IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,801

RICARDO JOHNSON,
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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CERTIFICATE OF TYPE SIZE AND STYLE

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 for the State of Florida, Respondent herein,

hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court 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 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 argument section.

Petitioner was charged with trafficking in hydrocodone, **or a mixture containing Hydrocodone**, in an amount of twenty-eight (28) grams or more, but less than thirty (30) kilograms. (R 2).

Richard Sandell, a loss investigator for Eckerd’s, testified

that Eckerd's started an investigation of its Hallandale Pharmacy, where Petitioner worked, in December, 1996, because it had detected a large loss of drugs at that store. (T 77-78). The company installed a video camera which recorded Petitioner stealing bottles of Vicodin and Lorcet. (T 78-82). Petitioner was apprehended when he left the store and found to have four bottles on his person. (T 82-84). Petitioner admitted to Mr. Sandell that he had been taking drugs "for personal reasons, . . . selling the drugs and [ ] trading the drugs for sex." (T 85-86).

The total weight of the stolen tablets was 344.6 grams. (T 118-120).

SUMMARY OF THE ARGUMENT

POINT I

The Fourth District's decision must be affirmed. Contrary to Petitioner's assertions, a plain reading of section 893.135(1)(c)1, along with a review of its legislative history and the United States Supreme Court's definition of "mixture", demonstrates Petitioner was properly charged with and convicted of trafficking.

Further, State v. Holland, 689 So. 2d 1268 (1st DCA 1997), relied upon by Petitioner is inapplicable as it interpreted the earlier 1993 trafficking statute which did not expressly list hydrocodone. The 1995 amendment to the statute, expressly including hydrocodone, means it is no longer necessary to consult

the Schedules in order to determine whether or not possession of the requisite amount of hydrocodone may be prosecuted as trafficking. Alternatively, if this Court finds the statute ambiguous, the State urges that Holland was wrongly decided in that it interprets the trafficking statute and Schedules in a way which mandates an absurd result.

POINT II

This Court has already rejected Petitioner's argument that his 25 year mandatory minimum sentence constitutes "cruel and/or unusual punishment."

ARGUMENT

THE FOURTH DISTRICT CORRECTLY CONSTRUED SECTION 893.135(1)(C)1, FLORIDA STATUTES (1997), CONCLUDING THAT PETITIONER COULD BE PROSECUTED UNDER THE TRAFFICKING STATUTE. (Restated).

Petitioner argues the Fourth District Court of Appeal wrongly construed section 893.135(1)(c)1, Florida Statutes (1997). Petitioner contends he cannot be convicted of trafficking because the Vicodin ES and Lorcet tablets involved here are Schedule III drugs under section 893.03(3)(C)4, Florida Statutes (1997), which cannot form the basis for a trafficking prosecution under section 893.135(1)(c)1. The State disagrees and submits the Fourth District's decision must be affirmed.

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**.

Contrary to Petitioner's assertions (IB 13), **"any such substance"** refers to both those drugs expressly listed in section 893.135(1)(c)1, 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 200 Vicodin ES tablets and 200 Lorcet tablets, which contain hydrocodone. The Petitioner does not argue that the total or aggregate weight of the tablets is less than 4 grams. As such, it is clear that Petitioner was properly convicted of violating 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).

Contrary to Petitioner's assertions, the only meaning that can be gleaned from the language of section 893.135(1)(c)1, 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 the legislature 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**.

Petitioner's argument **not only misreads** the plain meaning of section 893.135(1)(c), but also incorrectly asserts that section 893.03, the drug schedules, governs whether Petitioner may be charged with trafficking. However, contrary to Petitioner's assertions, the drug schedules in section 893.03 have no effect upon whether someone may be charged with trafficking under section 893.135(1)(c)1. 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 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.

According to Petitioner, because the Vicodin ES and Lorcet tablets involved in this case fall under Schedule III, a person cannot be charged with trafficking. Petitioner relies upon State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), in support of his argument. In Holland, the First District held that section 893.03 should be consulted in determining whether one could be charged with trafficking. The First District reasoned 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.

However, Petitioner's reliance upon Holland is misplaced because Holland interpreted a **prior** version of the trafficking statute (section 893.135(1)(c)1), which did not specifically list hydrocodone. The Holland court reached its decision by considering **the 1993** version of section 893.135(1)(c)1, which stated 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, 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."

Under the **1993** version of the statute a defendant could be charged with trafficking if he was in possession of 4 grams of morphine, opium, or any of the chemically related substances which are listed in section 893.03(1)(b) (Schedule I) or section 893.03(2)(a) (Schedule II). **However, because there was no mention of hydrocodone in the 1993 version,** the designated Schedules had to be consulted before a defendant could be charged with trafficking in hydrocodone.

The Holland court was faced with a quandary because hydrocodone appears **twice-** in Schedule II, where the drug is listed as simply hydrocodone, **and** in Schedule III, when it is "not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit...." Fla. Stat. 893.03(3)(a)4. The Holland court concluded that because the drug Patricia Holland was charged with possessing was accurately described by the Schedule III description, that the State was prohibited from charging her with trafficking. The trafficking statute was inapplicable, the Holland court found, because it required the drug in question to be "as described in" either Schedule I or II. Indeed, the court found that under the facts before it, "the amount of the controlled substance per dosage unit, not the aggregate amount or weight, determines whether the defendant may be charged with violating section 893.135(1)(c)1" Id. at 1270.

Holland is inapplicable to this case because, as already

noted, section 893.135(1)(c)1 was amended in 1995 to expressly include hydrocodone. The amended, **present** version of the statute now reads as follows:

> 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 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**, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs. (Emphasis added)

The significance of the amendment is clear. By adding oxycodone, hydrocodone, and hydromorphone to the body of the text, the legislature intended to elevate these three drugs to the same status as morphine and opium. No longer is a trial court obligated to consult the Schedules to determine whether a defendant charged with possessing 4 grams or more of any of these five narcotics is properly charged with trafficking. Further, because the statute also refers to "mixtures", it is likewise clear that if an individual possesses 4 grams or more of pills containing, as in the present case, hydrocodone mixed with acetaminophen, he may be charged under this statute with trafficking in hydrocodone.

To hold otherwise would be to give no effect to the 1995 legislative amendment of this statute. When the legislature

amends a statute, it is presumed that the legislature intends the amended statute to be given a different meaning from that accorded to it previously. Hall v. Oakley, 409 So. 2d 93 (Fla. 1st DCA 1982). Further, as already noted, the legislative intent in amending section 893.135(1)(c)1 was to broaden its application. There is a high potential for abuse in the trafficking in prescription drugs and the legislature was trying to impose more severe sanctions than those provided by simple possession (section 893.13(1)(a)2). Consequently, this Court must conclude that the effect of the new language added to section 893.135(1)(c)1 (1995) was to include hydrocodone within that class of narcotics to which morphine and opium already belonged. Possession of 4 grams or more of hydrocodone, whether in pure form or in a mixture, is to be considered trafficking regardless of where this drug may appear in the Schedules.

Petitioner's contention that Schedule III drugs were not intended to constitute trafficking because they do not have the "potential for abuse" that Schedule II drugs have insults efforts to stop drug abuse and is logically and legally unreasonable. According to Petitioner's reasoning, one could traffick in a billion Vicodin pills, each containing 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, but could not be charged with trafficking because the Vicodin

pills are a Schedule III drug. That result is absurd and contrary to the legislative intent.

Further, Petitioner's contention that the trafficking statute will lead to unreasonable prosecutions for possession of relatively small amounts, e.g. 5 or 6 pills, is misleading. Obviously one or two tablets containing a small amount of hydrocodone would have minimal potential for abuse and could readily be prosecuted under the third degree felony statute. However, possession of a larger number of tablets could have the same potential for abuse as any schedule II substance. In Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668; 54 L.Ed.2d 604 (1978), the court said:

> In our system, so long as the prosecutor has probable cause to believe that the accuse committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Similarly, the Florida Supreme Court has held that the prosecutor has the discretion to decide under which statute to charge an offender. See State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1988) citing Unites States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 775 (1979), State v. Bonsignore, 522 So. 2d 420 (5th DCA 1988). Petitioner fails to recognize that the prosecutor has the discretion to determine which charge is appropriate, and which charge can be

proven beyond a reasonable doubt. Thus, it is obvious a person would not be charged with trafficking for the illegal possession of 5 or 6 pills or cough syrup, as Petitioner suggests. Further, it is clear that here Petititoner stole **400** pills.

In State v. Hayes, 720 So.2d 1095 (Fla. 4th DCA 1998), the Fourth District Court of Appeal agreed that 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). 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).

Further, although there are no Florida cases dealing specifically with "mixtures" containing hydrocodone, there are several cocaine cases which support the fact the Vicodin tablets are "mixtures". For example, in Ankiel v. State, 479 So. 2d 263 (5th DCA 1985), the court held that the State could charge a defendant with possession of "a mixture containing cocaine" if it chose to do so rather than charging him solely with the possession of the cocaine contained in it. In State v. Garcia, 596 So. 2d 1237, 1238 (3rd DCA 1992), the court said that the intent of the statute was to classify the offender based upon the total amount of the substance containing the cocaine, not by the amount of pure cocaine itself. The court noted that the larger amount of the diluted mixture could be disseminated to a larger number of people thus creating a greater potential for harm.

Finally, in State v. Yu, 400 So. 2d 762 (Fla. 1981) the court found that the 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 therefore could pose greater potential for harm to the public (and finding the statute was therefore not arbitrary, unreasonable or a violation of due

process and equal protection of the law). Plainly, it is the law in this state that one charged with possession of an illegal substance which is contained in a mixture with other substances can be charged according to the total weight of the mixture rather than according to the weight of the illegal substance alone.

Petitioner's final argument, that the "doctrine of lenity" applies to this case similarly lacks merit. The "doctrine of lenity" requires that when a criminal statute is "susceptible of differing construction, it shall be construed most favorably to the accused." Fla.Stat. s.775.021(1) (1997). Because section 893.135(1)(c)1 **is not** susceptible of differing interpretations, the doctrine does not apply here. The trafficking statute is plain and unambiguous and requires Petitioner be charged in this case. Further, even assuming arguendo 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). Thus, the legislative intent, as outlined throughout this brief, would require Petitioner be charged with trafficking.

Moreover, assuming arguendo this Court finds it necessary to resort to the drug schedules, Holland's interpretation is incorrect and unduly restrictive. Essential to this area of concern has been the question of how to interpret the Schedules themselves. Under the 1993 statute, if the drug in question was neither morphine nor opium and was not otherwise "described" in either Schedule I or II, that defendant could not be charged with trafficking. In the Holland case, the First District concluded that because Patricia Holland was in possession of pills containing a specific dosage amount which was consistent with the description found in Schedule III, section 893.03(3)(c)4, the State was therefore precluded from charging the defendant with trafficking because of language in Schedules I and II which suggested that if the drug appears in any other Schedule, it was consequently excluded from classification as either a Schedule I or II narcotic. The language in question reads: "Unless specifically excepted or unless listed in another schedule..., the following substances are controlled in Schedule X." The State disagrees with the

Holland court's interpretation of this language.

The difficulty with this interpretation of the statute is that all of the schedules contain this language, which makes it extremely difficult to interpret. Presumably, then, if one is in possession of a drug which, like hydrocodone, is found in more than one Schedule simultaneously, it is possible to reach the absurd conclusion that the drug must be excluded from all of the Schedules wherein it appears, because *each* of those schedules directs the court to exclude the narcotic if it is also found in another schedule. This type of "hall of mirrors" interpretation causes an absurd result. Since hydrocodone appears in both schedule II (section 893.03(2)(a)) and III (893.03(3)(c)4), if one follows the instructions requiring exclusion of any narcotic which also appears in another schedule, the absurd result mandated by the 1st District's decision requires that hydrocodone be excluded from both of the Schedules in which it appears. Surely the legislature did not intend such a result, nor should this Court permit such an erroneous, illogical and unreasonable interpretation to stand. See State v. Webb, 398 So. 2d 820 (Fla. 1981). ("Construction of a statute which lead to an absurd or unreasonable result or would render the statute purposeless should be avoided", Id at 824.)

The effect of Holland's decision is to exclude from the

trafficking statute any preparation of hydrocodone which fits the description found in Schedule III, despite the fact that hydrocodone also appears in Schedule II. The State would urge that the legislative intent behind this language was to grant the State the authority to select between two different offenses, trafficking or possession. Holland strips the State of the discretionary authority intended by the legislature and, as we shall see, prohibits the State, effectively, from ever being able to prosecute anyone for trafficking in hydrocodone.

Hydrocodone appears on the street only in pill form, and always in a mixture which admittedly is correctly described by the language found in Schedule III. If this Court agrees that the Holland's interpretation applies to the 1995 trafficking statute as well, the consequence of this would be that the State would be foreclosed from prosecuting cases involving trafficking where the mixture of hydrocodone contains less than 15 milligrams per dosage unit and is delivered in a pill form. By its plain language, the trafficking statute applies to 4 grams or more, but less than 30 kilograms, "of **any** mixture" containing hydrocodone as described in s. 893.03(1)(b) or (2)(a), **regardless** of the amount of hydrocodone actually present in the mixture. Cf. State v. Yu, supra and Velunza v. State, 504 So. 2d 780 (3rd DCA 1987).

But because Petitioner's hydrocodone mixture was in pill form, each pill (or "dosage unit") containing less than fifteen milligrams each, Holland has declared that he may not be charged with trafficking. This interpretation places undue emphasis on form over substance and is indeed absurd.

The State would urge that lesser concentrations of hydrocodone, such as is described in Schedule III, are not automatically exempt from prosecution under the "any mixture" portion of section 893.135(1)(c)1 simply because Schedule III is an accurate description of the mixture. The State should have the authority to determine which charge is appropriate under the facts of each case. Holland strips the State of this authority.

Instead, because it is clear from the face of the 1995 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. Coleman v. Coleman, 629 So. 2d 103 (Fla. 1993) and City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993). Consequently, while hydrocodone in the dosage strength possessed by Petitioner might well be accurately described in Schedule III, nevertheless, because the pills in question were without question a mixture (hydrocodone and acetaminophen), this mixture nevertheless may be considered as being governed by

the trafficking statute because of language found therein which prohibits and defines as trafficking the possession of 4 grams or more of any mixture containing hydrocodone.

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 definition of "mixture." Accordingly, the Fourth District's decision **upholding Petitioner's conviction must be affirmed.** The listing of hydrocodone as both a Schedule II and Schedule III drug **cannot and does not have any effect upon** the trafficking statute. It is clear from the face of the trafficking statute that it applies to **any** mixture containing hydrocodone, and therefore, there is no need to look behind the provision's plain language to determine legislative intent.

POINT II

PETITIONER'S 25 YEAR MINIMUM MANDATORY PRISON SENTENCE DOES NOT VIOLATE THE FLORIDA AND FEDERAL CONSTITUTION'S PROHIBITION AGAINST CRUEL OR/AND UNUSUAL PUNISHMENT. (Restated).

Petitioner argues that his mandatory sentence of 25 years constitutes cruel or/and unusual punishment in violation of the Eighth Amendment. The State disagrees.

In State v. Benitez, 395 So.2d 514 (Fla. 1981), this Court **rejected** the argument advanced by Petitioner here- that

the mandatory sentences of section 893.135 constitute cruel and unusual punishment in that they are unnecessarily severe and disproportional to the nature of the crime. In upholding the mandatory sentences of section 893.135, this Court reasoned:

> This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. See, e. g., McArthur v. State, 351 So.2d 972 (Fla.1977); Banks v. State, 342 So.2d 469 (Fla.1976); O'Donnell v. State, 326 So.2d 4 (Fla.1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case wherein the sentence was grossly disproportionate to the severity of the crime the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.
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> . . .
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.
>
> . . .
>
> [F]or crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

. . .

> The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. See McArthur v. State; O'Donnell v. State; accord, People v. Broadie, > 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, cert. denied, > 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975).

Id. at 518 (citations omitted). See also Hale v. State, 630 So.2d 521 (Fla. 1993); Morgan v. Brescher, 466 So.2d 1218 (Fla. 4th DCA 1985).

Federal courts have also held that the mandatory sentences for drug trafficking do not violate federal bans on cruel and unusual punishment. See Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); McCullough v. Singeltary, 967 F.2d 530 (11th Cir. 1992).

Contrary to Petitioner's assertions, the 25 year sentence in this case, although severe, does not constitute "cruel or/and unusual"punishment. As a pharmacy technician for Eckerd Drugs for approximately four (4) years, Petitioner had long had access to such prescription drugs. Indeed, the reason Eckerd's installed a video monitor was because of the large loss of drugs at that store. Obviously, if a person in Petitioner's position was stealing large quantities of prescription drugs and distributing them on the street, he would pose a great threat to the public health and safety.

Petitioner admitted to store employees that he had sold the drugs he had taken previously for money and in exchange for sex.

By providing for more serious sanctions that hose provided for simple possession under sections 893.03(3) and 893.13(1)(a)2, the Legislature meant to address this serious threat to public health and safety posed by those who illegally traffic in this type of prescription drug. Petitioner was precisely the type of person the Legislature was targeting.

Finally, it is of no consequence that the mandatory minimum penalty for trafficking in a mixture containing hydrocodone is more sever than that for trafficking in substantial quantities of marijuana and cocaine. The Legislature has chosen to address this epidemic problem of trafficking in narcotic pills by authorizing the imposition of more sever penalties than for the possession or sale of certain controlled substances. That is a matter of legislative prerogative and consequently, there is no basis here for finding the mandatory sentence constitutes cruel and unusual punishment.

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: CHERRY GRANT, Esquire, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on

this 29th day of March, 1999.