IN THE SUPREME COURT OF FLORIDA,

CASE NO.: 95,507

CHRISTOPHER L. BOWEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellee certifies that the following persons or entities may have an interest in the outcome of this case:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the Appellee before the Fourth District Court of Appeal. Respondent was the prosecutor in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida and Appellant on appeal to the District Court.

In this brief, Petitioner will be referred to as "Petitioner." Respondent will be identified as "state."

The following symbols will be used:

A = Appendix

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

The state accepts the Petitioner's Statement of the Case and Facts for purposes of this appeal.

SUMMARY OF ARGUMENT

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

Moreover, this Court should adopt State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998) and reject State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) as relied upon by Petitioner. Holland interpreted the earlier 1993 trafficking statute which did not list hydrocodone expressly. The 1995 amendment to the statute, under which Petitioner was charged, expressly included hydrocodone. As a result, 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 interpreted the trafficking statute and Schedules in a way that mandates an absurd result.

Finally, in actual practice, the only forms of hydrocodone available on the street are pills or liquids containing no more than 15 milligrams of hydrocodone per dosage unit. Thus, if Holland is followed, the state will effectively be prohibited from ever prosecuting anyone for trafficking in hydrocodone.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CONSTRUED SECTIONS 893.03(3) AND 893.135, FLORIDA STATUTES PROPERLY IN CONCLUDING THAT PETITIONER COULD BE PROSECUTED UNDER THE DRUG TRAFFICKING STATUTES BASED UPON POSSESSION OR SALE OF LEGALLY MANUFACTURED HYDROCODONE TABLETS DESCRIBED IN SECTION 893.03(3)(c)(4), FLORIDA STATUTES. (restated).

Petitioner asks this Court to determine whether the sale of Vicodin tablets with an aggregate weight of four (4) or more grams constitutes trafficking in hydrocodone and seeks reversal of the Fourth District Court of Appeal's ("Fourth District") decision in State v. Bowen, 736 So. 2d 1283 (Fla. 4th DCA 1999). (IB 5 and Appendix). The State submits that the Fourth District was correct and that such a sale does in fact constitute trafficking in hydrocodone, which is punishable as a first degree felony.

Petitioner was charged by Amended Information with trafficking in over 14 grams of hydrocodone, in violation of section 893.135(1)(c)1, Florida Statutes (1997). (R 15). Based on State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), the trial court dismissed the charge finding that each Vicodin tablet contained only 7.5 milligrams of hydrocodone, and therefore, was a Schedule III drug. (R 30). The Fourth District determined that a defendant may be charged with trafficking under section 893.135(1)(c)1 where the amount of hydrocodone in each tablet is approximately 10 milligrams, because it is the **aggregate weight** of all the tablets, not the per dosage unit, which determines the weight for

prosecution under section 893.135(1)(c). In determining it was the aggregate weight of the hydrocodone pills which controls, the Fourth District relied upon State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998) and State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So.2d 737 (Fla. 1997). Additionally, reliance was placed upon those courts's reading of the legislative history of section 893.135 (1)(c) along with the United States Supreme Court's interpretation of the federal law upon which section 893.135(1)(c) is premised. Conflict with State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998) was certified. The Fourth District's reasoning in Hayes and in the instant case should be adopted by this Court based upon the following analysis.

Section 893.135(1)(c)1 provides 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."

(emphasis supplied). This statute's plain reading establishes that it is pertinent in three situations: (1) where an individual has four or more grams of any morphine, opium, oxycodone, hydrocodone, hydromorphone; (2) where a person has four or more grams of any salt, derivative, isomer, or salt of an isomer thereof, as

described in Schedule I and Schedule II; or (3) where an individual has **four or more grams of any mixture containing any such substance**.

"Any such substance" refers to those compounds expressly listed in section 893.135(1)(c), 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), Florida Statutes (1997). As a result, section 893.135(1)(c) applies to **any mixture** containing morphine, opium, oxycodone, hydrocodone, or hydromorphone, or **any mixture** containing the substances listed in Sections 893.03(1)(b) and (2)(a) **in addition to** criminalizing possession of four or more grams of morphine, opium, oxycodone, hydrocodone, and hydromorphone. Furthermore, **"any mixture"** means **all mixtures** containing any one of the foregoing substances **regardless** of the amount of the prohibited substance contained in the mixture. Obviously, the trafficking statute applies to **any** mixture containing 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)(section 893.135(1)(b), Florida Statute (cocaine trafficking provision) is constitutional and "[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).

From the foregoing, it is a crime to possess four or more grams of any mixture containing hydrocodone. In the instant case, Petitioner was charged under the third scenario addressed by section 893.135(1)(c)1; that is, having four or more grams of a **mixture** containing hydrocodone. There was no challenge to the fact that the tablets were a hydrocodone mixture nor did Petitioner assert that the total weight of the tablets is less than four grams. Because hydrocodone is a substance listed in section 893.135(1)(c) the tablets fall within the "any mixture" portion of the trafficking statute. Without question, Petitioner was properly charged with trafficking.

It is a fundamental principle of statutory construction that where the statutory language is clear, unambiguous, and conveys a definite meaning, that language controls, and there is no need for judicial interpretation. State v. Dugan, 685 So. 2d 1210 (Fla. 1996)(when interpreting statutes, courts must derive the legislative intent from the plain meaning of provision; if the language of the statute is clear and unambiguous, legislative intent must be determined from words used without resorting to the rules of statutory construction or speculating what the legislature intended). The only connotation that can be garnered from section 893.135(1)(c)1's language is that it is unlawful to possess four 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 using the broad term "any" in describing the mixtures which fall under the provision, the legislature was casting a wide-net and intended to cover **"all mixtures"** containing hydrocodone, including prescription drugs like Vicodin.

Support for the state's "plain reading" of this section is found in the provision's 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 legislative amendment established the clear intent to create the offense of trafficking in four 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 clear purpose was to target also the growing and overwhelming **trafficking in prescription drugs**.

Claiming the Vicodin tablets involved here are only a Schedule III drug, Petitioner asserts that he should not have been charged with trafficking. This completely ignores the plain meaning of section 893.135(1)(c). And contrary to Petitioner's position, 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(1)(b) describes Schedule I drugs while section 893.03(2)(a) proscribes Schedule II drugs. Section 893.03(2)(a) provides in pertinent part:

> 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), Florida Statutes (1997) which reads:

> 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.

With respect to Petitioner's claim that Vicodin is a Schedule III drug for which he may not be charged with trafficking, he relies upon State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), and

several administrative agency rulings to support his argument. Such reliance is misplaced, however.

In Holland, the First District Court of Appeal ("First District") reasoned that if a mixture containing the identified controlled substance fell within the Schedule III provision, then the amount per dosage unit controlled, not the aggregate weight, for purposes of charging an individual with trafficking. Reliance upon Holland is misplaced because that decision interpreted a **prior** version of the trafficking statute that 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, trafficking could be charged if the defendant possessed four grams of morphine, opium, or any of the chemically related substances that are listed in section 893.03(1)(b) (Schedule I) or section 893.03(2)(a) (Schedule II). **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.

In Holland, the court was faced with a quandary because hydrocodone appears **twice**, first in Schedule II, where it was listed simply as hydrocodone, and then in Schedule III, where it is identified as "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 the defendant was charged with possessing was identified accurately by the Schedule III description, the State was prohibited from charging her with trafficking. Under Holland's analysis, the trafficking statute was inapplicable, 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." Id. at 1270. While this may have been the proper analysis under the 1993 version of the statute, it fails under the 1995 amended provision because hydrocodone is specifically listed in the present trafficking provision.

Additionally, Holland is inapplicable here 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 obvious. By adding oxycodone, hydrocodone, and hydromorphone to the body of the text, the legislature clearly intended to elevate these particular drugs to the same status as morphine and opium. The trial court must no longer consult the Schedules to determine whether a defendant charged with possessing four or more grams of any of these five narcotics is properly charged with trafficking. Additionally, because the section refers to "mixtures", it is likewise clear that, if a person possesses four or more grams containing a specified drug (here it is hydrocodone mixed with acetaminophen) that person may be charged under this provision with trafficking.

Accordingly, to find otherwise, would give no effect to the 1995 legislative amendment. When the legislature amends a statute, it is presumed it intends the amended provision to be given a different effect from the prior statute. Hall v. Oakley, 409 So. 2d 93 (Fla. 1st DCA 1982). As noted above, the legislative intent in modifying section 893.135(1)(c)1 was to broaden the statute's application. With the high potential for abuse in trafficking in prescription drugs, the legislature attempted to impose more severe

sanctions than provided under simple possession, section 893.13(1)(a)2). Consequently, this Court is bound to conclude that the effect of the new language of section 893.135(1)(c)1 (1995) was to include hydrocodone within that class of narcotics to which morphine and opium already belong. Possession of four or more grams of hydrocodone, whether in pure or mixed form, is to be considered trafficking, regardless of where this drug may appear in the Schedules.

Petitioner's argument that Schedule III drugs were not intended to constitute trafficking because they do not have the "potential for abuse" that Schedule II drugs have, offends efforts to stop drug abuse and is unreasonable both logically and legally. For example, under Petitioner's reasoning, one could traffic in a million Vicodin pills, each containing eight milligrams of hydrocodone and 800 milligrams of acetaminophen, but could not be charged with trafficking because the Vicodin pills are a Schedule III drug. That result is senseless and contrary to legislative intent.

Also, Petitioner's argument that the trafficking statute will lead to unreasonable prosecutions for possession of relatively small amounts, e.g. five or six pills or a few ounces of liquid medicine, is misleading. Obviously, one or two tablets containing a small amount of hydrocodone might have minimal potential for abuse, however, any number of tablets could have the same potential for abuse as any schedule II substance. In Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), the 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 has the discretion to determine 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 (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 can be proven beyond a reasonable doubt.

In Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998), the Fourth District agreed that a trafficking charge would be proper under section 893.135(1)(c), where the **aggregate weight** of all the tablets is four or more grams, even though the amount of hydrocodone in each **individual** tablet is less than 15 milligrams, making it a Schedule III drug under section 893.03(3). Id. at 1096 Based upon its reading of section 893.135 (1)(c), the legislative history of the provision, and the United States Supreme Court's interpretation of the federal law upon which section 893.135(1)(c) was premised, the Hayes court found it is the aggregate weight of the tablets and not the amount of hydrocodone per dosage unit which determines the weight for a section 893.135(1)(c) prosecution. In so holding, the Fourth District 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,716 So.2d 327 (Fla. 2d DCA 1998).

Relying upon Chapman v. United States, 500 U.S. 453 (1991), superseded by statute on other grounds, United States v. Turner, 59 F. 3d 481 (4th Cir. 1995), the Fourth District 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. In Chapman, 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). Chapman, 500 U.S. at 455. The law required "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).'" Id. The United States Supreme Court in Chapman 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. Id. It was reasoned that the interpretation was compatible with Congress's "'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." Id. at 461 (citing H.R.Rep. No. 99-845, pt. 1, pp. 11-12, 17 (1986)).

Noting that neither the statute, nor the sentencing guidelines defined either "mixture" or "substance", the Chapman court determined the meaning of these words by referring to the scheme of

the drug laws, and 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).

Id. Applying those definitions to the blotter paper containing LSD, the United States Supreme Court decided that because 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. Id. Although the two could be separated, they could also be ingested together like cocaine or heroin mixed with cutting agents. Id. Hence, it was logical to include the weight of the paper in calculating the total weight of the controlled substance. Id. Consistent with this position, the Court held that the weights of containers or packaging materials, which cannot mix with the drug and are not consumed with the drug, could not be included for sentencing purposes. Id.

As the Fourth District noted in Hayes, the Chapman analysis applies to the Vicodin tablets at issue here. "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." Hayes, 720 So. 2d at 1096-1097 (citations omitted). Thus, the Vicodin tablets involved

here fall within the United States Supreme Court's definition of "mixture".

Although there are no Florida cases specifically dealing with "mixtures" containing hydrocodone, there are cocaine prosecutions which support the state's contention that Vicodin is a "mixture". For example, in Ankiel v. State, 479 So. 2d 263 (5th DCA 1985), the Fifth District Court of Appeal conclude that the State could charge a person with possession of "a mixture containing cocaine" instead of charging him with possession of the cocaine contained in it. In State v. Garcia, 596 So. 2d 1237, 1238 (3rd DCA 1992), the appellate court found that the intent of the statute was to classify the defendant based upon the total amount of the substance containing the cocaine, not by the quantity of pure cocaine itself. In so concluding, the court noted that the larger amount of diluted mixture could be disseminated to a greater number of people. This in itself, created a greater potential for harm.

This Court, in Yu, 400 So. 2d at 765, found that the legislature could have reasonably concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine. Thus, the drug in its mixed form could pose greater potential for harm to the public. It was concluded that the statute was not arbitrary, unreasonable, or a violation of either due process or equal protection of the law. Clearly, Florida law provides that a person 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. This conclusion, in conjunction with the reading of the trafficking provision, does not produce an absurd result as posited by Petitioner. (IB 15-16). It is not unusually harsh or unreasonable. It is well within the legislature's authority to identify those drugs it believes particularly dangerous, no matter in what form they may be distributed. It is the total weight of the product, not just the dangerous chemical, that is the factor which determines whether the person may be charged with possession or trafficking.

Moreover, Petitioner's assertion that the construction the State suggests is unusually harsh, lacks merit. (IB 15). Section 775.021(1), Florida Statutes (1997) and the "doctrine of lenity" requires that when a criminal statute is "susceptible of differing construction, it shall be construed most favorably to the accused." Because section 893.135(1)(c)1 **is not** susceptible of differing interpretations, the doctrine is not applicable here. The trafficking statute is clear and unambiguous. And it mandates that Petitioner be charged with trafficking 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. A 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 a finding that Petitioner was charged with trafficking properly.

Furthermore, even assuming that this Court finds it necessary to resort to the drug schedules, the interpretation put forward in Holland is incorrect and unduly restrictive. Central to this issue has been the question of how to interpret the Schedules. 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, a trafficking charge could not stand. In the Holland case, the First District found that because the defendant was in possession of pills containing a specific dosage amount, which was consistent with the description found in Schedule III, the state was precluded from charging a defendant with trafficking because of the language of Schedules I and II, which suggested that if the drug appears in any other Schedule, it was excluded from classification as either a Schedule I or II narcotic. The pertinent language provides, "Unless specifically excepted or unless listed in another schedule..., the following substances are controlled in Schedule X." The state disagrees with the interpretation of this language given by the court in Holland.

The difficulty with this statutory interpretation is that all

of the schedules contain such language, which makes it extremely difficult to decipher. Under the First District's interpretation, if a defendant 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. It is this interpretation which causes an absurd result. Because 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 illogiocal result mandated by the First District's decision is that hydrocodone is excluded from both Schedules in which it appears. Surely, the legislature did not intend such a result, nor should this Court permit such an unreasonable interpretation to stand. See State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). ("Construction of a statute which lead to an absurd or unreasonable result or would render the statute purposeless should be avoided").

The Fifth District Court of Appeal, in Baxley, held that only a small amount of hydrocodone is a schedule III substance, and that if the amount involved four or more grams of a mixture containing hydrocodone, it becomes a schedule II substance for which prosecution for trafficking under Section 893.135 is proper. Baxley, 684 So. 2d at 832-33. The court, in Baxley, recognized that hydrocodone is listed in Schedules II and III, and that both

Schedules provide that a substance is included in that section "unless listed in another schedule". The court reasoned:

> In fact, because hydrocodone appears in both schedules, our interpretation of the statute is given more credence. 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*. This gives both schedules meaning. See Lareau v. State, 573 So. 2d 813 (Fla. 1991) (when two conflicting or ambiguous provisions of the same legislative act were intended to serve the same purpose, they must be read in *pari materia* to ascertain the overall legislative intent and to harmonize the provisions so that the fullest effect can be given to each); Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100 (Fla. 1st DCA 1996) (a law should be construed in harmony with any other statute having the same purpose; where statutes operate on the same subject without plain inconsistency or repugnancy, if possible courts should construe them so as to preserve the force of both without destroying their evident intent).

Id. at 832-33. (italics in original). Baxley follows the plain meaning of the statutes and was decided after the 1995 amendments to section 893.135(1)(c)1 became effective.

The effect of Holland, however, is to exclude from the trafficking statute any hydrocodone preparation that fits the description found in Schedule III, in spite of the fact that hydrocodone also appears in Schedule II. The state maintains that the legislative intent behind the language of both Schedules was to grant prosecutors the authority to select between two different offenses, trafficking or possession. But Holland strips the State of its discretionary authority and, in effect, prohibits the State from being able to prosecute anyone for trafficking in hydrocodone.

Hydrocodone appears on the market only in pill or liquid form, and always in a mixture which, admittedly, is described by the language found in Schedule III. If this Court agrees that the Holland interpretation applies to the 1995 trafficking statute, the consequence 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. By its plain language, the trafficking statute applies to four or more grams, 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. Yu, 400 So. 2d at 765 (cocaine mixtures pose a greater threat than in pure form with a greater potential of harm to the public). However, because the hydrocodone Petitioner possessed was a mixture in pill form, with each pill (or "dosage unit") containing less than fifteen milligrams, Holland has declared that they may not be charged with trafficking. This interpretation places undue emphasis on form over substance and is indeed absurd.

Additionally, Petitioner's argument that it takes much less hydrocodone than cocaine or cannibis to subject a person to trafficking is not well taken. (IB 17). Clearly, it is the legislature's perogative to identify those drugs, along with the weights and their method of distribution, it wishes to declare illegal. Similarly, it is the legislature that outlines the penalties to be imposed for violation of the criminal statutes. Hence, if the legislature chose to punish a person for trafficking

in hydrocodone more severely than one trafficking in another substance, this Court should give that legislative decision effect.

The State urges that lesser concentrations of hydrocodone, such as described in Schedule III, are not exempt from prosecution under the "any mixture" portion of section 893.135(1)(c)1 simply because Schedule III contains an accurate description of the hydrocodone in pill form. The State should have the authority to determine which charge is appropriate on a case-by-case basis. Holland strips the State of its inherent authority.

Conversely, 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). Hence, while hydrocodone in the dosage strength possessed by Petitioner might well be described accurately in Schedule III, nevertheless, because the pills in question were a mixture (hydrocodone and acetaminophen), this mixture may be considered as being governed by the trafficking statute. This conclusion is based on the language found in that statute, which prohibits and defines trafficking as the possession of four or more grams of any mixture containing hydrocodone.

It is clear that the argument put forward by Petitioner is in direct conflict with 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 reversing the dismissal of the trafficking charge 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 provision that it applies to **any** mixture containing hydrocodone, and therefore, there is no need to look behind the plain language to determine legislative intent.

Based upon the forgoing, it is clear that it is the aggregate weight of the mixture containing an illegal substance which controls. The legislature made its intentions known that hydrocodone in either pure or mixed form was subject to the trafficking statute when it amended section 893.135(1)(c)1 in 1995. This Court should reject the analysis of Holland, adopt the reasoning set forth in Hayes and the instant case, while finding that hydrocodone in Vicodin tablet form subjects a person to charges of trafficking, based upon the aggregate weight of the proscribed drug.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Respondent respectfully requests that this Honorable Court AFFIRM the decison of the Fourth District Court of Appeal.

Respectfully submitted,

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