

**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

**MAY 10 1999**

CLERK, SUPREME COURT

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Chief Deputy Clerk

SUSAN DIAL and )  
 VIRGINIA SIDELINGER, )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Case No. 95,507

PETITIONERS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward, Florida, and Appellee in the Fourth District Court of Appeal. Respondent was Appellant, below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

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 CASE AND FACTS

Petitioner Dial was charged by information with trafficking in over four grams of hydrocodone and petitioner Sidelinger was charged in the same information with conspiracy to traffic in over four grams of hydrocodone, in violation of section 893.135(1)(c)1, Florida Statutes (1997). Slip opinion. Petitioners moved to dismiss those counts arguing that the substance involved, vicodin tablets, are not within the trafficking statute as they contain only 10 mg. of hydrocodone making them a Schedule III drug not within the preview of section 893.135(1)(c)1. Slip opinion. The trial court granted the motion on the authority of State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), and respondent appealed. The fourth district, in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), subsequently considered the same issue, disagreed with the first district in Holland, and certified conflict with that case. Id. at 1097. On April 7, 1999, the district court, relying on Hayes, then reversed the dismissal in the instant case. Slip opinion. Petitioners filed a timely amended notice of intent to invoke jurisdiction May 5, 1999, thus invoking the jurisdiction of this Court.

### SUMMARY

This Court has discretionary jurisdiction pursuant to Article V, Section 3 of the Florida Constitution to review the decision in the instant case. The decision of the district court sub judice directly conflicts with the first district's decision in Statea v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), on the question of whether possession of Schedule III tablets containing less than 15 mg. of hydrocodone combined with a therapeutic amount of a non-narcotic ingredient can be the subject of drug trafficking under the mixture provision of Florida Statute 893.135(1)(c)1. The opinion itself recognizes the conflict in decisions between the first, fifth and fourth districts. In addition, the opinion expressly relies on State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), a case now pending before this Court as case 94,688, which expressly certified conflict with Holland, as well as State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998). Jurisdiction is therefore also proper pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

PETITIONERS HAVE PROPERLY INVOKED THIS COURT'S JURISDICTION SINCE THE OPINION IN THE INSTANT CASE CONFLICTS WITH THE OPINIONS IN STATE v. HOLLAND, 689 SO. 2D 1268 (FLA. 1ST DCA 1997), AND STATE v. PERRY, 716 SO.2D 327 (FLA. 2D DCA 1998), ON THE SAME QUESTION OF LAW.

To properly invoke the conflict jurisdiction of this Court petitioners must demonstrate a direct conflict between the express holding of the decision challenged and that of another district court on the same rule of law. Art. V, s. 3(b)(3), Fla. Const., Jenkins v. State, 385 So.2d 1356 (Fla. 1980). That standard is met not only where the opinion itself recognizes the conflict but also where the case on which the opinion relies is properly pending before this Court. Jollie v. State, 405 So. 2d 418 (Fla. 1981).

In the instant case petitioners were charged with trafficking or conspiracy to traffic in over four grams of hydrocodone, specifically vicodin tablets containing 10 mg. hydrocodone. The district court reversed, stating,

The trial court granted the motions (to dismiss) on the authority of State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997). The fifth district had taken a contrary position in State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), and after the trial judge ruled in this case, this court agreed with Baxley in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998) and certified conflict with Holland.

Our reasoning is set forth in Hayes and need not be repeated here.

Slip opinion, appendix. The district court's decision therefore recognizes conflict with Holland on its face. It also meets the requirement of Jollie in that it relies on a decision currently pending before this Court in which conflict was certified.<sup>1</sup>

This court should accept jurisdiction as the identical issue is currently pending in several other cases.

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<sup>1</sup> Hayes certified conflict not only with Holland but with State v. Perry as well. Hayes is currently pending before this court as case 94,688, as is Perry, case 93,757.

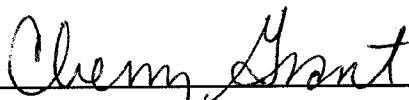


CONCLUSION

This court should accept jurisdiction pursuant to Article V, § 3(b)(3), Fla. Const. and order briefs on the merits from both parties.

Respectfully Submitted,

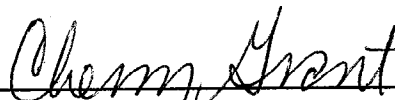
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Debra Rescigno, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 3401-2299 this 7 day of May, 1999.



CHERRY GRANT  
Counsel for Petitioner

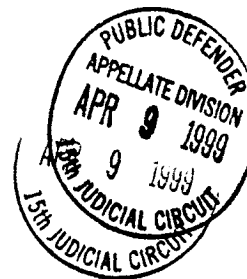
IN THE SUPREME COURT OF FLORIDA

SUSAN DIAL and	)	
VIRGINIA SIDELINGER,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No.
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

A P P E N D I X

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

JANUARY TERM 1999



STATE OF FLORIDA,

Appellant,

v.

SUSAN DIAL and VIRGINIA SIDELINGER,

Appellees.

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CASE NO. 98-2803

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Opinion filed April 7, 1999

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert A. Hawley, Judge; L.T. Case No. 97-1331 A&B.

Robert Butterworth, Attorney General, Tallahassee, and Debra Rescigno, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellees.

PER CURIAM.

Defendants were charged with trafficking or conspiracy to traffic in over four grams of hydrocodone, a violation of section 893.135(1)(c)1, Florida Statutes (1997). Defendants moved to dismiss on the ground that each vicodin tablet contained only 10 mg. of hydrocodone which would not violate section 893.135(1)(c), the trafficking statute. The trial court granted the motions on the authority of State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997). The fifth district had taken a contrary position in State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), and after the trial judge ruled in this case,

this court agreed with Baxley in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998) and certified conflict with Holland. Our reasoning is set forth in Hayes and need not be repeated here. We therefore reverse the order of dismissal.

POLEN and SHAHOOD, JJ., concur.  
KLEIN, J., concurring specially with opinion.

KLEIN, J., specially concurring.

I reluctantly agree with the majority opinion, because I am bound by our decision in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998). I say reluctantly because I question whether, when the legislature enacted and amended our drug trafficking statute, it recognized how severe the penalties could be where the form of a drug such as hydrocodone was one to two percent in a commonly used prescription drug. Because section 893.135(1)(c)1 includes four grams or more of hydrocodone or "four grams or more of any mixture containing any such substance," the statute imposes a very harsh penalty for illegally possessing a quantity of pain killers which can be obtained in one prescription.

It means that these defendants, illegally in possession of forty-nine vicodin tablets, a common prescribed pain killer in which the aggregate weight of hydrocodone is less than one-half a gram, are drug traffickers subject to a twenty-five year mandatory minimum sentence and a fine of \$500,000. They are subject to the same penalty as a person illegally possessing twenty-eight grams of pure heroin. This anomaly occurs because it is the total weight of the tablets, which are ninety-eight percent a non-controlled substance, which determines the penalty. I therefore prefer the result reached by two of our sister courts, holding that hydrocodone in tablet form is not covered by the trafficking statute. State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998).

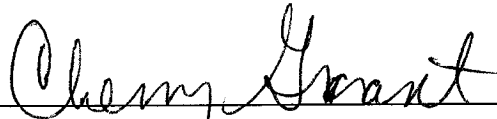
In arguing that we should reconsider and recede from Hayes, appellees point out that our opinion in Hayes acknowledges that the trafficking statute, so far as hydrocodone is concerned, is "unclear." Hayes, 720 So. 2d at 1096. Appellees then argue that when the language of a penal statute "is susceptible of differing constructions, it shall be construed most favorably to the accused," citing our lenity statute, section 775.021(1), Florida Statutes, Perkins v. State, 576 So. 2d 1310 (Fla. 1991), and cases cited therein. It is also arguable that the opinion of the fifth district found the statute unclear in Baxley because that court applied a statutory construction principle that conflicting or ambiguous provisions of the same legislative act should be read *in pari materia* so that the fullest effect can be given to each. Baxley, 684 So. 2d at 832-33.

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 violates due process." Id. at 781-82. The void for vagueness doctrine is one of the principles underlying our lenity statute. Perkins, 576 So. 2d at 1313. I would apply lenity here.

**NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appendix has been furnished by courier to Debra Rescigno, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 7 day of May, 1999.



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