IN THE SUPREME COURT OF FLORIDA

RICARDO JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94,801
	)	DCA Case No. 97-03013
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and he was the appellant in the District Court of Appeal, Fourth District. He will be referred to as Petitioner in this brief.

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

STATEMENT OF THE CASE

Petitioner will rely on the statement in his initial brief on the merits.

STATEMENT OF THE FACTS

Petitioner will rely on the statement in his initial brief on the merits.

SUMMARY OF ARGUMENT

Petitioner will rely on the summary in his initial brief on the merits.

ARGUMENT

POINT I

THE FOURTH DISTRICT WRONGLY CONSTRUED FLORIDA STATUTES 893.03(3) AND 893.135 TO CONCLUDE THAT PETITIONER COULD BE PROSECUTED UNDER THE DRUG TRAFFICKING STATUTE BASED ON HIS POSSESSION OF LEGALLY MANUFACTURED HYDROCODONE TABLETS DESCRIBED IN 893.03(3)(c)(4).

Respondent's brief claims that "contrary to Petitioner's assertions" there is one and only one meaning which can be "gleaned from the language of section 893.135(1)(c)1" (Resp. Brf. at 5), "because section 893.135(1)(c)1 is not susceptible of differing interpretations" (Resp. Brf. at 19).[1] Respondent then urges this Court to construe Florida Statute 893.135(1)(c)1 in such a way that a person with perhaps as few as 5 tablets or a few teaspoons of prescription medication containing hydrocodone could be charged with and convicted of drug trafficking.[2] But merely making the claim that there is only one way to read the statute does not make it so. Witness the instant case: petitioner believes the statute has a plain meaning and so does respondent, yet they have come to

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[1] No fewer than 18 times, respondent has asserted the statute is "plain" or "clear," yet it take respondent 21 pages to explain this clear statute.

[2] Respondent's statement on page 22 of its brief that hydrocodone "appears on the street only in pill form" is incorrect as the prescription medication comes in both pill form, usually as a pain reliever, and liquid form, usually as a cough syrup. Although most of the pending cases involve the pills, some are based on possession of the liquid form. Petitioner has no knowledge of whether or not illicitly produced hydrocodone is available "on the streets;" there is no record support one way or the other.

opposite conclusions as to what that meaning is. Indeed, if only one interpretation of this statute was possible, this case would not now be before the Court. Instead, the first district in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), interpreted the statute one way, the fifth district in Baxley v. State, 684 So. 2d 831 (Fla. 5th DCA 1996), interpreted it another, the fourth district in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), interpreted it another but with the same result as the fifth, and the second district in State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998), agreed with the first. Recognizing the disparity, Judge Klein in the fourth district has now explained in his concurring opinion in State v. Dial, 24 Fla. Law Weekly D___ (Fla. 4th DCA April 7, 1999), that,

> Appellees appear to have a good point about this statute being susceptible to different constructions. After all, the first district in *Holland* and the second district in *Perry* concluded that the trafficking statute means one thing so far as hydrocodone in tablet form is concerned, and this district in *Hayes* and the fifth district in *Baxley* concluded that it means something else. In *Hermanson v. State*, 604 So. 2d 775 (Fla. 1982), the Florida Supreme Court reversed defendant's convictions under confusing statutes, observing that both the trial court and the appellate court had "difficulty understanding the interrelationship of the statutes," and that "confusion in lower courts is evidence of vagueness which violated due process." *Id*. at 781-782. The void for vagueness doctrine is one of the principles underlying our lenity statute. *Perkins*, 576 So. 2d at 1313.[3] I would apply lenity here.

[3] Perkins v. State, 576 So. 2d 1310 (Fla. 1991).

State v. Dial, supra, Klein, J., concurring.

Judging from its brief, part of respondent's problem in understanding or explaining section 893.135(1)(c)1 is its lack of understanding of the substances which §893.135(1)(c)1 attempts to regulate. This lack immediately reveals itself in respondent's explanation that

> "a plain reading of the statute shows it applies in three 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[4] of any salt, derivative, isomer, or salt of an isomer thereof,[5] as described in Schedule I and Schedule II[6] or; (3) when a person has 4 grams or more of any mixture containing any such substance."

(Resp. Brf. at 4). Contrary to respondent's claim, the phrase "or any salt, derivative, ..." etc. does not stand on its own but is part and parcel of the list morphine, opium, oxycodone, hydrocodone, hydromorphone. There are two reasons it should be clear this is a single grouping. First, all the substances listed in §893.03(1)(b) and §893.03(2)(a) including the salts and derivatives, have one thing in common: their basic chemical structure is morphine, the most important of the opium alkaloids. See Pharmacognosy, Edward P. Claus, Varro E. Tyler, & Lynn R.

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[4] The repetition of "4 grams or more" does not appear in the statute.

[5] Here respondent has left out the words "including heroin" which appear in the statute.

[6] Respondent again changes the wording of the statute which only includes subsection (b) of schedule I and subsection (a) of schedule II.

Brady, Sixth Ed. at 261. When minor modifications are made to the morphine structure, other drugs are created such as hydrocodone or hydromophone. Likewise the various salts, isomers, and ethers of morphine are created depending on the modification made. Id. at 261-263. Heroin is also one of these variations, as are the other controlled substances listed in subsections (1)(b) and (2)(a) of §893.03, referred to in §893.135(1)(c)1. Because it is a fairly easy procedure for chemists or drug manufactures to change the underlying chemical compound by the addition of other elements such as sodium chloride (thus creating a "salt" of morphine,) the legislature has learned to include the salts, isomers, or derivatives of the basic drug it is controlling when it lists the substances; otherwise any good drug trafficker could merely make a slight alteration in the chemical compound and have that new substance excluded from the statute even though it was essentially the same as the scheduled drug. Separating the salts and derivatives into a separate category as respondent suggests therefore makes no sense from a chemistry standpoint, nor would it accomplish any statutory purpose. If anything, reading the statute in that way would actually increase the confusion surrounding what is prohibited.

Second, the state's tortured reading of §893.135(1)(c)1, ignores those rules of composition and grammar for parallel construction which we all learned (or should have learned) in junior high school. The construction which reveals itself in §893.135(1)(c)1 is that the statute contains two parallel groupings

or phrases, each beginning with the words “4 grams or more of....” §893.135(1)(c)1, Fla. Stat. (1997). The first phrase is "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)." The second phrase if "4 grams or more of any mixture containing any such substance." §893.135(1)(c)1, Fla. Stat. (1997).

The reason the state takes its chosen path is because it wants to isolate the language “as described in s. 893.03(1)(b) or (2)(a)” from morphine, opium, oxycodone, hydrocodone, and hydromorphone. The fact is, if “as described in” modifies hydrocodone, then the hydrocodone/acetaminophen tablets which appellant had would not be included within §893.135 because it would not be hydrocodone “as described in 893.03(2)(a)” as the statute requires, but rather hydrocodone as described in 893.03(3)(a).

Although respondent claims in one section of its brief that any substance listed in §893.03(1)(b) or (2)(a) will support a trafficking charge (Resp. Brf. at 4), just three pages later it tries to refute petitioner’s argument by claiming that §893.03, the drug schedules, “have no effect upon whether someone may be charged with trafficking under section 893.135(1)(c)1.” (Resp. Brf. at 7). Respondent is wrong. The way the legislature wrote the statute, it depended on two subsections of schedules I and II to define the limits of the trafficking statute. If substances controlled under the other schedules, here schedule III, were to be considered then

the legislature merely needed to include them rather than use the limiting language of "as described in."

According to respondent, the sky is going to fall if this Court does not accept its reading of the statute. "... 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." (Resp. Brf. at 12.) Petitioner doubts that circumstance will ever occur, but questions whether that hypothetical is any worse than the reality that if respondent's interpretation is accepted small time users and dealers can and will go to prison on 25 year mandatory sentences. Although petitioner asserts in Point II of his brief that the application of such a severe penalty constitutes a cruel or unusual punishment as applied to him, there is no question that the legislature can (and does) enact statutes with harsh penalties. However, should this Court agree with the courts in Holland and Perry, the sky will not fall in: if the legislature indeed wants to include schedule III drugs within §893.135 all it would need to do is rewrite the statute to either clearly include schedule III drugs by total weight, by total weight of the controlled substance or, better yet, by setting pill count as the triggering mechanism.

The state's prosecution sub judice was based on its assertion that pharmaceutically produced pills containing hydrocodone are "mixtures" within the meaning of §893.135. But who, in common usage, would refer to a pill as a "mixture?" Because what was to

be included within the statute was admittedly "unclear" to the fourth district in Hayes, the court says it relied on Chapman v. United States, 500 U.S. 453 (1991), and quoted the dictionary definitions for the word "mixture" from Chapman. Putting aside for the moment the fact that illicitly prepared LSD in unknown quantities or strength on blotter paper hardly compares to Vicodin or Lorcet still sealed in the manufacturers bottles, the question of whether these tablets are "mixtures" really depends on which dictionary one consults. According to Remington's Pharmaceutical Sciences, the Bible to the pharmaceutical industry, "mixtures" are defined as a type of suspensions and are,

> aqueous liquid preparations which contain suspended, insoluble, solid substances and are intended for internal use.

Remington's Pharmaceutical Sciences, Mack Publishing Co., 14th Ed. at 1496-1499. Neither Vicodin nor Lorcet are liquid preparations, so they do not fit that definition. The first definition Chapman cites is

> 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).

Chapman, at 461. Both Vicodin and Lorcet contain two or more components but, unlike LSD on blotter paper or cocaine cut with sugar, they are in fixed proportion to one another and that fixed portion is always identical and identifiable without testing, as demonstrated by the chemist's testimony in this case. Under this

definition Vicodin and Lorcet are not mixtures. Apparently the court in Hayes chose not to use this dictionary definition but instead relied on the definition in the Oxford English Dictionary also referred to in Chapman, namely

> two substances blended together so that the particles of one are diffused among the particles of another.

Chapman, at 461. It is interesting to note that the LSD in Chapman fit both definitions; the Supreme Court did not have to choose to use one and ignore the other as the fourth district did in Hayes.

Nor does the LSD on blotter paper or cocaine combined with a cutting agent compare with the drugs in this case. The whole purpose of the blotter paper or the cutting agent is to ***assist in the distribution*** of the otherwise illegal drug.

In cocaine distribution powder cocaine is cut or cooked with any number of other substances for the purpose of increasing the profit for the distributor by increasing the number of doses of the drug available for sale, or, in the case of LSD, to increase the ease of distribution. As the state's brief acknowledges, the purpose of a cutting agent is to increase the amount of cocaine or other unlawful drug which can be distributed. Resp. Brf. At 17-18, ("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.") In addition, generally the cutting agent or the blotter paper has no affect on the amount of drugs which an individual can consume. The same can hardly be said for Vicodin ES or Lorcet.

Acetaminophen does not assist in the distribution of hydrocodone. Unlike Vicodin ES or Lorcet, which come from a pharmaceutical manufacturer, LSD and cocaine are illicitly produced. Unlike sugar or blotter paper, acetaminophen is not a cutting agent for hydrocodone; it is added *not to increase* the distribution of hydrocodone but *to assist in restricting* the amount of hydrocodone needed for the purpose prescribed. Unlike cocaine combinations or LSD which would require chemical analysis to determine the proportion of illegal to legal substances, Vicodin and Lorcet are combined by the manufacturer in specific amounts, as the state's own chemist explained (T 121,122, 125). Each pill contains exactly the same amount of hydrocodone and acetaminophen as every other one (T 125). Further, unlike cutting agents for cocaine or blotter paper which have no affect on the amount of drugs an individual can consume, acetaminophen and the antihistamines combined in the cough syrups in fact restrict the amount of the controlled substance which an individual can consume because of the side-effects they cause. This is no doubt the reason the legislature placed pharmaceuticals like Vicodin ES, Lorcet, cough syrup with codeine or hydrocodone, etc. into schedule III to begin with: their potential for abuse is lower because any “high” gained from taking large amounts of the controlled substances would be grossly outweighed by the extremely unpleasant side-effects from the second medication.

Although respondent and the fourth district say they are relying on legislative history to determine what §893.135(1)(c)1

means, that very legislative history states:

> Section 893.03, F.S. contains standards and schedules for controlled substances. Controlled substances are drugs that have a potential for abuse. Included in the drugs listed under this section are morphine, heroin, cannabis, peyote, opium, methadone, and anabolic steroids. Although these drugs have a great potential for abuse, *if combined with other drugs, the potential for abuse can be reduced or even eliminated*.

House of Representatives Final Bill Analysis & Economic Impact Statement of May 12, 1995. This statement does *not* support respondent's conclusion, but instead supports the interpretation that drugs in combinations are not the problem the legislature sought to address. Indeed, they reenacted the schedules leaving hydrocodone combined in therapeutic dosage units in schedule III and out of the trafficking statute.

Nor is the state's "hall of mirrors" argument persuasive. The language in the schedules to which the state objects giving any meaning whatsoever is "unless specifically excepted or unless listed in another schedule...." see e.g. §893.03(2)(a), Fla. Stat. (1997). Using hydrocodone as an example, the state claims the exception means that because hydrocodone is listed in both schedules II and III, it would not be regulated by either schedule. The state's conclusion is wrong because its basic premise is wrong. Hydrocodone alone is listed only in schedule II, and the subsection containing the drug, unlike others in the statute, does *not* include compounds, mixtures, or preparations of hydrocodone. §893.03(2)(a), Fla. Stat. (1997). Hydrocodone in specific maximum

dosage units compounded with other therapeutic ingredients is listed *only* in schedule III. There is no "hall of mirrors" because each substance is assigned to its own schedule. Further, under rules of statutory construction, a specific statute trumps a general one. Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959).

Finally, respondent complains that petitioner's reading of the trafficking statute deprives the prosecution of it jealously guarded discretion to prosecute. But that discretion is not unbridled; citizens should not be prosecuted unless the statutes clearly prohibit a specific conduct. Prosecuting persons in unlawful possession of Vicodin or Lorcet is clearly authorized, as is prosecution for sale, delivery, or possession with intent to sell. §893.13, Fla. Stat. (1997). The same cannot be said for prosecuting a person with as few as 5 or 6 tablets as a drug trafficker. Although the state's brief claims this would never happen (just trust us,) the cases pending before this Court and in the district courts demonstrate otherwise. Nevertheless, the question here is not one prosecutorial discretion but of what the legislature actually authorized in §893.135(1)(c)1.

POINT II

PETITIONER'S 25 YEAR MINIMUM MANDATORY PRISON SENTENCE FOR POSSESSION OF FOUR BOTTLES OF ACETAMINOPHEN CONTAINING 1.5% OR LESS HYDROCODONE AND WORTH LESS THAN $300 VIOLATES THE FLORIDA AND FEDERAL CONSTITUTIONS' PROHIBITION AGAINST CRUEL OR/AND UNUSUAL PUNISHMENT.

Contrary to respondent's suggestions in its brief, petitioner has not argued that every mandatory sentence for drug offenses

would be unconstitutional. Instead, his argument is that the mandatory 25 year sentence impose on him for his possession of the schedule III drug involved in this case is unconstitutional under both state and federal law because it is disproportionate to his offense.

Although respondent relies on State v. Benitez, 395 So. 2d 514 (Fla. 1981), that case does not mandate affirmance without further consideration because the law regarding this issue has evolved considerably since 1981 as demonstrated by State v. Hale, 630 So. 2d 521 (Fla. 1993). See also Gibson v. State, 721 So. 2d 363 (Fla. 2d DCA 1998); B.B. v. State, 659 So. 2d 256, 266 (Fla. 1995), Grimes, J. dissenting. Further, the statute which this Court ruled on in 1981, is not the same. Benitez involved the sale of a kilogram of cocaine worth $44,000, Benitez, 395 So. 2d at 516, as opposed to the possession of 3.5 grams of schedule III hydrocodone worth less than $300 at issue here. This Court in Benitez acknowledged that in an extreme case "the legislature's judgment (could) run afoul of the constitutional prohibition...." Id. at 518. Petitioner has merely argued that threshold has been met in this case.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court exercise its discretion to review the decision and resolve the issues presented in this case in accordance with the district court's decisions in Holland and Perry.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to Celia Terenzio and Debra Rescigno, Assistant Attorney Generals, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this _____ day of March, 1999.

_____
Counsel for Petitioner