IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,688

KATHRYN P. HAYES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE DISTRICT COURT IN AND FOR
THE FOURTH DISTRICT, STATE OF FLORIDA
Case No.: 97-2014

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PETITIONER'S REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES

Counsel for the Petitioner, Kathryn Hayes, certifies that the following persons have or may have an interest in the outcome of this case.

Metcalf, Andrew B., Defense Counsel

Carney, James J., Assistant Attorney General

Hawley, Honorable Robert A., Circuit Court Judge

Taylor, Ed, Assistant State Attorney

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PRELIMINARY STATEMENT

Kathryn Hayes was the Defendant below and shall be referred to as "Petitioner." The State of Florida was the Plaintiff below and shall be referred to as "Respondent."

REPLY TO RESPONDENT'S ANSWER BRIEF

The Respondent suggests that s. 893.03 should not be consulted in determining whether or not a defendant can be charged with trafficking, pursuant to s. 893.135(1)(c)1. Furthermore, the Respondent states that the Petitioner has failed to demonstrate how s. 893. 135(1)(c)1 is ambiguous. First and foremost, the plain language of 893. 135(1)(c)1 calls out 893.03(1)(b) and (2)(a) as those schedules which are applicable. Therefore, to say that 893.03 should not be consulted makes no sense whatsoever. How can 893.03 be ignored when the trafficking statute specifically uses the language, "as described in 893.03(1)(b) or (2)(a)?" This further exhibits the Respondent's effort to bypass the very language that removes the drugs Lortab and/or Vicodin from the purview of the trafficking statute, as neither of these drugs are "described" in 893.03(1)(b) or (2)(a). Of course, s.893.03 should be consulted when interpreting the meaning of 893.135(1)(c)1.

As to whether or not the Petitioner has shown the ambiguity of s. 893.135(1)(c)1, the answer lies in the plain language of the provision and s.893.03. It has been sufficiently demonstrated that a person of ordinary intelligence in unlawful possession of Lortab/Vicodin would not have fair notice that their conduct constituted trafficking under s. 893.135(1)(c)1. Any person reading the trafficking statute in accord with 893.03(1)(b) and (2)(a) would see that Lortab is not a Schedule I

or II drug. Instead it would be noted that chemical makeup of Lortab is specifically described in Schedule III, s. 893.03(3)(c)4. Although the Lortab contains hydrocodone, this particular makeup does not fall under the purview of the trafficking statute. This is the logical result reached when considering the listing of hydrocodone into two separate schedules.

A plain language interpretation produces this result, however, considering the argument of the Respondent, s. 893.135(1)(c)1 is, at best, ambiguous. The Supreme Court of the United States held, that a statute which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is unconstitutionally vague. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110(1972). This Court further elaborated by holding that the language of a statute must "provide a definite warning of what conduct" is required or prohibited, "measured by common understanding and practice." State v. Bussey, 463 So.2d 1141, 1144 (Fla.1985).

Pursuant to s.775.021(1) of the Florida Statutes, when the language of a statute is susceptible to differing constructions, "it (the statute) shall be construed most favorably to the accused. The Respondent argues the "rule of lenity" is not applicable, due to the Court's primary obligation to give effect to the legislative intent of the statute. The problem is the Respondent assumes the Legislature intended those in unlawful

possession of a prescription medication be sentenced longer than those who traffic in drugs like cocaine and marijuana. This notion is ridiculous.

The Petitioner next relies on the argument that the Holland Court and cases following its lead appear to suggest that one could never be charged with trafficking in Lortab or Vicodin, *(See pg. 9 of Petitioner's Brief)*, thus insulting efforts to stop drug abuse. However, it is obvious that our Legislature was aware of this fact when they drafted the language of 893.135(1)(c)1 and refused to spell out 893.03(3)(c) alongside 893.03(1)(b) and (2)(a). Instead, hydrocodone as it is found in Lortab is specifically exempted from treatment as a Schedule I or II drug by its listing in 893.03(3)(c)4, which states:

> "The following substances are controlled in Schedule III: (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."

It makes no sense that our Legislature would want Lortab/Vicodin to be treated the same as a Schedule II drug when it went to great lengths to specifically delineate it as a Schedule III drug. It does make sense that what our Legislature intended by the "any mixture" language of s. 893.135(1)(c)1, was to describe and modify substances only "as described in s. 893.03(1)(b) or (2)(a). In other words, the "any mixture

containing any such substances" language of 893.135(1)(c)1 does not mean any mixture of hydrocodone period. It means "any mixture" of hydrocodone as described in 893.03(2)(a). The plain language exempts Schedule III hydrocodone.

This reading of 893.135(1)(c)1 is in complete contrast to the interpretation given by the Respondent. Thus, applying the "rule of lenity," the provision should be construed most favorably to the accused in accord with s. 775.021(1), the Rule of Construction.

Finally, the Respondent argues that our state trafficking law is based upon federal law, and in doing so cites Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) as controlling. In Chapman, the Supreme Court held that the weight of blotter paper, and not just the weight of the pure LSD, which was present on the paper, was to be used in determining the total weight for purposes of sentencing. What the Respondent fails to acknowledge is that in the case at bar, unlike Chapman, the drug in question is listed in two different schedules. Hydrocodone, unlike lysergic acid diethylamide (LSD), has a recognized, legitimate medical use. In fact, hydrocodone, as found in Lortab by definition has a potential for abuse less than substances contained in Schedule I and II and has a currently accepted medical use in the United States. *See 893.03(3)(c).* However, LSD is a drug with a high potential for abuse and has no currently medical use in treatment in the United

States and in its use under medical supervision does not meet accepted safety standards. *See 893.03(1).*

This is a critical distinction omitted by the Respondent in its reliance upon Chapman. On one hand, the federal courts were dealing with a street level drug with no medical treatment value, which is subject to widespread abuse and dissemination. While on the other, the case at hand deals with a drug that has accepted medical use that is not subject to widespread abuse and street level dissemination. Nevertheless, the Respondent views it as logical to punish a prescription drug abuser more severely than a major drug trafficker in possession of 10,000 pounds of marijuana or 300 pounds of cocaine. It makes little sense that someone in possession of heroin could qualify for pretrial intervention, while someone in unlawful possession of one bottle of pain medication faces a minimum mandatory sentence of twenty-five years in prison.

CONCLUSION

Contrary to the argument of the Respondent, the Petitioner is not looking behind the plain language of the trafficking statute to determine legislative intent. Looking at the plain meaning of the black-letter law, it is evident that our lawmakers wanted hydrocodone to be treated differently depending upon its mixture. This is the only explanation as to why this narcotic is listed in two separate schedules. The plain language of the trafficking statute is consistent with this premise. Section

893.135(1)(c)1 only spells out Schedule I and II when describing substances which are applicable to the provision. Schedule III drugs, in not being mentioned, are therefore exempted.

The Respondent relies upon its interpretation of 893.135(1(c)1, which in parts states that any person who "knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" four grams or more of a controlled substance **"as described in 893.03(1)b) or (2)(a)"** or four grams or more **"of any mixture containing any such substance"** commits the crime of trafficking in illegal drugs. The Respondent, contrary to the plain language of the provision, claims that the Florida Legislature meant to include schedule III hydrocodone in the trafficking statute by the use of the words "any mixture." What the Respondent fails to recognize is that the "any mixture" language pertains only to substances "as described in 893.03(1)(b) or (2)(a). In other words, "any mixture" describes only pure hydrocodone as found in 893.03(2)(a). It is evident that our lawmakers are targeting those in possession of large quantities of these substances not people who are in possession of one bottle of pain medication. Simply put, this means a person can only traffic in four grams or more of pure hydrocodone or **any mixture** containing four grams or more of hydrocodone, not someone in possession of .0001 grams of hydrocodone mixed with 3.999 grams of a recognized therapeutic agent. As the Respondent

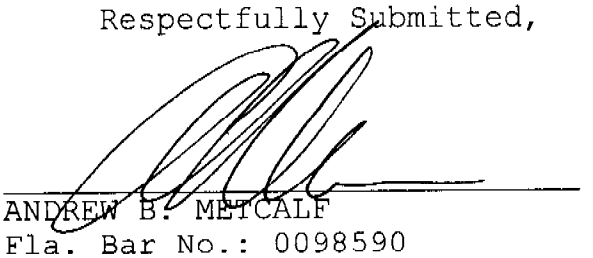
points out, State v. Webb, 398 So.2d 820 (Fla. 1981), states, "Construction of a statute which leads to an absurd or unreasonable result or would render the statute purposeless should be avoided." It makes much more sense to say that a person can never traffic in Lortab than to say that someone who procures their friend's or family member's prescription of Lortab, which amounts to illegal possession, faces a minimum of twenty-five years in prison. There has been no extrinsic data or evidence of legislative intent that supports the absurd and ridiculous interpretation provided by the Respondent.

It would be shameful to imagine that our Legislature intended to sanction possession of one bottle of prescription pain medication, or codeine which is an alkaloid of opium also listed in schedule II, more severely than those in possession of thousands of pounds of marijuana or hundreds of pounds of cocaine, both of which are truly subject to widespread abuse and dissemination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James J. Carney, Assistant Attorney General 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401 and Steven Whittington, Robert Augustus Harper Law Firm, P.A. 325 West Park Avenue, Tallahassee, FL 32301-1413, Honorable Robert Hawley, Indian River County Courthouse, 2000 26th Avenue, Vero Beach, Florida 32960 and Ed Taylor, Office of the State Attorney, Indian River County Courthouse, 2000 16th Avenue, Vero Beach, Florida 32960 via United States mail delivery this the 1st day of April, 1999.

Respectfully Submitted,



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