

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC00-1723

DAVID KLAYMAN,

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF

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PREFACE

The Respondent David Klayman will be referred to as "Mr. KLAYMAN" in this brief.

The Petitioner, the State of Florida, will be referred to as "the State" in this brief.

Citations to the record on appeal before this Court will be referred to as "R." followed by the page number where the information may be found.

Citations to the State's Initial Brief will be referred to as "IB." followed by the page number where the information may be found.

CERTIFICATION OF TYPE STYLE

Counsel for the Mr. KLAYMAN certifies this Answer Brief is prepared with 12 point Courier New type, a font that has 10 characters per inch.

STATEMENT OF CASE AND FACTS

Mr. KLAYMAN accepts the State's statement of case and facts.

SUMMARY OF ARGUMENT

Mr. KLAYMAN agrees with the State that the three-prong test stated in *Witt v. State*, 387 So. 2d 922 (Fla.), cert. denied sub nom. *Witt v. Florida*, 449 U.S. 1067, 101 S. Ct. 1067, 66 L. Ed. 2d 612 (1980) controls the issue here.

Application of the *Witt* test results in the retroactive application of the *Hayes v. State*, 750 So. 2d 1 (Fla. 1999) to prior trafficking convictions based on the prescription tablets Lorcet having less than 15 milligrams of hydrocodone per dosage unit.

Contrary to the State's contentions, the *Hayes v. State* implicates constitutional concerns because it abrogated the trafficking offense and continued imprisonment for a non-existent crime cannot withstand a due process analysis. Uniformity and fairness outweigh decisional finality because only a limited window containing convictions from 1995 to 1999 could be affected and review of such cases will not necessarily require evidentiary hearings. In accord with the Fourth District's decision in *Klayman v. State*, 765 So. 2d 784 (Fla. 4th DCA 2000), uniformity requires retroactive application of *Hayes v. State* to eliminate sentencing discrepancies between the State's five district courts.

ARGUMENT

At issue is whether Mr. KLAYMAN can be imprisoned under a sentence for a non-existent offense. The Due Process Clause of the Florida and federal constitutions clearly bar this. Art. I, §9, *Fla. Const.*; Amend. XIV, *U.S. Const.*

Mr. KLAYMAN agrees with the State that the three-prong test stated in *Witt v. State*, 387 So. 2d 922 (Fla.), cert. denied sub nom. *Witt v. Florida*, 449 U.S. 1067, 101 S. Ct. 1067, 66 L. Ed. 2d 612 (1980) controls whether this Court's decision in *Hayes v. State*, 750 So. 2d 1 (Fla. 1999) should be applied retroactively to Mr. KLAYMAN's conviction and sentence. (IB at 6).

Mr. KLAYMAN also agrees with the State's reliance on this Court's decision in *State v. Callaway*, 658 So. 2d 983 (Fla. 1995), modified on other grounds, *Dixon v. State*, 730 So. 2d 265 (Fla. 1999), as the best illustration of how the three-part *Witt* analysis is applied. (IB at 6-9).

Applying the *Witt* analysis, Mr. KLAYMAN agrees with the State that *Hayes v. State* is a decision of this Court. (IB at 11).

The State is wrong, however, when it claims the *Hayes v. State* decision does not implicate constitutional matters. (IB at 11). This Court in *Hayes v. State* abrogated the criminal offense of trafficking in the

prescription drug Lorcet having less than 15 milligrams of hydrocodone per dosage unit. Mr. KLAYMAN was convicted and sentenced in part for exactly this. (R.Ê3). Conviction and continued imprisonment of Mr. KLAYMAN for a non-existent crime clearly cannot withstand a due process analysis.Ó *State v. Callaway*, 658 So. 2d 983, 986 (Fla. 1995). Further, *Hayes v. State* was this CourtÕs first decision on the 1995 law. The decision was therefore not an evolutionary or incremental refinement.

Incredibly, the State asserts that conviction of the first degree felony does not impact Mr. KLAYMANÕs liberty interest. (IB at 12). The relevant Criminal Punishment Code for trafficking of hydrocodone was a Level 7 offense scoring 56 points as a primary offense. ¶¶ 921.0012(3), 921.004(1)(a), *Fla. Stat.* (1997). Fifty-six months imprisonment impacts liberty interests with a vengeance.¹

As to the third *Witt* factor, this CourtÕs decision in *Hayes v. State* mandates that uniformity and fairness must prevail over decisional finality contrary to the StateÕs

¹ The record on appeal does not contain either the judgment and sentence or the sentencing scoresheet. It is impossible, therefore, for the State to quantify on this record the actual impact to Mr. KLAYMANÕs sentence from the conviction for trafficking in hydrocodone.

assertion. (IB at 13). Uniformity is paramount in this case. There can remain no principled reason why Kathryn Hayes did not commit a trafficking offense as a matter of law, yet Mr. KLAYMAN is in a Florida prison for the same action. The window in which convictions for trafficking in hydrocodone under 15 milligrams is limited, that is, from the original 1995 enactment of the law to the 1999 *Hayes* decision. The impact to decisional finality therefore creates the same result as the limited windows created by the abrogation of criminal convictions in *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) or *State v. Thompson*, 750 So. 2d 643 (Fla. 1999).

The State's threat that each hydrocodone conviction will require an evidentiary hearing to determine the content, weight and purity of the hydrocodone is spurious. (IB at 15-16). The *Hayes* decision did not require an evidentiary hearing; the holding rests on the percentage of hydrocodone in a prescription Lorcet tablet. *Hayes v. State*, 750 So. 2d 1, 1 (Fla. 1999). The hydrocodone conviction in this case likewise rests on a prosecution involving Lorcet. (R.Ê3). The State provides no quantifiable data on the number, if any, of convictions involving hydrocodone that would require any evidentiary hearing whatsoever.

The paramount value of uniformity between Florida district courts also agrees with the Fourth District's holding in this case that sentencing discrepancies could occur between the five district courts. *Klayman v. State*, 765 So. 2d 784 (Fla. 4th DCA 2000). See also, *Hayes v. State*, 750 So. 2d 1, 2 (Fla. 1999) (stating conflict of decisions between First and Second, and, Fourth and Fifth District Courts of Appeal on issue). Constitutional due process under both the Florida and federal constitutions requires that criminal statutes apprise ordinary persons of common intelligence what is prohibited. That requirement is not met if jurisdictional chalk lines between district courts alone determine whether a first degree felony has or has not been committed.

For the above reasons, Mr. KLAYMAN requests this Court affirmatively answer the certified question that the *Hayes v. State* decision is retroactive.

CONCLUSION

Mr. KLAYMAN requests this Court affirmatively answer the certified question of the Fourth District Court of Appeals that the *Hayes v. State* decision is retroactive, and remand this appeal for further proceedings which include resentencing for Mr. KLAYMAN.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of Respondent's Answer Brief was sent to CELIA TERENCE, ESQ., Bureau Chief, West Palm Beach, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL, 33401-2299; AUGUST A. BONAVIDA, ESQ., Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL, 33401-2299, by U.S. Mail this 27th day of November 2000.

R. MITCHELL PRUGH, ESQ.