IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1723

STATE OF FLORIDA,

Petitioner,

vs.

DAVID KLAYMAN,

Respondent.

****

PETITIONER'S INITIAL BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

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CERTIFICATE OF INTERESTED PERSONS

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

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CERTIFICATE OF TYPE FACE

In accordance with the Florida Supreme Court Administrative Order issued July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

_____

AUGUST A. BONAVITA

TABLE OF AUTHORITIES

FEDERAL STATUTES

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PRELIMINARY STATEMENT

The Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal (Att. A).

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On October 7, 1999, this Court issued its decision in Hayes v. State, 750 so.2d 1 (Fla. 1999)(holding that Lorcet tablets which contain less than fifteen milligrams of hydrocodone per dosage unit are schedule III substances and, as such, possession of same do not violate Section 893.135(1)(c)1, Fla. Stat. (1999)("Statute"))("Hayes"). On April 14, 1999 while Hayes was pending in this Court, Respondent pled guilty to trafficking in hydrocodone (between four and fourteen grams)(Count I), and possession, sale, and delivery of alprazolam (Count II) and was convicted and sentenced to serve 42.7 months in Florida State Prison followed by thirty-six months probation (R). According to his sworn motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 ("Motion"), Respondent did not appeal either the judgment or sentence to the Fourth District Court of Appeals (R).

On November 2, 1999, Respondent signed his Motion wherein he claimed that, in light of Hayes, he was wrongfully convicted of violating the Statute (R). Petitioner submitted its response to the Motion arguing that Hayes should not be retroactively applied to his conviction (R). The trial court denied the Motion by an order dated February 15, 2000 and Respondent appealed to the lower court (R). On May 22, 2000, that court issued an order directing Petitioner show cause why Respondent's "appeal should not be remanded to the trial court either for an evidentiary hearing or for the attachment to the order of denial portions of

the record which conclusively show that [Respondent] is entitled to no relief if any records exist at all" (R).

Petitioner submitted its response to this order on June 12, 2000 (R). The lower court reversed and remanded the trial court's order certifying the following question as being one of great public importance: "Should the supreme court's decision in [Hayes] be retroactively applied?" Klayman v. State, 25 Fla. L. Weekly D1767 (4th DCA July 26, 2000)(Att. B). This appeal follows.

SUMMARY OF THE ARGUMENT

It is respectfully submitted that this case was incorrectly decided and that Respondent's conviction and sentence are proper and that this Court should answer the certified question in the negative.

ARGUMENT

SHOULD THIS COURT'S DECISION IN HAYES BE RETROACTIVELY APPLIED?

Petitioner submits that this Court should exercise its jurisdiction to resolve this issue which has been certified by the lower court to be one of great public importance. Art V, § 3(b)(4), Fla. Const. Petitioner submits that the lower court erred in holding that Hayes applies retroactively to Respondent's conviction and sentence.

In Hayes, this Court examined whether the Legislature intended the "anomaly" that someone, like Hayes, who possessed a "minimal number of prescriptions tablets containing hydrocodone" would receive the same sentence as someone who "illegally possesses twenty-eight grams of pure heroin." Id. at 3. In so doing, this Court opined that it "must examine the actual text of" Sections 893.135(1)(c)1, 893.03(2)(a)1.j, and 893.03(3)(c)4, Fla. Stat. (Supp. 1996). Hayes, 750 So.2d at 3.

In reaching the conclusion that possession of the Lorcet tablets at issue could not be a violation of the Statute, this Court compared the provisions of the above-quoted sections to the language contained in the Statute and concluded that, because the quantity of hydrocodone contained in each Lorcet tablet fell within the class of Schedule III substances, Hayes could not be guilty of violating the Statute. This is because the Statute criminalizes trafficking in Schedule I and II substances only.

Hayes, 750 So.2d at 5.

In State v. Callaway, 658 So.2d 983 (Fla. 1995), this Court held that its decision in Hale[1] should be given retroactive effect. There, like Respondent at bar, Callaway sought postconviction relief claiming that Hale should be retroactively applied to his conviction.[2] Callaway, 658 So.2d at 984. Regarding rule 3.850 motions, Callaway emphasized that:

> Witt[3] is 'the controlling case by which to determine whether a change in decisional law should be applied retroactively.' [State v. Glenn, 558 So.2d 4, 7 (Fla. 1990)]. We reaffirm our decisions in [McCuiston v. State, 534 So.2d 1144 (Fla. 1988)] and Glenn and again recognize that Witt provides the proper standard for determining whether a change in the law should be retroactively applied to provide postconviction relief under rule 3.850.

Callaway, 658 So.2d at 986.

Callaway then applied the three-part Witt test:

> To determine whether Hale should be retroactively applied, the fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases. Witt, 387 So.2d at 929. Under Witt, a new rule of law may not be retroactively applied unless it satisfies three

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[1]Hale v. State, 630 So.2d 521 (Fla. 1993), cert. den., 513 U.S. 909, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994).

[2]The trial court treated his rule 3.800(a) motion as one filed under rule 3.850 because the claim necessarily presented factual issues which needed to be resolved in a hearing. Id.

[3]Witt v. State, 387 So.2d 922 (Fla. 1980), cert. den., 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980)..

> requirements. The new rule must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. Witt, 387 So.2d at 929, 930.

Callaway, 658 So.2d 983 at 986.

As to the second prong of the Witt test, Callaway found that:

> Hale also satisfies the requirement that it be constitutional in nature. As the district court in the instant case recognized, in the absence of an empowering statute, the imposition of consecutive habitual felony offender sentences for offenses arising out of a single criminal episode could not withstand a due process analysis. Callaway, 642 So.2d at 640. Furthermore, the decision in Hale significantly impacts a defendant's constitutional liberty interests.

Id. at 986.

Finally, under the third prong, Callaway explained that:

> ... [D]ecisions which have fundamental significance generally fall into two broad categories: (a) those decisions such as Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), 'which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties;' and (b) decisions such as Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which 'are of sufficient magnitude to necessitate retroactive application' under the threefold test of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). Witt, 387 So.2d at 929...
>
> Under Stovall, consideration must be given to (i) the purpose to be served by the new

rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice. 388 U.S. 293, 87 S.Ct. 1967...

Stovall also requires consideration of the extent of reliance on the old rule. We agree with the district court of appeal that although many courts may have relied upon the belief that habitual felony offender sentences could be imposed consecutively, that reliance could have existed for only a short period of time. Callaway, 642 So.2d at 641. As the district court noted, prior to 1988, when section 775.084, Florida Statutes (1987), was amended, habitual felony offender sentences were subject to the limitations of the sentencing guidelines. Id. at 641 n. 3 (citing to Whitehead v. State, 498 So.2d 863 (Fla.1986) for support). Thus, any reliance on the belief that habitual offender sentences could be imposed consecutively for multiple offenses committed during a single criminal episode could only have existed during the six-year period between the 1988 amendment of section 775.084 and this Court's 1994 decision in Hale.

The third factor for consideration under Stovall addresses the impact that retroactive application of the rule will have on the administration of justice. We agree with the district court that retroactive application of the rule announced in Hale will have no serious adverse effect upon the administration of justice. Callaway, 642 So.2d at 641. **Courts will not be required to overturn convictions or delve extensively into stale records to apply the rule**. The administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of section 775.084 and the decision in Hale are required to serve sentences two or more times as long as similarly situated defendants who happened to be sentenced after Hale.

Callaway, 658 So.2d at 986-87(e.s.).

In Glenn, this Court held that its previous decision in Carawan v. State, 515 So.2d 161 (Fla. 1987) did not apply retroactively through a motion for postconviction relief. Glenn, 558 So.2d at 9. The Glenn Court applied the Witt test and, in so doing, carefully weighed the competing interests of "the importance of decisional finality" against "ensuring fairness and uniformity in individual cases. Id. Regarding the former, this Court stated:

> 'The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole.'
>
> [Witt] (footnote omitted). Therefore, the doctrine of finality should be abridged only when a more compelling objective, such as ensuring fairness and uniformity in individual adjudications, is present. In practice, because of the strong concern for decisional finality, this Court rarely finds a change in decisional law to require retroactive application. *See* State v. Washington, 453 So.2d 389 (Fla.1984). *Accord* McCuiston v. State, 534 So.2d 1144 (Fla.1988)

> (declined to retroactively apply Whitehead v. State, 498 So.2d 863 (Fla.1986), which held that finding a defendant to be an habitual offender is not a legally sufficient reason for departure from sentencing guidelines); Jones v. State, 528 So.2d 1171 (Fla.1988) (declined to retroactively apply Haliburton v. State, 514 So.2d 1088 (Fla.1987), which held that police failure to comply with attorney's telephonic request not to question a defendant further until that attorney could arrive was a violation of due process); State v. Safford, 484 So.2d 1244 (Fla.1986) (declined to retroactively apply State v. Neil, 457 So.2d 481 (Fla.1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising peremptory challenges); State v. Statewright, 300 So.2d 674 (Fla.1974) (declined to retroactively apply Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which established that police must warn arrested persons of their right to remain silent before questioning those persons).

Glenn, 558 So.2d at 7.

The Court concluded that the Carawan decision constituted "an evolutionary refinement of the law which should not have retroactive application." Id. at 8. Further, the Glenn Court found that:

> Granting collateral relief to Glenn and others similarly situated would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better spent in handling its current caseload than in reviewing cases which were final and proper

> under the law as it existed at the time of trial and any direct appeal.

Id. at 8.

Also, Glenn concluded that applying the Carawan decision in Glenn's case would not "cure any individual injustice or unfairness to" him. Id. Finally, the Court found that subsequent Legislative amendments effectively overruled Carawan and thus Glenn in effect was asking this Court to retroactively apply a decision interpreting legislative intent in enacting a statute that the Legislature has subsequently indicated is incorrect. Glenn, 558 So.2d at 9.

In the case at bar, Petitioner submits that, like McCuiston, Jones, Safford, and Statewright, Hayes should not be retroactively applied to Respondent's postconviction relief motion. First, it is undisputed that Hayes was decided by this Court. Second, Petitioner submits that the Hayes decision is merely an "evolutionary refinement in the law" as opposed to being "constitutional in nature." Witt. In 1995, the Legislature amended the Statute to include hydrocodone. *See*, Ch. 95-415, § 5, Laws of Florida. Throughout the Hayes opinion, this Court analyzed in great detail various provisions of the Statute and compared them to those contained in other parts of Chapter 893, Fla. Stat. (1996 Supp.). Hayes. Yet, nowhere in Hayes does the Court examine the issue presented there through a "constitutional lense." State v. Stevens, 714 So.2d 347, 349 (Harding, J.,

concurring); *Cf.*, State v. Iacovone, 660 So.2d 1371, 1373 n.1 (in deciding retroactivity, the Court alluded to the fact that the decision sought to be applied retroactively violated due process); Callaway.

Also unlike Callaway, Hayes does not "significantly impact [Respondent's] constitutional liberty interest." Callaway, 658 So.2d at 986. This is true since Respondent pled guilty to trafficking in hydrocodone in an amount over four but less than fourteen grams (R). The prescribed penalty for a someone who is convicted for trafficking in this amount is that "such person shall be sentenced pursuant to the Criminal Punishment Code and pay a fine of $50,000." Section 893.135(1)(c)1.a, Fla. Stat. (1998 Supp.).[4] Thus, although a first degree felony, Respondent received a guidelines sentence with the added provision that he pay the mandatory fine. Thus, applying Hayes retroactively will not "cure any individual injustice or unfairness to" Respondent or others similarly situated. Glenn.

In applying the third prong in Witt, Petitioner submits that Hayes does not "have fundamental significance." Id. First, Hayes is not a decision which can be fairly characterized as being one

[4]In 1999, the Legislature amended this provision to impose a minimum mandatory sentence of three (3) years. Ch. 99-188, § 9, Laws of Florida as codified in Section 893.135(1)(c)1.a., Fla. Stat. (1999). However, this does not affect Respondent since the date of his offense and conviction are prior to the effective date of this amendment.

that "place[es] beyond the authority of the state the power to regulate certain conduct or impose certain penalties." Witt; Callaway. Indeed, it can hardly be disputed that the State certainly possesses the power to regulate possession and control of certain dangerous controlled substances. This includes defining what substances are dangerous as well as establishing under what circumstances under which they may legally be possessed.

Further, Hayes is not "'of sufficient magnitude to necessitate retroactive application' under the threefold test of [Stovall] and [Linkletter]." Witt. First, the purpose underlying Hayes was purely one of statutory interpretation, namely, "whether the drug trafficking statute applies to possession of hydrocodone in amounts under fifteen milligrams per dosage unit." Hayes. This stands in stark contrast to Hale where the purpose underlying the rule in that case was:

> to ensure that the sentences of criminal defendants convicted of multiple offenses arising out of a single criminal episode are not doubly enhanced by first lengthening the sentences under the authority of the habitual felony offender statute and then by imposing the lengthened sentences consecutively. Hale, 630 So.2d at 524.

Callaway, 658 So.2d at 987.

From this it can be reasonably argued that Hale sought to remedy a situation that the Legislature never intended, i.e. doubling an enhanced sentence, whereas in Hayes, the purpose was

purely one of statutory interpretation. Thus in Hayes, this Court was "not making a major change in the law, but rather attempting to harmonize and refine the law as it is applied in determining the proper method of construing criminal statutes in light of the constitutional prohibitions against double jeopardy." Glenn, 558 So.2d at 8.

"Stovall also requires consideration of the extent of reliance on the old rule." Callaway, 658 So.2d at 986. While Petitioner readily agrees that the amendment to the Statute to include hydrocodone is relatively recent, it is submitted that the courts and the State have nonetheless relied on that amendment. That the Legislature made it abundantly clear that it intended those persons, such as Hayes, to be prosecuted for trafficking in hydrocodone is without question. Indeed, the preamble to the legislation which amended the Statute clearly states that it is "An act relating to...amending s. 893.135, F.S.; prescribing first-degree-felony penalties for offenses involving trafficking in...hydrocodone... and derivatives of [it]...." Ch. 95-415, Preamble, Laws of Florida. Further, the lower court in Hayes found this to be true:

> 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. (See Staff of Fla. H.R. Comm. on Health Care, CS/HB 1385 (1995) Staff Analysis 2 (Final May 12, 1995)(on file with comm.)) Florida's trafficking statute was then amended to parallel the federal controlled substances

> law, 21 C.F.R. § 1308.22, with some exceptions. (Id., p. 1); see also Staff of Fla. S. Comm. on Com., CS for SB 272 (1993) Staff Analysis 1 (Feb. 16, 1993)(on file with comm.) The obvious intent of the legislators, therefore, was to broaden the scope of the trafficking statute to allow the state to prosecute persons, such as Hayes, who previously had escaped conviction and punishment.

State v. Hayes, 720 So.2d 1095, 1096 (Fla. 4th DCA 1998).

Based on this, Petitioner submits that the courts as well as the State relied greatly on the Statute as amended in that it unambiguously gave the green light to prosecute offenders for trafficking in hydrocodone in the prescribed amount.

Finally, the third factor in Stovall "addresses the impact that retroactive application...will have on the administration of justice." Callaway, 658 So.2d at 986-87. Petitioner submits that a retroactive application of Hayes will have a substantial impact on the administration of justice. Glenn. Indeed, unlike Callaway, trial courts, including the one at bar, will "be required to overturn convictions or delve extensively into stale records to apply the rule." Id. at 986-87; Glenn. This is true since each case will require a plenary evidentiary hearing wherein the controlled substance will have to be analyzed for its content, weight and purity. In the event the evidence were lost or destroyed, would the defendant then receive the benefit of the doubt thus resulting in that person's conviction be vacated? Clearly, this is not a case, such as Hale, where the trial court

could simply resentence someone without having to make new factual findings. Therefore, Petitioner submits that this factor alone tips the scale in favor of "decisional finality." Glenn.

Finally, like Glenn, the Legislature has effectively sounded the death knell for Hayes by amending Section 893.03, Fla. Stat. (1999) to eliminate hydrocodone as being a Schedule III substance. Ch. 00-320, § 2, Laws of Florida.[5] It can hardly be disputed that this action was in direct response to Hayes. *See*, House Comm. On Crime & Punishment, Final Analysis, H.R. Doc., 16 Leg., 2d Reg. Sess., §§ II.B.4 & II,C (2000)(stating that this amendment is "designed to undo the effects of the Hayes decision.) Based on this, Petitioner submits that, like Glenn, Respondent is in effect asking this Court to retroactively apply a decision interpreting legislative intent in enacting the Statute that the Legislature has subsequently indicated is incorrect. As Glenn found, there is no "logic in such a

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[5]Petitioner notes that, subsequent to this amendment, the Attorney General issued an Informal Legal Opinion stating that, due to the "concerns expressed by the medical community, this office anticipates initiating rule-making under...section 893.0355, Florida Statutes, regarding the rescheduling of certain mixtures of hydrocodone to a Schedule III controlled substance." Op.(Informal) Att'y Gen. Fla. (August 29, 2000)(App. C). The letter was in response to concern from the medical and pharmacological communities "expressing their concern that the reclassification of any and all compounds of hydrocodone as a Schedule II drug poses a danger to the public...." Id., n. 7.

Petitioner submits that, despite the concern raised by the Attorney General, the fact remains that the Legislature has clearly expressed its disapproval of Hayes by amending the Statute.

position." Id. at 9.

In conclusion, Petitioner submits that under Witt and Stovall, the lower court erred in holding that Hayes should be retroactively applied. Alternatively, if this Court disagrees with Petitioner, it is submitted that similarly situated individuals seeking postconviction relief under Rule 3.850 relying on this decision, be permitted to do so only within two years of the date of said decision. *See*, Callaway (establishing a two-year window in which to challenge the imposition of their consecutive habitual offender sentences).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to QUASH the lower court's decision and AFFIRM

the trial court's order denying the Motion.

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" and "Appendix" has been furnished to: DAVID KLAYMAN, Pro Se, DC

#A583222, River Junction Work Camp, 300 Pecan Lane, Chattahoochee, Florida, 32324 on this ___ day of September, 2000.

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APPENDIX

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