IN THE SUPREME COURT OF THE STATE OF FLORIDA

CHRISTOPHER L. BOWEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96,357
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

ALLEN J. DeWEESE
Assistant Public Defender

Attorney for Christopher L. Bowen

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, 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.

CERTIFICATE OF TYPE FACE

In accordance with the Statement of Type Face 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 AND FACTS

Petitioner was charged in Count I of an amended information with trafficking in over 14 grams of hydrocodone, in violation of section 893.135(1)(c)1, Florida Statutes (1997)(R 15). Petitioner moved to dismiss this count, arguing that the substance involved, Vicodin tablets, is a Schedule III rather than a Schedule I or II drug and therefore is not within the trafficking statute(R 12-15). The trial court granted the motion on the authority of State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) (R 30), 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. On July 28, 1999, the district court, relying on Hayes, then reversed the dismissal in the instant case. State v. Bowen, 736 So. 2d 1283 (Fla. 4th DCA 1999). Petitioner filed a timely notice of intent to invoke jurisdiction August 16, 1999, thus invoking the jurisdiction of this Court. On August 27, 1999, this Court accepted jurisdiction and ordered briefs on the merits.

This case is one of several following Hayes certified by the Fourth District to this Court on the same issue. Gaschler v. State, 1999 WL 641798 (Fla. 4th DCA August 25, 1999); State v. Feldman, 1999 WL 565842 (Fla. 4th DCA August 4, 1999); State v. Falkenstein, 720 So. 2d 1143 (Fla. 4th DCA 1998); State v. Bates,

24 Fla. L. Weekly D116 (Fla. 4th DCA December 23, 1998); Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th DCA October 28, 1998); State v. Dial, 730 So. 2d 813 (Fla. 4th DCA 1999). The arguments in this brief are substantially the same as those before this Court in Dial.

SUMMARY OF THE ARGUMENT

Petitioner was charged with trafficking in hydrocodone or a mixture containing hydrocodone in excess of 14 grams based on his obtaining 20 Vicodin-ES tablets from a pharmacy with an allegedly false prescription (R 14-15). Vicodin is a brand name of a prescription pain reliever which contains a small amount of hydrocodone and a large amount of acetaminophen. Hydrocodone is a controlled substance regulated under § 893.03(2)(a)1 j, Florida Statutes (Supp. 1996) ("Schedule II") by itself, but under § 893.03(3)(c)4, Florida Statutes (Supp. 1996) ("Schedule III"), if in specific statutorily described dosage units of not more than 15 milligrams per unit. The felony known as "trafficking" applies to Schedule I and II narcotics only. Because the hydrocodone possessed by petitioner was a Schedule III rather than a Schedule II narcotic, there is insufficient evidence to sustain his conviction for trafficking in hydrocodone and thus his motion to dismiss was properly granted. The record affirmatively demonstrates petitioner committed only the lesser offense of possession of a controlled substance.

ARGUMENT

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

Petitioner was charged with trafficking in hydrocodone or a mixture containing hydrocodone in an amount over 14 grams based on obtaining a prescription drug, Vicodin, containing a small set amount of hydrocodone, a controlled substance, manufactured with a much larger set amount of acetaminophen, commonly known as Tylenol.[1] The state's theory of prosecution was that these drugs are a mixture containing hydrocodone within the meaning of the trafficking statute. The Fourth District agreed but acknowledged that the First and Second Districts have reached the opposite conclusion. State v. Bowen, 736 So. 2d 1283(Fla. 4th DCA 1999). The court followed State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), an earlier case from the Fourth District. The issue presented in this case is whether petitioner's possession of Vicodin tablets constituted trafficking in hydrocodone, a first degree felony.

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[1] Hydrocodone is a semisynthetic narcotic pain-reliever and cough suppressant similar to codeine. Barnhart Edward, R., Physicians' Desk Reference 1158 (45th ed. 1991). It is prescribed for the relief of moderate to moderately severe pain. Id. Vicodin ES tablets contain 10 milligrams of hydrocodone and 750 milligrams of acetaminophen; Lorcet tablets (another brand name) contain 10 milligrams of hydrocodone and 650 milligrams of acetaminophen. Id.

There are three principle statutes which affect the issue presented *sub judice*: §§ 893.03, 893.13, and 893.135, Florida Statutes (Supp. 1996).

Florida Statute 893.03 provides, "The substances enumerated in this section are controlled by this chapter." § 893.03, Fla. Stat. (Supp. 1996). The statute then divides itself into five sections called schedules, each containing subsections listing the controlled substances within the particular schedule. Most of the subsections begin with the statement, "unless specifically excepted *or unless listed in another schedule*, any material, compound, mixture, or preparation which contains any quantity ...." and then list the controlled substances included. See e.g. §§ 893.03(1)(c), (1)(d), (2)(c), (2)(d), & (3)(a), Fla. Stat. (Supp. 1996)(emphasis added). The schedules are arranged in descending order based on the potential for abuse of the controlled substances listed. Controlled substances listed in Schedules I and II have the highest abuse potential. §§ 893.03(1) & (2), Fla. Stat. (Supp. 1996).

Hydrocodone, but not compounds, mixtures, or preparations containing hydrocodone, see §893.03(2)(a), Fla. Stat. (Supp. 1996),) is first listed as a Schedule II substance under § 893.03(2). That statute provides,

> (a) 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, including but not limited to, the following:
>
> * * *
>
> j. Hydrocodone

are Schedule II controlled substances.

The next section of the statute, § 893.03(3), lists the Schedule III controlled substances. Hydrocodone is again included, this time as a Schedule III controlled substance, if it is in combination as described in §893.03(3)(c)4:

> (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation *containing limited quantities* of any of the following controlled substances or any salts thereof:
>
> ***
>
> 4. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

See also § 893.03(3)(c)3, Fla. Stat. (Supp. 1996)(controlling hydrocodone combined with isoquioline alkaloid of opium). Between the two schedules of the statute, both of which regulate hydrocodone, §§ 893.03(3)(c) 3 & 4 are obviously the more specific since they describe particular dosage units and combinations. When a defendant's acts are covered by a specific statute, the specific statute generally controls over a more general statute on the same subject. See Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959); Burnett v. State, 23 Fla. L. Weekly D2342 (Fla. 1st DCA Oct. 15,

1998).

Vicodin falls within the parameters of subsection (c)(4), as it contains a therapeutic 10 milligrams of hydrocodone combined with acetaminophen, an active ingredient which is not a controlled substance (R 67). Vicodin also includes small amounts of other ingredients such as corn starch, colloidal silicon dioxide, croscarmallose sodium, dibasic calcium, etc. which allow the tablets to adhere together or are added for color, size, or other marketing reasons. See www.rxlist.com/cgi/generic/hydrocod.htm.

That hydrocodone combined with acetaminophen is a Schedule III drug has been repeatedly recognized by the State of Florida through the Agency for Health Care Administration Department of Health. e.g. Agency for Health Care Administration v. Ralph A. Shutterly, case 95-2139, 1995 Fla. Div. Adm. Hear. LEXIS 585 (Dec. 22, 1995); Agency for Health Care Administration, Board of Medicine v. Jeri-Lin Furlow Burton, M.D., case 93-3096, 1995 Fla. Div. Adm. Hear. LEXIS 21 (April 21, 1995); Department of Health, Board of Medicine v. Samir Najjar, M.D., case 97-33663, 97-3442, 1998 Fla. Div. Adm. Hear. LEXIS 372 (August 18, 1998). See also, United States v. Osborne, 1997 CCA LEXIS 464 (U.S. Air Force Ct. of Crim. App. 1997)("Hydrocodone is a Schedule II controlled substance, but that in the form of Vicodin, it is a Schedule III controlled substance.") Even the court in Baxley v. State, 684 So. 2d 831 (Fla. 5th DCA 1996), agreed the individual tablets involved in that

case were Schedule III substances. There can, therefore, be no real dispute that the tablets which petitioner possessed are indeed Schedule III drugs.

Florida Statute 893.13, and specifically subsection (6)(a) makes it unlawful to possess a controlled substance without a valid prescription. §893.13(6)(a), Fla. Stat. (Supp. 1996). On the date of this incident that offense was a third degree felony, §893.13(6)(a), Fla. Stat. (Supp.1996), as was sale or possession with intent to sell a substance described in §893.03(3). §893.13(1)(a)2, Fla. Stat. (Supp. 1996). The latter was the offense with which petitioner should have been charged. Instead he was charged with a violation of Florida Statute 893.135(1)(c)1, drug trafficking. That statute provides,

> (c)1. Any person who ... is knowingly in actual or constructive possession of 4 grams or more of any morphine, opium, oxycodone, hydrocodone, 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 ... known as "trafficking in illegal drugs."

The plain meaning of this statute is that a person can only traffic in substances *"as described* in s.893.03(1)(b) or (2)(a)." Petitioners further argued that the words "any such substance" in the phrase "4 grams or more of any mixture containing any such substance" refers back to "as described in s. 893.03(1)(b) or (2)(a)." Vicodin is not a substance "as described in

s.893.03(1)(b) or (2)(a)" because it is contained within the more specific provision of §893.03(3)(c)4.

Petitioner is in good company when he contends §893.135(1)(c)1 has a plain meaning: the First District so held in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997). There a defendant was charged with trafficking under the same provision of the statute as petitioner here. The charge was based on Holland's sale of Lortab and Vicodin tablets. Holland moved to dismiss, offering proof that the tablets contained less than 15 milligrams per dosage unit. The state argued that despite the dosage and Schedule III, it could consider the total weight of the tablets under the mixture provision of § 893.135(1)(c). The district court rejected that argument.

> Reading sections 893.135(1)(c)1 and 893.03 (3)(c)4 in concert, 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 of weight, determines whether the defendant may be charged with violating section 893.135(1)(c)1, Florida Statutes.

689 So. 2d at 1270. The Second District in State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998), and subsequent cases agreed.

Even the Fifth District in State v. Baxley, supra, and the Fourth District in State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), and Johnson v. State, 23 Fla. L. Weekly D2419 (Fla. 4th DCA Oct. 28, 1998), agreed that the trafficking statute limits itself

to Schedule I and II substances. They both disagreed with Holland's conclusion, however, though their analysis of how Vicodin, a Schedule III drug, can be the subject of the trafficking statute differs.

According to Baxley, "if the amount involved is 4 grams or more of hydrocodone or 4 grams or more of a mixture containing hydrocodone then hydrocodone becomes a SCHEDULE II substance." 684 So. 2d at 832. But where does §893.03 or §893.135 say anything about transferring substances from one schedule to another? If the legislature intended weight to control the schedules, surely the legislature would have mentioned that fact when it assigned substances to schedules. Not only was weight not mentioned as a factor in scheduling hydrocodone, the legislature chose not to include compounds, mixtures, or preparations as part of §893.03(2)(a) at all. It also excluded from Schedule II any drug, such as hydrocodone, which has been listed in another schedule. §893.03(2)(a), Fla. Stat. (Supp. 1996). The legislature no doubt made those choices because it knew it was including compounds, mixtures or preparations containing limited small amounts of hydrocodone with large amounts of ingredients such as acetaminophen in another schedule, Schedule III. If the legislature had intended the courts to reassign the schedules based on weight, it would have done so more clearly or directly than by the language found in §893.135(1)(c)1, the drug trafficking statute.

The Baxley court says its interpretation makes sense because "SCHEDULE III substances include hydrocodone or hydrocodone mixtures which meet the section 893.03(3)(c)4 limitation and SCHEDULE II includes all other hydrocodone." 684 So. 2d at 832. In the first place, Schedule III only contains the specified hydrocodone mixtures; it does not contain plain hydrocodone which is always in Schedule II. Second, that statement explains nothing. The simple fact is that each Vicodin tablet is exactly what is described in subsection (c)4, whether there is one tablet or two tablets, five tablets or ten tablets. Under Baxley's rationale, any time two or more tablets are present they would convert to Schedule II drugs since only a single tablet meets the section 893.03(3)(c)4 limitation. According to Baxley then, anytime a pharmacist fills a standard prescription for 20 Vicodin the pharmacist is providing a Schedule II drug rather than a Schedule III drug. Finally, that rationale breaks down altogether when one considers that subsection (4)(c) also includes liquid preparations containing hydrocodone. Depending on the density of the liquid used in the preparation, a few teaspoons of cough syrup containing hydrocodone would also be considered a Schedule II drug, rather than a Schedule III drug, and subject the person in possession to drug trafficker status.[2]

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[2] While it may seem farfetched to think this would ever happen, State v. John Patrick Mills, case no. 97-2678, currently pending in the second district involves a charge of trafficking in

Besides the actual language of the statute, that the legislature never intended this cross-scheduling should be clear from the reasons underlying the assignment of schedules to begin with. The legislature found that Schedule II drugs, such as cocaine, have a "*high* potential for abuse and (have) currently accepted but *severely restricted medical use* in treatment in the United States, and abuse of the substance may lead to *severe* psychological or physical dependence." § 893.03(2), Fla. Stat. (Supp. 1996). By comparison, a Schedule III controlled substance such as Vicodin have a potential for abuse *less than* Schedule I or II substances, have *currently accepted uses* in the United States, and "abuse of the substances may lead to *moderate or low* physical dependence or high psychological dependence ...." §893.03(3), Fla. Stat. (Supp. 1996). The fact that a person has in his or her possession 8 tablets of Vicoden rather than 5 tablets does not in any way alter the potential for abuse, the current medical use of the substance, nor its potential for psychological or physical dependence.[3] Yet, possessing over 5 or 6 of the tablets, the recommended daily dosage is, according to the Baxley and Hayes

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14 to 28 grams of hydrocodone based on possession of six teaspoons of cough syrup.

[3] The recommended dosage of Vicodin ES is one tablet every four to six hours. PDR at 1159. However, on occasion physicians prescribe significantly more than that for those with chronic pain. See e.g. Dept. of Health v. Najjar, LEXIS 372 (Lorcet Plus prescriptions of 90-100 pills refilled monthly.)

courts, the difference between being a drug trafficker and not being a drug trafficker.

The Fourth District in State v. Hayes and thus in the case *sub judice* reached the same result as the Baxley court but took a different approach. Although the defendant argued §893.135 has a plain meaning when read in connection with the other statutes, the Fourth District court found it was:

> unclear ... which quantities of hydrocodone, or any mixture thereof, fall within the Schedule II classification, thus activating the trafficking statute, and which retain the Schedule III classification, which is outside the scope of the statute.

Hayes, at 1096. But if indeed the statute is unclear, then rules of statutory construction required not that the ambiguity be resolved in favor of the more serious offense as the Hayes court did, but rather in favor of the citizen accused. "...when the language [of a criminal statute] is susceptible of differing constructions, it shall be construed most favorably to the accused." §775.021(1), Fla. Stat. (1997). See also, State v. Dial,730 So. 2d 1095 (Fla. 4th DCA 1999), Klein, J., special concurrence.

If these statutes need to be construed, then another principle of statutory construction is that it will be assumed the legislature did not intend an unusually harsh, unreasonable or absurd result. State v. Iacovone, 660 So. 2d 1317 (Fla. 1995); Williams v. State, 492 So. 2d 1051 (Fla. 1986); R.F.R. v. State, 558 So. 2d 1084 (Fla. 1st DCA 1990).

Normally, large amounts of drugs are required as the threshold for drug trafficking prosecutions. Under the state's proposed reading of §893.135, however, prosecutions for drug trafficking based upon Vicodin would require just a few pills. Vicodin tablets weigh approximately 800 milligrams of which only 10 milligrams is hydrocodone. The threshold 4 gram trafficking weight is thus just 5 or possibly 6 pills. A person in unlawful possession of approximately 35 pills would meet the 28 gram threshold and be subject to at least a 25 year mandatory minimum term of imprisonment and a $500,000 fine regardless of prior record or any other circumstance. §893.135(1)(c)1 c, Fla. Stat. (Supp. 1996). Under the state's interpretation of these statutes, trafficking in cocaine is a much better gamble for drug dealers. A first time offender in possession of 28 grams of a mixture containing cocaine, the threshold for trafficking, is subject to the guidelines with little or no jail time required. §893.135(1)(b)1 a, Fla. Stat. (Supp. 1996). Judge Klein's concurring opinion in Dial recognized the absurdity of the result which the Baxley and Hayes decisions require:

> 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 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.

Dial, 730 So. 2d at 813. No one would likely argue that a person in possession of 149 kilograms of cocaine is not a drug trafficker, but the mandatory minimum is 10 years less than for the person with 40 tablets of Vicodin. §893.135(1)(b)1c, Fla. Stat. (Supp. 1996). All this despite the legislative findings that a Schedule II drug such as cocaine has "a high potential for abuse," has "severely restricted medical use," and may lead to "severe psychological or physical dependence," §893.03(2), Fla. Stat. (Supp. 1996), whereas Vicodin has a less potential for abuse or dependence and has currently accepted medical uses. §893.03(3) Fla. Stat. (Supp. 1996). Or how about cannabis, a schedule I drug with *no* accepted medical use and a high potential for abuse? It takes 50 pounds to reach a trafficking weight, again resulting in a guidelines sentence for possession up to 9,999 pounds. §893.135(1)(a)1 & 2, Fla. Stat. (Supp. 1996). 10,000 pounds or more will get the drug trafficker a 15 year mandatory sentence, again 10 years less than the penalty petitioner received. §893.135(1)(a)3, Fla. Stat. (Supp. 1996). If this construction is not absurd, then nothing will ever meet the test. The construction reached by the Holland court, by comparison, would require a person be in possession of about 500 Vicodin to qualify as a drug trafficker, a result far

more in line with the quantities required for Schedule I and II controlled substances.

Another absurd result dictated by both the Baxley and Hayes courts' cross-scheduling: This same statute, §893.135(1)(c)1, includes a prohibition against possession or sale of more than 4 grams of opium or 4 grams or more of a mixture containing opium "as described" in Schedule I or II. Like hydrocodone, opium is dual scheduled, appearing first in a variety of forms in Schedule II (a)(1)a-f. Opium also appears in Schedule V in compounds, mixtures, or preparations of not more than 100 milligrams of opium per 100 milliliters or per 100 grams. §893.03(5)(a)5, Fla. Stat. (Supp. 1966). Parepectolin is a liquid sold for controlling diarrhea which does not require a prescription to obtain from a pharmacist. It contains a quarter grain (15 milligrams) of opium combined with paregoric, pectin, and kaolin. Physician's Desk Reference at 1777. Reaching the 4 gram trafficking limit for opium mixtures then would be as simple as possession of a few teaspoons of parepectolin.

The statute as written does not require such an expansive approach. In short, based on reading of the statute as a whole it is an absurd result to conclude that the legislature intended to punish trafficking in Schedule III hydrocodone, which is 98 3/4% or 99% noncontrolled substances, substantially more severely than trafficking in either a Schedule I or II substance.

This Court should therefore adopt the reasoning in Holland and quash the decision in this case.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse the judgment and sentence of the district court and allow the trial court's dismissal to stand.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 260509
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

ALLEN J. DeWEESE
Assistant Public Defender
Florida Bar No. 237000
Attorney for Christopher L. Bowen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Marrett W. Hanna, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 17th day of September, 1999.

Attorney for Christopher L. Bowen