In The

SUPREME COURT OF FLORIDA

LISA BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 94,528

ON APPEAL
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN THE FOURTH DISTRICT

Petitioner's Reply Brief

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Counsel for the Petitioner, Lisa Brown, certifies that the following persons or entities may have an interest in the outcome of this case:

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ARGUMENT

The State's argument, that the trafficking statute is clear and unambiguous and therefore not in need of judicial interpretation, does not comport with reality. Prosecution under Schedule III as a third-degree felony is the only statute under which petitioner may be prosecuted. It clearly and unambiguously describes the type of hydrocodone with Tylenol allegedly possessed by petitioner. The description of a "mixture" in Schedule I and II is more vague and ambiguous than the specifically described mixture of hydrocodone in Schedule III.

The conflict between the district courts of appeal interpreting the differences between Schedule III and Schedule II illustrates that there is nothing clear and unambiguous as the State suggests. If anything, the only statute that is clear and unambiguous is the Schedule III statute that specifically describes the hydrocodone allegedly possessed by petitioner.

The State argues that its "plain reading" of the statute is supported by legislative history in which the Legislature expressed the concern in "rising court cases in Florida in which people have avoided conviction for trafficking in substances not listed in the statute." State v. Hayes, 720 So. 2d 1095, 1096 (Fla. 4th DCA 1998). Respondent's Answer Brief on the Merits at 6. This does not offer support to the argument of the State. The legislative history cited by the State applies to substances not listed in the Schedule of restricted drugs as opposed to

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substances that are specifically and in great detail listed in Schedule III as in the case before the Court.

The State also argues, regarding mixtures in Schedule I and II, in a conclusory fashion, that "the obvious purpose was also to target the growing and overwhelming trafficking in prescription drugs." Respondent's Answer Brief on the Merits at 7. The State offers no citation for this statement because there is none. The phrase 'obvious purpose' merely hides the reality that no such purpose was ever discussed or found in any authority. Instead, this is the State's wishful and strained interpretation of the facts. The truth of the matter is that *if* the Legislature were concerned, as the State asserts in its brief, about "growing and overwhelming trafficking in prescription drugs," the Legislature would never have passed Schedule III and made prescription drugs a third-degree felony. Id. at 7. (emphasis added) In addition, the argument of the State contradicts to the specific language of Schedule III were the Legislature found that prescription narcotics have "a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use." Florida Statute section 893.03(3)(1995).

Finally, the State pathetically attempts to wrap its argument in the cloak of stopping drug abuse, a popular mantra these days. The State asserts that, "Holland insults efforts to stop drug abuse and is logically and legally unreasonable."

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Respondent's Answer Brief on the Merits at 9. Besides being disrespectful of the District Court of Appeals' opinion of the law, this is just a lame emotional appeal to suggest that unless State prosecutors are allowed to interpret statutes in a light most favorable to the prosecution of drug abuse, then the Court is contrary to the popular majority and in some manner condones drug abuse. Implicit in this argument is that the individual rights of citizens and the rule of law be damned.[1] This mentality asserted by the State is evident in the State's criticism of the opinion of the First District Court of Appeals, that the opinion "insults efforts to stop drug abuse and is logically and legally unreasonable." Id. at 9. This illustrates the danger of allowing prosecutors to interpret and define the law according to their wishes. The Eleventh Circuit Court of Appeals articulated these concerns in U.S. v. Hardy, 895 F.2d 1331(11th Cir. 1990). In Hardy, the Court noted that, "...even when the passions of the public are running high, those accused of crimes retain their rights, and the courts must be vigilant to protect those rights by carefully enforcing congressional mandates and by holding the government to its burden of proof." Id. at 1332.

The State cites State v. Yu, 400 So.2d 762 (Fla. 1981), but misstates the holding of the case. Yu clearly supports petitioner's argument in her Initial Brief. Petitioner's Brief on the Merits at 10. In Yu, the Court held that "a mixture

[1] The tenor of this argument by the State smacks of the anti-Communist witch-

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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." Id. at 765. The same cannot be said for Vicodin. On the contrary, Vicodin tablets are not and cannot be mixed or cut with other substances to increase sales or profit potential on the street. Vicodin is a mixture of proportions of therapeutic substances (Tylenol) well known to the public. For this reason, Vicodin does not pose a greater potential for harm to the public contemplated in Yu and should therefore, not be categorized with mixtures of unknown non-therapeutic ingredients such as the mixture of cocaine in Yu that serve NO OTHER PURPOSE but to generate a greater number of illegal sales. The differences between Schedule I and II when compared to Schedule III and the difference between Yu and the case before the Court is in the purpose the mixture was created and the ability of the mixture to generate increased sales. The difference is articulated by the Legislature in Schedule III and is plain and unambiguous, as previously noted in this brief.

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hunts during the McCarthy hearing in the 1950's.

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CONCLUSION

Because Schedule III specifically describes Vicodin, because the exact amount of hydrocodone and Tylenol in each Vicodin tablet cannot be mistaken for any other type of a mixture, because the Vicodin is a pharmaceutically manufactured tablet, this mixture must be prosecuted as a third-degree felony. The State's arguments are conclusory, unsupported and pander to the popular loathing of drug abuse. These arguments are not grounded in jurisprudence. This Court should REVERSE the Fourth District's decision in the case before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 10 day of March, 1999 to: Celia Terenzio, Esquire, Bureau Chief, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299; Debra Rescigno, Esquire, Assistant Attorney General, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299; Edward M. Kay, P.A., 633 SE 3rd Avenue, Suite 4F, Ft. Lauderdale, FL 33301.

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