for sentencing purposes.
>
> The Chapman analysis applies with respect to the Lorcet tablets in this case. The hydrocodone has been mixed, or commingled, with the acetaminophen, and the two are ingested together. The acetaminophen facilitates the use, marketing, and access of the hydrocodone. Therefore, based upon the legislature's clear intent to create the offense of trafficking in hydrocodone, as well as the Supreme Court's definition of the term "mixture" as it is used in this context, we conclude that the aggregate weight of the tablets seized from Hayes, and not the amount of hydrocodone per dosage unit, is the determinative weight for prosecution under section 893.135(1)(c)1, Florida Statutes (1996). Since the weight of the hydrocodone mixture exceeded four grams, Hayes could be prosecuted under section 893.135(1)(c)1 for trafficking in a Schedule II drug.

Id. at 1096-1097 (citations omitted).

In Baxley, the Fifth District held that only a small amount of hydrocodone is a schedule III substance and that if the amount involved is 4 or more grams of a mixture containing hydrocodone, it becomes a schedule II substance for which prosecution for trafficking under Section 893.135 is proper. The Baxley court noted that hydrocodone is listed in schedule II and III, both of which provide a substance is included in that schedule “unless

listed in another schedule". The court said:

> "In fact, because hydrocodone appears in both schedules, our interpretation of the statute is given more credence. Schedule III substances include hydrocodone or hydrocodone mixtures *which meet the §893.03(3)(c)4 limitation* and schedule 2 includes *all other hydrocodone.* This gives both schedules meaning. See Lareau v. State, 573 So.2d 813 (Fla. 1991) (when two conflicting or ambiguous provisions of the same legislative act were intended to serve the same purpose, they must be read in *pari materia* to ascertain the overall legislative intent and to harmonize the provisions so that the fullest effect can be given to each; Mack v. Bristol Myers Squibb Co., 673 So.2d 100 (1st DCA 1996) (a law should be construed in harmony with any other statute having the same purpose ..." Id. at 832-833 (Italics in original).

In sum, it is clear that Petitioner's argument is in clear contrast to the "plain meaning" of the statute, its legislative history and the United States Supreme Court's interpretation of a similar federal statute. Accordingly, the Fourth District's decision **reversing the trial court's order dismissing the trafficking** charge should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Appellant respectfully requests this honorable Court to **AFFIRM** the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished by U.S. mail, postage prepaid, to: BRADLEY STARK, Esquire, 2601 S. Bayshore Drive, Suite 601, Miami, Fl. 33133 on this 19th day of February, 1999.