IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DEBRA WRIGHT,

Respondent.

CASE NO. 95,749

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellant in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Debra Wright, the Appellee in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or by her proper name.

The District Court below treated the case as an appeal from a non-final order, so that no record on appeal was issued by the circuit court. At the District Court level and before this Court, the Petitioner will rely upon the appendix attached to both this brief and the initial brief below. Reference to the appendix will be made by the use of the symbol "A" followed by citation to any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

This case is one of several before this Court presenting the same issue. These include: James Potts v. State, case no. 93,546, State v. Blaine Alleman, case no. 93,883, State v. Mary Frances Stein, case no. 94,093, State v. Lenard Rera, case no. 94,094, Stephen Falkenstein v. State, case no. 94,527, Lisa Brown v. State, case no. 94,528, Donald F. Sihart v. State, case no. 94,677, Kathryn P. Hayes v. State, case no. 94,688, Harriet Bates v. State, case no. 94,741, Ricardo Johnson v. State, case no. 94,801, Ann Marie Wilson v. State, case no. 94,934

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article V, § 3(b)(4), Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(vi).

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The defendant was charged by information, on August 10, 1998, with trafficking in illegal drugs, to wit, "4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, heroin, or a salt, isomer, or salt of an isomer thereof, including heroin, or grams or more of any mixture containing any such substance, in violation of Section 893.135(1)(c)(1)(a), Florida Statutes", count one; possession of Diazepam (Valium) in violation of 893.13(6)(a), Florida Statutes, count two; and possession of Alprazplam (Xanax) in violation of 893.13(6)(a), Florida Statutes, count three. (A1, pages 1-2).

On October 6, 1998, the defendant filed a sworn motion to dismiss count one of the information. (A2). This motion set forth the following grounds in support of dismissal:

> 1. On June 24, 1998, Defendant was transported to Lake Butler Hospital, apparently suffering from a drug overdose.
> 2. Members of Defendant's family brought five (5) bottles of different drugs in pill or tablet form to the hospital.

> 3. The bottles brought to the hospital had been discovered by members of Defendant's family in Defendant's personal belongings.
> 4. Among the bottles presented at the hospital were 519 pills containing a mixture of Hydrocodone Bitartrate and Acetaminophen.
> 5. Analysis by FDLE has determined that none of the pills contained more than 15 mg of Hydrocodone Bitartrate each.
> 6. A copy of the FDLE analysis which reflects the same is attached hereto. (A2)

In response to the motion to dismiss, the State conceded that in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997, the First District Court had reached the same issue and held that "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, Florida Statutes." 689 So.2d at 1270. (A3). While noting that the Holland decision was binding upon the trial court, the State pointed out that the Fifth District Court of Appeal had reached a contrary result on the same issue in State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996) and Potts v. State, 710 So.2d 1387 (Fla. 5th DCA 1998) and had certified conflict with the First and Second Districts on this point. (A3)

At the hearing on the motion to dismiss conducted on October 21, 1998, counsel for the defendant indicated to the court that the State and the defense proposed that the lower court grant the motion to dismiss, so that the State could appeal, given the fact that the issue was currently before the Florida Supreme Court whose ruling would be dispositive. (A4, page 2). The trial court granted the motion to dismiss count one and held the

remaining counts against the defendant in abatement until the issue could be determined. (A4, page 3; A5).

A timely notice of appeal by the State was filed on October 22, 1998. (A6). On May 27, 1999, the First District Court of Appeal entered its per curiam affirmance based upon it prior decision in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), certifying conflict with State v. Hayes, 720 So.2d 1095 (Fla. 4th DCA 1998) and State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996). (A, 7).

SUMMARY OF ARGUMENT

ISSUE I.

The First District Court of Appeal erroneously affirmed the lower court's order dismissing a count charging her with trafficking in hydrocodone in reliance upon its opinion in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997).

F.S. 893.135(1)(c)(1) prohibits the trafficking in four or more grams of hydrocodone or any mixture thereof. The lower courts' conclusion that the determination of the weight of the controlled substance was to be made based upon the weight of the enumerated substance alone, rather than upon the aggregate weight of the pills is incorrect and in contravention of both the clear wording of the statute and basic principles of statutory construction.

In State v. Hayes, 720 So.2d 1095 (Fla. 4th DCA 1998), review pending, and State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996), review denied, 694 So.2d 737 (Fla. 1997), two other District Courts of this State reached a contrary result, which is in keeping with the plain meaning of the statute. There, the Courts held that one who sells four grams or more of a mixture containing hydrocodone can be prosecuted for trafficking pursuant to F.S. 893.135(1)(c)(1). The State asserts that this interpretation of the plain meaning of the statute is correct and that Holland was erroneously decided. The Holland Court's conclusion that a defendant cannot be convicted of trafficking regardless of the number of tablets sold because each tablet

contains only a small amount of hydrocodone is in contravention of basic principles of statutory construction as it completely ignores the statutory language “**any mixture** containing... hydrocodone.” The Legislature clearly intended to punish severely those persons who trafficked in substantial quantities of narcotic pills.

The State urges this Court to approve the decisions in Hayes and Baxley and to disapprove the decision below.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DISMISSING A COUNT CHARGING THE DEFENDANT WITH TRAFFICKING IN HYDROCODONE WHEN F.S. 893.135(1)(c)(1) IS VIOLATED BY THE POSSESSION OF FOUR OR MORE GRAMS OF ANY MIXTURE CONTAINING HYDROCODONE?

The State contends the First District Court of Appeal erred by affirming dismissing count of a count charging the Respondent with trafficking in hydrocodone based upon its prior decision in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), because Holland is predicated upon an erroneous reading of F.S. 893.135(1)(c)(1).

The Holland Court concluded that in determining whether a violation of the statute had occurred, the requisite amount of the controlled substance was determined by actual weight of the enumerated substance excluding other substances also contained in the pill, rather the aggregate weight of the tablets. This holding is misguided as it is based upon an erroneous reading of the statute.

Effective July 1, 1995, the trafficking statute, Section 893.135(1)(c)1, was amended to include hydrocodone or '4 grams or more of **any mixture** containing any such substance'. This amendment referencing either the drug hydrocodone (among other substances) or any mixture containing it plainly and unambiguously demonstrates the intent of the state legislature to target and punish severely those who would traffic in substantial

quantities of narcotic pills containing these substances. Chapter 95-415, Laws of Florida.

As recognized by the Fourth District Court in State v. Hayes, 720 So.2d 1095, 1096 (Fla. 4th DCA 1998), (citing the staff report), support for the 'plain reading' of the statute is found in its legislative history by the addition of the words 'any mixture.' '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.' The obvious intent behind such legislative amendment was intended to target the growing problem resulting from the illegal sale of prescription drugs.

Despite this clear expression of legislative intent and the plain language of the statute, the result below prohibits conviction under the trafficking statute regardless of how many tablets containing hydrocodone she possessed and sold because each tablet only contained a relatively small amount of the controlled substance.[1] The holding in Holland and below, by implication, conclude the legislature never intended the word 'mixture' as used in Section 893.135(1)(c)(1) of the Florida Statutes to apply to prescription drugs such as those possessed by the defendant in this case.

[1] In this case, the Respondent, whose motion to dismiss conceded possession of a total of 519 pills containing hydrocodone, possessed pills which contained a total weight of 41.4 and 288 grams respectively, amounts well in excess of 28 grams.

This conclusion can only be based upon the erroneous belief that the statute is ambiguous and requires interpretation by reference to other statutes. However, the provisions of F.S. 893.135(1)(c) are plain and ambiguity is not created by reference to F.S. 893.03.

Subsection (2)(a) of that statute which lists Schedule II drugs, included:

> 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
>
> ***
>
> (j) hydrocodone.

Hydrocodone is also listed as a schedule III drug under F.S. 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.

The position adopted by the First District Court of Appeal in Holland, without finding an ambiguity in F.S. 893.135(1)(c)(1), held that F.S. 893.03 must be referred to in determining whether a defendant could be charged with trafficking. That court found that if a mixture containing a controlled substance was one within schedule III, then the amount per dosage unit, rather than

the aggregate weight is determinative of how the offender could be charged. The basis of the Holland Court's reasoning appears to be that because section 893.03(2)(a) exempts substances "listed in any other schedule" and because hydrocodone is listed in both schedule II and schedule III, it is exempted from the trafficking statute and therefore an offender could never be convicted of trafficking in Vicodin or hydrocodone, "regardless of the number of tablets sold." 689 So.2d at 1269. The court held that because hydrocodone was also classified as a schedule III drug where it was present in amounts not more that 15 milligrams per dosage unit,

> it is clear to us that, if a mixture containing the controlled substance falls within the parameters set forth in Schedule III, 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, Florida Statutes. The Lortab and/or Vicodin tablets allegedly sold by Holland do not fall within the trafficking statute charged because the concentration of hydrocodone per dosage unit is less than 15 milligrams... Id.

Contrary to Holland, however, the listing of hydrocodone as both a schedule II and a schedule III drug cannot and does not have any effect upon the operation of the trafficking statute since it clearly applies to **any mixture containing hydrocodone**, regardless of amount of hydrocodone therein. The result below is directly contrary to the Legislature's intention to elevate oxycodone and hydrocodone to the same status of morphine and

opium in its scheme of preventing drug abuse. It also runs afoul of basic principles of statutory construction.

By expressly referring to **mixtures** of these drugs, the Legislature clearly intended to include situations such as the one at bar, so that if an individual possessed 4 or more grams of pills containing hydrocodone mixed with a binding agent such as acetaminophen, he or she could be charged with trafficking in hydrocodone. This intention is obviously based upon the Legislature's recognition that for the controlled substance to be distributed, it must be done in a pill form, necessitating the inclusion of binders and fillers. To conclude otherwise is to give no effect to the 1995 amendment to the statute, Hall v. Oakley, 409 So.2d 93 (Fla. 1st DCA 1982), and ignores the Legislature's obvious intent in amending Section 893.135 to provide for a more serious sanction for violators than that provided for mere possession or sale under Sections 893.03(3) and 893.13(1)(a), regardless of whether the pure drug or an admixture was involved.

Furthermore, as previously noted, the holding in Holland is also clearly violative of basic principles of statutory construction. Where the language of a statute is clear and unambiguous and conveys a definite meaning, the language of the statute controls and there is no need for judicial interpretation. See: State v. Dugan, 685 So.2d 1210 (Fla. 1996) (in interpreting a statute, courts must determine the legislative intent from the plain meaning of the statute; if the language of

the statute is clear and unambiguous, the court must derive the legislative intent from words used without involving rules of statutory construction or speculation as to what the legislature intended.)

Also of significance is the fact that both the ruling below and the result in Holland are in direct conflict with rulings of this Court which has already addressed the issue of enhanced penalties for mixtures containing controlled substances. In State v. Yu, 400 So.2d 762 (Fla. 1981), appeal dismissed, 454 U.S. 1134, 102 S.Ct. 988, 71 L.Ed.2d 286 (1982), this Court recognized the fact that dangerous drugs are often marketed in a diluted or impure state and that it is not unreasonable for the Legislature to deal with the mixture or compound rather than the pure drug. The Yu Court squarely recognized the Legislature's broad discretion in determining measures necessary for the protection of the public and its determination that a mixture containing a controlled substance could be distributed to a greater number of people than the same amount of the undiluted substance, thus posing a greater potential for harm to the public. Based upon this recognition, the finding that the crime was therefore deserving of a greater penalty, was a determination strictly within the Legislature's prerogative. See also: Velunza v. State, 504 So.2d 780 (Fla. 3d DCA 1987); State v. Garcia, 596 So.2d 1237 (Fla. 3d DCA 1992) (reversing trial court order reducing charges from trafficking in more than 400 grams of

cocaine or a mixture thereof to simple possession on defendant's motion to dismiss).

The State asserts that the decision of the Fifth District Court of Appeal in State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996), is in conformity with Yu, but in direct conflict with the decision reached in Holland. In Baxley, the court addressed the issue of whether a person who dealt in tablets containing a controlled substance, each of which individually was classified as a schedule III substance and a third degree felony was subject to prosecution for trafficking if the total amount of the controlled substance exceeded four grams. The Baxley Court concluded that [i]f the number of tablets aggregates 4 grams or more of hydrocodone or a mixture of hydrocodone, then we agree with the State that prosecution is proper under section 893.135. 684 So.2d at 833. See also: Potts v. State, 710 So.2d 1387 (Fla. 5th DCA 1998) (affirming defendant's convictions and sentences on the authority of Baxley, certifying conflict with Holland. Review pending in case no. 93,546.

The Fourth District Court, in State v. Hayes, supra, aligned itself with the Fifth District Court and reversed a trial court's order dismissing an information charging Hayes with trafficking in four or more grams of hydrocodone. The Hayes Court, noting that it based its decision on a reading of the legislative history of F.S. 893.135(1)(c)(1), as well as, the United States Supreme Court's interpretation of federal law on which the state statute was based, employed the analysis of Chapman v. United

State, 500 U.S. 453 (1991), superseded by statute on other grounds as stated in United States v. Turner, 59 F.3d 481 (4th Cir. 1995) and held:

> 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. See Rolande-Gabriel, 938 F.2d at 1237.[2] 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 tablet 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. As such, we reverse the order dismissing the information in this case, and certify conflict with Holland and Perry.[3] 23 Fla. L. Weekly at D2184-2185.

The State asserts that the definitions of the terms 'mixture' and 'substance' relied upon by the Hayes Court are in keeping with principles of statutory construction which require words to be given their plain meaning in the absence of statutory definition. State v. Cohen, 696 So.2d 435, 437 (Fla. 4th DCA 1997), citing Green v. State, 604 So.2d 471, 473 (Fla. 1992) (In the absence of a statutory definition, the plain and ordinary

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[2] United State v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991).

[3] State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998) (affirming dismissal of charges based upon Holland.

meaning of words can be ascertained, if necessary, by reference to a dictionary).

By adding mixtures containing hydrocodone to the trafficking statute without removing them from F.S. 893.13(1)(a)(1), a second degree felony which prohibits possession with intent to sell, F.S. 893.13(2)(a)(1), a second degree felony which prohibits purchase or possession with intent to purchase, and F.S. 893.13(6)(a), third degree felony, which prohibits unlawful possession statute, the Legislature has left prosecutors discretion to choose under which statutory provision to charge such drug offenders. In Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed. 2d 604 (1978), the United States Supreme Court said:

> In our system, so long as the prosecutor has probable cause to believe that the accused 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.

Likewise, this Court has held that the prosecutor should have the discretion to decide under which statute to charge an offender. See State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1988), citing United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 775 (1979). See also State v. Bonsignore, 522 So. 2d 420 (Fla. 5th DCA 1988).

In the instant case, the Respondent was in possession of 519 tablets with a total weight in excess of 41.4 and 288 grams. The possession of the 519 tablets in this case has just as great a

potential for abuse as possession and sale of cocaine or any other Schedule II substance and should be prosecuted under the trafficking statute. See Ankiel v. State, 479 So.2d 263 (Fla. 5th DCA 1985); State v. Garcia, 596 So.2d 1237, 1238 (Fla. 3d DCA 1992). The prosecutor properly exercised his discretion in charging the Respondent under the first degree trafficking statute, Section 893.135(1)(c).

This Court should approve the decision of the Fifth District Court of Appeal in Baxley and the Fourth District Court of Appeal in Hayes et al. and should overrule Holland which permits a drug dealer caught selling a truckload of Vicodin or Roxicet tablets to be subject only to third degree felony sanctions. The State respectfully suggests that this is clearly not what the legislature intended nor what the statute so plainly states.

The Legislature has broad discretion in determining necessary measures for the protection of the public health, safety, and welfare. When the Legislature acts in these areas, the courts may not substitute their judgment for that of the Legislature concerning the wisdom of such acts. State v. Thomas, 428 So.2d 327, 331 (Fla. 1st DCA 1983), citing, State v. Yu, 400 So.2d 762 (Fla. 1981), appeal dismissed, 454 U.S. 1134, 102 S.Ct. 988, 71 L.Ed.2d 286 (1982).

For all of these reasons, the State respectfully requests that this Court reverse the judgment below.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court below should be quashed and the results in State v. Hayes and State v. Baxley approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this _____ day of July, 1999.

_____
Giselle Lylen Rivera
Attorney for the State of Florida

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