Drug Trafficking Sentencing in Florida: Can Seven Pills Turn a Defendant into a First-Degree Felon

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I. INTRODUCTION

Florida has been associated with illegal drugs since the television show Miami Vice and the “Cocaine Cowboys” of the 1980’s. Marijuana, cocaine, heroin, crack, and LSD have fallen from the lips and pens of newscasters and newspaper writers throughout the Sunshine State. However, Vicodin1

1. Vicodin is “indicated for the relief of moderate to moderately severe pain.” PHYSICIAN'S DESK REFERENCE 1367–68 (Medical Economics Co. 52d ed. 1998). Its chemical make-up is typically 7.5 milligrams of hydrocodone bitartrate combined with 750 milligrams of acetaminophen. Id. Under the manufacturer’s specifications, it is stated that the tablets are classified as a SCHEDULE III substance. Id.
may be the next drug to become a household name, not because of its prolific use, but because of its impact on the Florida State drug laws. The technical name for Vicodin is hydrocodone, which is referred to in sections 893.03 (drug schedules) and 893.135(1)(c)(1) (trafficking) of the Florida Statutes. Two Florida District Courts of Appeal have interpreted these statutes in conflicting ways. When this happens, it creates a somewhat chaotic situation due to the construction of the Florida court system.

In Florida, the trial courts, otherwise known as the circuit courts, are bound by the decisions of the district court of appeal in that particular district. However, if there is no case on point in that district, and there is a case on point in another district, the trial court is bound by the other district’s decision. Nonetheless, decisions of the district court of appeal in one district are merely persuasive authority in another district court of appeal. Therefore, the other district courts of appeal are free to disagree. When this happens, trial courts are not bound by either of the conflicting districts, unless the trial court happens to be located in one of the districts, and then would, consequently, be bound by it anyway. As such, until the situation with these two district courts of appeal is resolved, trial courts in Florida have no authority from which to seek guidance.

This article will examine the discordant interpretations of the drug statutes and attempt to reach a conclusion on which is the best reading. Part II of this article will discuss the background of the statutes and the holdings and rationale behind the two conflicting cases. Part III will discuss other jurisdictions and their similar drug statutes. Part IV will discuss other controlled substances and how they are regulated under the Florida Statutes. Part V will suggest what should be done to resolve these inconsistencies. Part VI will conclude this article.

4. See State v. Baxley, 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996); Holland, 689 So. 2d at 1268.
6. Id. at 666–67 (citing State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).
7. Id. at 666.
8. Id. at 667 (citing State v. Hayes, 323 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).
9. Id.
10. An exception, however, would be trial courts in the First and Fifth District Courts of Appeal, since those courts are still bound to follow their particular district court.
II. BACKGROUND

A. Hydrocodone Statutes

Section 893.135(1)(c)(1) of the Florida Statutes mandates that:

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... hydrocodone... 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."\(^{11}\)

Because hydrocodone is listed as a SCHEDULE II drug,\(^ {12}\) it is considered to have a "high potential for abuse."\(^ {13}\) However, pursuant to section 893.03(3)(c)(4) of the Florida Statutes, if a tablet contains "not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients, which are not controlled substances," then the substance is considered a SCHEDULE III substance.\(^ {14}\) This would make the charge punishable as a third-degree felony,\(^ {15}\) bringing a lighter sentence. Reading these two statutes together, it may be possible to reach several conclusions. The first may be that if a defendant is caught with four grams of pills that contain hydrocodone, even if each pill contains less than fifteen milligrams, punishment as a first-degree felony is proper. Perhaps this should be labeled as the aggregation theory. This is the conclusion that Florida's Fifth District Court of Appeal reached in State v. Baxley.\(^ {16}\)

Another way to read the statutes is as the Florida First District Court of


\(^{12}\) Id. § 893.03(2)(a)(1)(i).

\(^{13}\) Id. § 893.03(2). SCHEDULE I drugs are considered to have "a high potential for abuse" and have "no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards." Id. § 893.03(1). SCHEDULE II drugs have a "high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States." Id. § 893.03(2). SCHEDULE III drugs have "a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States." Fla. Stat. § 893.03(3) (1997).

\(^{14}\) Id. § 893.03(3)(c)(4).

\(^{15}\) Id. § 893.13(1)(a)(2).

\(^{16}\) 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996).
Appeal did in *State v. Holland*, which will lead to the conclusion that if a person is caught with pills that contain hydrocodone, but each pill contains less than fifteen milligrams, punishment is only proper as a SCHEDULE III substance, and thus as a third-degree felony. This apparent ambiguity in the statutes has created a conundrum in the legal world and, likewise, caused a split in the appellate courts of the State of Florida.

**B. State v. Baxley**

"Michael Baxley was charged with [both] conspiracy to traffic and trafficking in hydrocodone" under section 893.135(1)(c)(1) of the *Florida Statutes*. His charges were dismissed in the lower court and the State appealed. The appellate court acknowledged several arguments made by Baxley, the first of which was that if the tablets in question contain less than fifteen milligrams, then they are considered a SCHEDULE III drug. The court doused this argument, however, by stating that “only a small amount of hydrocodone is a SCHEDULE I substance." Instead, the court held that it did not matter if the amount involved was four grams of pure hydrocodone or four grams of a mixture of hydrocodone; either one would suffice to make it a SCHEDULE II substance and therefore punishable as a first-degree felony.

Baxley also argued that hydrocodone is listed in both SCHEDULE II and SCHEDULE III, but both schedules provide an exemption if listed in another schedule. The court, however, stated that this gave its reading of the statute more credence because it proves that SCHEDULE III substances are only those limited by section 893.03(3)(c)(4), and all other hydrocodone is considered a SCHEDULE II substance. In reaching this

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17. 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997).
18. *Id.* at 1270; see also § 893.03(3)(c)(4) (1997).
19. *Baxley*, 684 So. 2d at 832.
20. *Id.*
21. *Id.*
22. *Id.* (emphasis omitted).
23. *Id.*
24. *Baxley*, 684 So. 2d at 832.
25. FLA. STAT. § 893.03(3)(c)(4) (1997). Section 893.03(3)(c)(4) of the *Florida Statutes* states that "any material, compound, mixture, or preparation containing limited quantities of . . . 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" are SCHEDULE III substances. *Id.*
26. *Baxley*, 684 So. 2d at 832.
conclusion, the court cited Lareau v. State,27 and Mack v. Bristol-Myers Squibb Co.,28 both of which stand for the proposition that when two laws of the same subject seem to be ambiguous, they should be read in pari materia29 in order to give effect to them both.30 In sum, the Baxley court held that "[i]f the number of tablets aggregates [four] grams or more of hydrocodone or a mixture of hydrocodone, then we agree with the State that prosecution is proper under section 893.135."31 The Supreme Court of Florida denied review of the Baxley case.32

C. State v. Holland

In 1997, the Florida First District Court of Appeal certified conflict with the Baxley court in State v. Holland.33 Holland had been charged with five counts of trafficking in hydrocodone.34 He subsequently filed a motion to dismiss pursuant to an affidavit given by a pharmacist asserting that the drug alleged in the information was in fact a SCHEDULE III drug as opposed to a SCHEDULE II drug, and therefore did not fall within the parameters of the trafficking statute.35 The lower court dismissed the information, and the State appealed.36

The Holland court, in reading section 893.135(1)(c)(1) together with section 893.03(3)(c)(4), held that "if a mixture containing the controlled substance falls within the parameters set forth in [Schedule] III, the amount of the controlled substance per dosage unit, not the aggregate amount or weight, determines whether the defendant may be charged with violating section 893.135(1)(c)1, of the Florida Statutes."37 Therefore, in its case sub judice, the court found that, since the Vicodin tablets that were allegedly sold by Holland had less than fifteen milligrams per dosage unit of

27. 573 So. 2d 813 (Fla. 1991).
29. In pari materia is defined as: "[u]pon the same matter or subject." BLACK'S LAW DICTIONARY 791 (6th ed. 1990). Statutes "in pari materia" relate to the same person or thing and have a common purpose. Id.
30. Baxley, 684 So. 2d at 832–33 (citing Lareau v. State, 573 So. 2d 813 (Fla. 1991); Mack v. Bristol–Myers Squibb Co., 673 So. 2d 100 (Fla. 1st Dist. Ct. App. 1996)).
31. Id.
32. Baxley v. State, 694 So. 2d 737 (Fla. 1997).
33. 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997).
34. Id. at 1269.
35. Id.
36. Id.
37. Id. at 1270; see also FLA. STAT. § 893.135(1)(c)(1) (1997).
hydrocodone, his violation did not fall within the trafficking statute. The court went on to hold that regardless of the number of tablets sold, the concentration of hydrocodone per dosage unit will remain below the threshold of fifteen milligrams. In other words, even if the amount of milligrams in each pill equals four grams when added together, if each pill contained less than fifteen milligrams, the defendant would escape the trafficking statute.

D. Criticism of Both Decisions

The largest problem with the Baxley decision is that it is extremely harsh in its punishment. Consider this example: a defendant is illegally in possession of ten Vicodin tablets. Each tablet contains 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, which is the typical makeup. Therefore, the defendant is in possession of a total of 7575 milligrams of Vicodin. After converting from milligrams to grams, it brings the total to 6.575 grams of Vicodin. However the defendant is only in possession of 0.075 grams of hydrocodone. In order to be sentenced under the trafficking statute, the defendant has to be in possession of four grams of hydrocodone or a mixture containing hydrocodone. Therefore, if the Baxley court were followed, the hypothetical defendant would be subject to prosecution under the trafficking statute, and thus charged with a first-degree felony. It is hard to fathom that the legislature intended for a person to be sentenced for a first-degree felony for the possession of ten Vicodin pills. In essence, it appears that the Baxley court would be over-inclusive in its approach.

The Holland case is also not without fault. It appears from that decision that aggregation of the weight or the amount of any SCHEDULE III controlled substances under any circumstances is not permitted. Therefore, if an individual illegally sold, delivered, possessed, or manufactured a large

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38. Holland, 689 So. 2d at 1270.
39. Id.
40. See supra note 1.
41. Calculations are as follows: 750 + 7.5 = 757.5. Then 757.5 x 10 (pills) = 7575 milligrams.
42. There are 1000 milligrams in one gram.
43. This is because there is only 7.5 milligrams of hydrocodone in one Vicodin tablet. See supra note 1. 7.5 x 10 = 75 milligrams. To convert to grams, divide by 1000, thus the total grams are 0.075.
44. FLA. STAT. § 893.135(1)(c)(1) (1997).
45. Holland, 689 So. 2d at 1270.
quantity of pills containing a SCHEDULE III controlled substance, and the pills contained less than the requisite fifteen milligrams, that person could never be charged with trafficking. This follows even if the accused possessed 1000 pills. This theory fails because, most likely, if a person has that many pills in his or her possession, he or she would be attempting to traffic them, and thus should be subject to the trafficking statute. Further, there are no Vicodin pills that contain more than fifteen milligrams per dosage unit. Therefore, the holding in the Holland case is weak because it is under-inclusive. It would render meaningless the provision of SCHEDULE II as it applies to hydrocodone.

III. HYDROCODONE STATUTES IN OTHER JURISDICTIONS

A. Other States

Most states have drug trafficking statutes similar to Florida’s. Some, however, only list hydrocodone in SCHEDULE II, while some list hydrocodone solely in SCHEDULE III.\(^{46}\) Notwithstanding, no other state has decided a case on point with Holland or Baxley.

B. Federal Statute

Title 21, section 812 of the United States Code\(^{47}\) provides the schedules of controlled substances.\(^{48}\) The construction of the hydrocodone statute in the federal version is very similar to the Florida Statute, with two exceptions. The first is an insignificant one, in that the United States Code refers to hydrocodone as “dihydrocodeinone.”\(^{49}\) The second, however, may be considered quite consequential, and is found in the sentencing guidelines.

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\(^{46}\) The states that list hydrocodone in both SCHEDULES like the Florida statute are:

- Georgia, GA. CODE ANN. § 16-13-26, 27 (1996);
- Hawaii, HAW. REV. STAT. § 329-18 (1993);
- Iowa, IOWA CODE ANN. § 124.206 (West 1997);
- Mississippi, MISS. CODE ANN. § 41-29-115, 117 (1972);
- Missouri, MO. REV. STAT. § 195.017 (West 1996);
- Montana, MONT. CODE ANN. § 50-32-224, 226 (1997);
- Nebraska, NEC. REV. STAT. § 195.017 (1995);
- New York, N.Y. PUB. HEALTH LAW § 3306 (McKinney 1998);
- North Dakota, N.D. CENT. CODE § 1903.1-07, 09 (1997);
- Texas, TEX. HEALTH & SAFETY CODE ANN. § 481.104 (West 1998);
- West Virginia, W. VA. CODE § 60A-2-208 (1998); and


\(^{48}\) Id.

\(^{49}\) See id. § 812(d)(3)-(4) SCHEDULE III. Dihydrocodeine and hydrocodone are used interchangeably. Id. Some states even list them like this: “dihydrocodeine (hydrocodone).” See, e.g., MONT. CODE ANN. § 41-29-117 (1997).
Section 2D1.1 of the United States Sentencing Guidelines sets forth the Federal Sentencing Guidelines for federal drug trafficking offenses. In order to obtain uniformity throughout the country, drug offenders are sentenced according to a base offense level. The requisite amount for each level is very specific, with a range of only ten to twenty grams, as opposed to Florida's degree-oriented felonies where the range may be four to 400 grams. The most important difference in these sentencing guidelines may be "Note A" inserted by the legislature that reads: "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

IV. DECISIONS INTERPRETING OTHER DRUG STATUTES

A. Florida

1. State v. Yu

In State v. Yu, the defendants attempted a constitutional attack on section 893.135 of the Florida Statutes. The lower court held that using the weight of "any mixture containing cocaine" instead of the weight of the pure cocaine was "arbitrary, unreasonable, and a violation of due process and equal protection of the law." Relying on People v. Mayberry, an Illinois case, and United States ex rel. Daneff v. Henderson, a federal case, the Supreme Court of Florida disagreed. In Daneff, the court noted that dangerous drugs are typically marketed in a diluted or impure state. It also stated that "[t]he State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a computer." Relying on the Daneff case,
the Supreme Court of Florida opined that it was reasonable for the legislature to conclude that a mixture containing cocaine could be disbursed to a larger amount of people than the same amount of pure cocaine and therefore could create a greater likelihood for harm to the public. 63

The United States Supreme Court almost had an opportunity to decide this question when one of the defendants from the Yu case appealed the decision of the Supreme Court of Florida to this nation's highest court in Wall v. State. 64 This appeal, however, was denied for jurisdictional reasons. 65 Justice Brennan noted in the denial that he would have heard the case on its merits and postponed the question of jurisdiction. 66 It is unfortunate that he was not allowed to do so.

2. After Yu

Since the Yu case, other Florida courts have had to apply its principles. In Asmer v. State, 67 the defendant was convicted of trafficking in methaqualone in an amount exceeding 200 grams. 68 At trial, the expert witness for the State testified that she had weighed the tablets, and their total weight was 795.7 grams, well above the requisite 200 grams. 69 However, she admitted that she had only tested one of the tablets at random for methaqualone, and that particular tablet contained the drug. 70 The defendant appealed his conviction and argued that the State failed to prove that he sold 200 grams of methaqualone alone, since it only tested one tablet. 71

The court found no merit in this argument. 72 Instead, it referred to Yu, remarking that the State is not "expected to draw distinctions so fine as to treat all law violators with the precision of a computer." 73 It went on to state that it would be "patently unreasonable" to require the state to test each of the 1000 tablets to prove that there were enough tablets that contained pure

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63. Yu, 400 So. 2d at 765 (citing United States ex rel. Daneff v. Henderson, 501 F.2d 1180, 1184 (2d Cir. 1974)).
65. Id. at 1134.
66. Id.
67. 416 So. 2d 485 (Fla. 4th Dist. Ct. App. 1982).
68. Id. at 486.
69. Id. at 486–87.
70. Id.
71. Id. at 487.
72. Asmer, 416 So. 2d at 487.
73. Id. (citing State v. Yu, 400 So. 2d 762, 764 (Fla. 1981)).
methaqualone to satisfy the statute. Therefore, the court upheld Asmer's conviction on the testing of one tablet.

In Ross v. State, the court distinguished the holding in the Asmer case as it did not apply to the random testing of only one of several separately wrapped packages of cocaine. The defendant in Ross was caught with a brown paper bag that contained two bundles. The first bundle had thirty-six separately wrapped plastic bags of white powder. The second bundle had fifty-six separately wrapped plastic packets of white powder. The laboratory technician in the Dade County Crime Laboratory tested one of the plastic bags from each of the bundles, and found that they both contained cocaine. The technician then emptied the contents of the baggies in the first bundle into one envelope and then emptied the contents of the second bundle into another envelope. The envelope with the first bundle weighed 12.6 grams, and the envelope with the second bundle weighed 26.2 grams, totaling 38.8 grams. The defendant was then charged with trafficking in cocaine under section 893.135(1)(b) of the Florida Statutes.

The court found this testing to be inadequate. It held that simply visually examining the separately wrapped packets was not sufficient. Instead, the court suggested that each packet (baggie) of the white powder should have been chemically tested by random sample. Furthermore, the court opined that there are a vast number of white substances that could

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74. Id.
75. Id.
76. 528 So. 2d 1237 (Fla. 3d Dist. Ct. App. 1988).
77. Id. at 1240.
78. Id. at 1238.
79. Id.
80. Id.
81. Ross, 528 So. 2d at 1238.
82. Id.
83. Id.
84. Id.
85. Id. See also Fla. Stat. § 893.135(1)(b) (1997). Section 893.135 (1)(b) of the Florida Statutes states:
   Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)(4), or any mixture containing cocaine . . . commits a felony of the first degree, which felony shall be known as “trafficking in cocaine.”
86. Ross, 528 So. 2d at 1239.
87. Id.
88. Id.
easily appear to be cocaine due to their white powdery appearance.\textsuperscript{89} Therefore, although one of the packets contained cocaine, the others could very well be just a white powdery substance that looks like cocaine.\textsuperscript{90}

The court noted that random testing of separate bags containing similar looking materials is distinguishable from the random testing of pills, which was the case in \textit{Asmer}.\textsuperscript{91} This is because the random sample of pills is taken from a single packet or bag, and thus the substance is commingled with the similar looking material.\textsuperscript{92} From that, the court opines, one can infer that the substances are the same.\textsuperscript{93} The court states, however, that one cannot make that inference where the "untested material is not commingled with the random sample."\textsuperscript{94} Therefore, since the bags in the \textit{Ross} case were not commingled, the supposition could not be made, and the defendant's charge was reduced to simple possession.\textsuperscript{95}

Chief Judge Schwartz dissented in the opinion.\textsuperscript{96} He disagreed with the majority because he found that it was reasonable to conclude that the material in the packet was representative of the other packages.\textsuperscript{97} He thought that the fact that there were separate envelopes was simply a difference, rather than a distinction between \textit{Asmer} and \textit{Ross}.\textsuperscript{98} The Chief Judge found that: "a reasonable person could conclude beyond a reasonable doubt that all of the packages in the two bundles contained cocaine."\textsuperscript{99} He observed that since the defendant possessed both bundles at the same time, they were properly added together.\textsuperscript{100}

In \textit{State v. Clark},\textsuperscript{101} the Florida Third District Court of Appeal upheld its decision in the \textit{Ross} case.\textsuperscript{102} In \textit{Clark}, the State's chemist had randomly tested capsules of cocaine contained in separate packages in one defendant's case, and in a single bag in another defendant's case.\textsuperscript{103} The capsules that
were tested did contain heroin, but it was less than the statutory requirement. The chemist then mixed the contents of the capsules that were taken from each package before they were weighed, and concluded that the mixture contained enough heroin to violate section 893.135(1)(c) of the Florida Statutes.

The court held that capsules that contained a white powdery substance are not distinguishable from the plastic packets (baggies) in the Ross case. Since Ross requires the testing of samples from each packet, it similarly requires the testing of the capsules. The Ross decision also dictates that the randomly tested material must add up to at least four grams. The court went on to hold that the chemist in this case did not follow these methods, and therefore the defendant’s charges should be reduced from trafficking to possession.

Chief Judge Schwartz, again, did not agree entirely with the majority, and filed a concurring opinion. He stated, again, that he disagreed with the decision in the Ross case, but since its holding represented the law and it applied to the case at hand, he was bound to follow it. He agreed with the State that the capsules in this case were more analogous to the packets in Ross than the pills in Asmer. However, he stated that “both the untested capsules and the untested pills in Asmer may just as easily contain harmless substances—the other capsules may be Contac; the other pills may be aspirin—as the untested powdery substance in Ross may be flour or sugar.” Since the possibility that the untested materials are innocent is the very foundation of Ross,” the judge reluctantly agreed that the decision of the majority was the correct one. In short, he says, “since we are stuck with Ross, we are stuck with ruling with the appellees [defendants] in this case as well.”

104. Id.
105. Id. See also FLA. STAT. § 893.135(1) (1997). Section 893.135(1) of the Florida Statutes is the same statute under which Holland and Baxley were convicted. Id.
106. Clark, 538 So. 2d at 502 (Schwartz, C.J., concurring).
107. Id.
108. Id.
109. Id.
110. Id. at 500.
111. Clark, 538 So. 2d at 501 (Schwartz, C.J., concurring).
112. Id. (citing Ross v. United States, 528 So. 2d 1237 (Fla. 3d Dist. Ct. App. 1988); Asmer v. State, 416 So. 2d 485 (Fla. 4th Dist. Ct. App. 1982)).
113. Clark, 538 So. 2d at 501–02 (Schwartz, J., concurring).
114. Id. at 502.
115. Id.
B. Federal

1. Chapman v. United States

In 1991, the United States Supreme Court came down with a landmark decision in *Chapman v. United States.* In delivering the majority opinion of the Court, Justice Rehnquist held that "Note A" required blotter paper to be counted for sentencing purposes in the total weight of lysergic acid diethylamide ("LSD"). In that case, the defendants were convicted of selling ten sheets of blotter paper, which contained 1000 doses of LSD. The pure weight of the LSD itself was only fifty milligrams; however, combined with the blotter paper, the total weight came to 5.7 grams. Since 42 U.S.C. § 841(b)(1)(B)(v) mandates a minimum sentence of five years for distributing more than one gram of LSD, the defendants were imposed with this sentence. This aggregate weight "was also used to determine the base offense level under the United States Sentencing Commission Guidelines Manual."

The defendants argued that the blotter paper should not be used to determine the total weight of the LSD because it is only a carrier medium and should not be included when calculating a sentence for LSD distribution. They reasoned that construing 42 U.S.C. § 841(b)(1)(B)(v) in such a manner would lead to aberrant results, and disparity in the sentencing practices. In order to combat this argument, the Court relied on two things: the construction of the statute and its legislative history. First, the Court

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119. *Id.* at 455.
120. *Id.*
122. *Id.* at 456.
124. *Id.* The court summarized petitioners' argument as follows:
   a major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube, would be subject to the mandatory minimum sentence. Thus, they contend, the weight of the carrier should be excluded, the weight of the pure LSD should be determined, and that weight should be used to set the appropriate sentence.
125. *Id.* at 453–55.
pointed out that the statute provides for different sentences for an offender
captured with a "mixture or substance containing a detectable amount" of the
drugs and one who is captured with a pure amount of the drug. The Court
exemplified this by referring to the phencyclidine ("PCP") statute found in
42 U.S.C. § 841(b)(1)(B)(v). The Court's thought process is founded in
the belief that the legislature could have provided for different sentences for
the pure amounts of all the drugs if it so desired. The fact that it did not
do this means that the legislature intended for carrier mediums to be
included in calculating the weight.

The Court next looked to the legislative history of the statute to provide
insight into the situation. The Court stated that "[t]he current penalties for
LSD distribution originated in the Anti-Drug Abuse Act of 1986." In the
Act, "Congress adopted a 'market-oriented' approach to punishing drug
trafficking." This means that the total quantity of what is distributed is
the means for calculating the length of a sentence, not the amount of the pure
drug involved. The Court deemed from the legislative history that the
purpose behind this was to keep from punishing the retail traffickers less
severely, even though they deal in lesser quantities of the pure drug, because
they are the people that "keep the street markets going." This would
explain why a wholesaler caught with 19,999 doses of LSD might be
punished less severely than a street trafficker caught with only 200 doses.

The defendants made one last argument. They asserted that the terms
"mixture" or "substance" cannot be given their dictionary meaning, as the
Court implied, because then the statute could be interpreted to embody
carriers such as a glass vial or a car in which the drugs are being transported,
which would make the statute senseless. The Court, however, defrayed
this argument as well. It contended that blotter paper qualified because,
when combined with LSD, "the particles of one are diffused among the

126. Id. at 459.
128. See id.
129. Id. at 459.
130. Id. at 460.
131. Id. at 461.
133. Id. at 461.
134. Id.
135. See id. at 458.
136. Id. at 462.
137. Chapman, 500 U.S. at 462–63.
particles of the other." Therefore, the "term does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a 'container.'" 

2. Beyond Chapman

Lower federal courts have had trouble applying the Chapman guidelines to other drug situations. In United States v. Mahecha-Onofre, the defendant chemically bonded cocaine to several suitcases in an attempt to elude customs officials. The district court sentenced Mahecha-Onofre to a ten-year mandatory minimum sentence under 42 U.S.C. § 841(b)(1)(B)(v). The court based its calculations for sentencing purposes on the weight of the cocaine and the suitcase material, as opposed to the pure weight of the cocaine. The court rejected the idea that if the material with which a substance is mixed can not be ingested with the controlled substance, then it cannot be added to the weight for sentencing purposes. Instead, the Court found that the suitcase material should be included in the total weight for sentencing purposes.

The Eleventh Circuit decided to go another way. In United States v. Rolande-Gabriel, the court held that the term "mixture," for the purposes of the Sentencing Guidelines, "does not include unusable mixtures." The defendant in this case was intercepted at Miami International Airport and found with sixteen plastic bags filled with a liquid substance containing

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138. Id. at 462 (citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)).
139. Id. at 462–63.
141. 936 F.2d 623 (1st Cir. 1991).
142. Id. at 624.
143. Id. at 625.
144. Id. The weight of the cocaine combined with the weight of the suitcase totaled 12 kilograms, while the pure cocaine weighed only 2.5 kilograms. Id.
145. Mahecha-Onofre, 936 F.2d at 626.
146. Id.
148. Id. at 1231.
149. Id. at 1238.
cocaïne. Based on scientific evidence, the court stated that the cocaine found in Rolande-Gabriel’s bags was not in a usable form, since it would have had to be extracted from the liquid to be sold on the streets, and the cocaine could not be ingested or consumed in that form. The court argued that the cocaine in the mixture was “easily distinguished from, and separated from” the liquid. Therefore, the court held that it would be irrational to include the liquid in the total weight for sentencing purposes.

The Sixth Circuit took yet another approach in *United States v. Jennings*. The defendants in that case were interrupted in the process of “cooking” methamphetamine, and argued that if they had not been disturbed, the weight of the drug would have been much less. The court agreed with the *Chapman* interpretation that “Congress did not want to punish retail traffickers of drugs less severely,” even when dealing with smaller amounts of the pure drugs, because they are the people who “keep the street markets going.” However, following that line of thinking, the court held that “the defendants [in this case] were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestible byproducts of its manufacture.” Therefore, the court held that the total weight was not to be used.

Another case that is more comparable to the hydrocodone situation is *United States v. Young*. The defendant in the case, John Ed Young, Sr., was convicted of possession of Dilaudid with intent to distribute, in

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150. Id. at 1232.
151. Id. at 1237.
152. Rolande-Gabriel, 938 F.2d at 1237 (citing Chapman v. United States, 500 U.S. 453 (1991)).
153. Id. at 1237.
154. 945 F.2d 129 (6th Cir. 1991), *opinion clarified by* 966 F.2d 184 (6th Cir. 1992).
155. Id. at 134. Testimony at the trial revealed that the total amount in the mixture was 4180 grams but contained only 1.67% methamphetamine. Id. The government’s chemist testified that if the chemicals had been able to react entirely, the solution would have yielded over 100 grams of methamphetamine. Id.
156. Id. at 136 (citing Chapman v. United States, 500 U.S. 453 (1991)).
157. Jennings, 945 F.2d at 137.
158. Id.
159. 992 F.2d 207 (8th Cir. 1993).
160. Dilaudid is a painkiller similar to morphine. *Drugs in Litigation* 394, 394 (Richard M. Patterson, J.D. ed., Law Publishers, 1996 ed.) (1996). Its active ingredient is called hydromorphone, which is a Schedule II substance under the federal statute. Id. at 208 n.2. Also note that hydromorphone and hydrocodone are listed together in all the same
violation of 42 U.S.C. § 841(b)(1)(B)(v). On appeal, he argued that the district court erred by sentencing him based on the entire weight of the Dilaudid tablets, instead of the hydromorphone alone. Young argued that the Chapman case is distinguishable here because it involved 42 U.S.C. § 841(b)(1)(B), which states that the offense is distributing a mixture of the substance, while he was convicted under 42 U.S.C. § 841(b)(1)(B), which does not include the mixture language. The defendant claimed that Congress only intended for the pure substance to be used as the weight for sentencing purposes.

The court cited to several cases that had addressed, and subsequently dispelled, that argument. In so doing, the court stated that there was no statutory rule of construction that would exact that reading of the statute. Therefore, Congress meant to use the same method for computing the weights of pharmaceutical drugs and the "street drugs" listed in 42 U.S.C. § 841(b)(1)(A), (B). Thus, the court upheld Young’s conviction.

Judge Bright, however, disagreed. He opined that Young’s sentence should have been calculated according to the pure weight of the hydromorphone, rather than the gross weight of the Dilaudid. He states that in “street weight” cases, such as cocaine and heroin, the weight, dose, and purity are in the control of the defendant. However, “in pharmaceutical drug cases, the pharmaceutical manufacturer controls the weight and quantity of the drug.” Therefore, the legislative intent to prevent drugs from being diluted and distributed to more people than non-diluted drugs is without merit. The judge summed up his argument as follows:

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statutes, including the trafficking statute, but hydromorphone is not listed in SCHEDULE III. See FLA. STAT. §§ 893.03, .135 (1997).

162. Young, 992 F.2d at 208.
163. Id. at 209.
164. Id. See also § 841(b)(1)(C).
165. Young, 992 F.2d at 209.
166. Id. at 209–10.
167. Id.
168. Id.
169. Id. at 211.
170. Young, 992 F.2d at 211 (Bright, J., dissenting).
171. Id. (Bright, J., dissenting).
172. Id.
173. Id.
174. Id.
In my view, a defendant should be held responsible for the weight of inert materials in substances containing a proscribed controlled drug only to the extent he or she in some way has control over its content. Here, Young clearly had no control over the weight or proportion of inert material contained in the Dilaudid tablets, and, thus, his sentence should be calculated according to the pure weight of the controlled substance hydromorphone.

C. Applicability to Baxley and Holland

After examining the other jurisdictions, a question now remains as to how these apply to the Baxley and Holland cases. First, one of the big concerns of the Supreme Court of Florida in Yu was burdening the State to “make gradations and differentiations” between the drugs with the “precision of a computer.” However, this was referring to street drugs such as cocaine, LSD, etc., which all have differing degrees of fillers or cutting agents. As stated earlier, Vicodin pills all have the same amount of hydrocodone in them. Further, it is also easy to distinguish those pills from each other since each pill is marked with its dosage. Following the same analysis, the worry of disparate sentencing should also be quelled. Since Vicodin pills all use the same “carrier medium” or filler—acetaminophen—there is no fear that a sentence could be based on the weight of different fillers with the same amount of pure hydrocodone.

Next, looking at the ingestible approach adopted by the court in Rolande-Gabriel, acetaminophen could be labeled as such. Acetaminophen is a “usable” substance, taken by most of us at some time or another in the form of Tylenol. Therefore, this approach would most likely call for aggregating the amount of the entire Vicodin pill as opposed to just weighing the hydrocodone.

Further, in following the majority opinion in the Young case, the total amount of the Vicodin pill would be calculated, since hydrocodone and hydromorphone are so similar. However, if courts were to follow Judge Bright’s dissenting opinion, the total weight should not be used for

175. Young, 992 F.2d at 212.
177. See supra note 1.
178. Id.
179. 938 F.2d 1231 (11th Cir. 1991).
180. Id. at 1232.
181. See Young, 992 F.2d at 209.
182. See id.
sentencing purposes because the defendant does not have control over how much hydrocodone is contained in each Vicodin pill.

V. SUGGESTIONS FOR FURTHER SENTENCING

A. Finding a Middle Road

One suggestion to clear up the ambiguity may actually be very simple: use only the pure hydrocodone to determine whether it falls under the trafficking statute. This seems logical because the statute refers to hydrocodone, not Vicodin. It does not say that possession of four grams of Vicodin should be known as trafficking in controlled substances. Therefore, the amount of hydrocodone in the substance would be the determining factor. Though the statute does say hydrocodone or a substance containing hydrocodone, the legislature surely could not have meant to sentence someone as a first-degree felon for ten pills of Vicodin.

This approach would also settle the dispute in Holland because it would allow the amount of the pure hydrocodone to be aggregated, regardless of the amount per dosage unit. Therefore, people with 1000 pills would not escape the trafficking statute. Using this interpretation, it would take approximately 533 pills to equal four grams. Therefore, it would be more difficult to charge someone with trafficking in hydrocodone than it would be under the Baxley decision, but, at least, it could be accomplished.

Furthermore, the Florida Legislature has mandated that penal statutes must be strictly construed in favor of defendants. Section 775.021(1) of the Florida Statutes mandates that “[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.” This statute is most definitely capable of differing constructions, as evidenced by two Florida District Courts of Appeal giving two entirely different interpretations. Therefore, under this rule of construction, the statute should be interpreted in favor of the defendant. This would mean that the Holland case would prevail, since it

184. Calculations are done as follows: 4000 (amount of milligrams in four grams) divided by 7.5 (amount of milligrams of pure hydrocodone in Vicodin) = 533.
185. FLA. STAT. § 775.021(1) (1997). See also Thompson v. State, 695 So. 2d 691 (Fla. 1997); Trotter v. State, 576 So. 2d 691 (Fla. 1990).
186. FLA. STAT. § 775.021(1).
would classify hydrocodone as a SCHEDULE III drug, making the offense a third-degree felony, as opposed to Baxley, which would make possession of ten pills of Vicodin a first-degree felony.\textsuperscript{188}

B. A Proposal by Thomas J. Meier

In his article, entitled \textit{A Proposal to Resolve the Interpretations of "Mixture or Substance" Under the Federal Sentencing Guidelines},\textsuperscript{189} Thomas J. Meier proposes a method for interpreting “mixture or substance” considering the inconsistencies created by the \textit{Chapman} case.\textsuperscript{190} Under his design, the weight of the pure drug should be added together with the weight of any non-drug substance \textit{only if all} of the following elements are met:\textsuperscript{191}

\begin{enumerate}
\item the substance cannot be easily distinguished or separated from the pure drug;
\item the substance is commonly ingested with the pure drug by street market level consumers; and
\item the substance dilutes the pure drug in order to increase the total quantity of the drug available for distribution at the street market level.\textsuperscript{192}
\end{enumerate}

As Meier suggests, the first element is taken from the \textit{Chapman} decision and does not include “the weights of containers and other packaging materials which are clearly not ‘mixed or otherwise combined with the pure drug.’”\textsuperscript{193} This would exclude materials such as glass vials.\textsuperscript{194} The second element excludes any materials that are not ingestible,\textsuperscript{195} such as suitcases.\textsuperscript{196} The third element diverges from the \textit{Chapman} decision. Meier suggests that “[i]t distinguishes between cutting agents that dilute the pure drug in order to increase the amount of the drug available to the consumer,

\begin{itemize}
\item \textsuperscript{188} \textit{Holland}, 689 So. 2d at 1268. \textit{See also} State v. Baxley, 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996).
\item \textsuperscript{189} Meier, \textit{supra} note 140, at 403.
\item \textsuperscript{190} \textit{Id.} at 403.
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id.} at 403–04.
\item \textsuperscript{193} Meier, \textit{supra} note 140, at 404 (citing \textit{Chapman v. United States}, 500 U.S. 453 (1991)).
\item \textsuperscript{194} Meier, \textit{supra} note 140, at 404.
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{See United States v. Mahecha-Onofre}, 936 F.2d 623 (1st Cir. 1991).
\end{itemize}
and carrier mediums that simply facilitate distribution of the pure drug.\textsuperscript{197} Thus, blotter paper would not be weighed because adding more does not further dilute the drug.\textsuperscript{198} There will still be one dose of LSD regardless of how much blotter paper is added.\textsuperscript{199}

Applying this test to hydrocodone or Vicodin might be a little more difficult. The first element may not exclude Vicodin because hydrocodone and acetaminophen are mixed together and not easy to physically separate. However, there is a prescribed amount of hydrocodone in every Vicodin tablet. Therefore, in that respect, it would be easy to separate the amount of hydrocodone from the acetaminophen, even if not physically.

Vicodin would meet the second element, however, because the entire pill is obviously ingestible and is normally ingested by the street market consumer. However, there is some question as to the term "street market level consumers," which calls into question the third element as well. Hydrocodone is not a drug similar to cocaine or LSD. It is typically not manufactured illegally, only sold or possessed illegally.\textsuperscript{200} Therefore, the substance is not meant to dilute the drug in order to increase the quantity of distribution, but is used as part of the entire drug. Acetaminophen is a painkiller similar to hydrocodone, just not as potent, and not illegal. Further, it would be practically impossible to dilute the hydrocodone any more unless you were a pharmaceutical manufacturer, seeing as it is mixed together chemically. Therefore, Vicodin would most likely fail the third prong of the test. Since the test is conjunctive, the amount of acetaminophen cannot be calculated into the total weight under this test.

VI. CONCLUSION

Overall it appears that the prior Florida cases offer little insight into what to do about the \textit{Baxley} and \textit{Holland} situation. The federal cases may present some guidance, but do not have a great effect since the federal laws and sentencing structure are set up differently than those of Florida. It comes down to the fact that section 893.135(1)(c)(1),\textsuperscript{201} read with section 893.03 of the \textit{Florida Statutes},\textsuperscript{202} is susceptible to differing meanings. This

\begin{itemize}
  \item \textsuperscript{197} Meier, supra note 140, at 405.
  \item \textsuperscript{198} Id. at 405–06.
  \item \textsuperscript{199} Id.
  \item \textsuperscript{200} It is only illegal to possess Vicodin without a prescription, or with a prescription given under false circumstances.
  \item \textsuperscript{201} FLA. STAT. § 893.135(1)(c)(1) (1997).
  \item \textsuperscript{202} Id. § 893.03.
\end{itemize}
being the case, the statute has to be read, for now at least, in favor of the accused. \textsuperscript{203} This commands following the \textit{Holland} decision over the \textit{Baxley} decision.

The ultimate solution would be for the Florida Legislature to revise these statutes so as to clarify its intent. With such a split in the Florida District Courts of Appeal, the alternative is for the Supreme Court of Florida take a position and answer these questions. Until then, defendants in the first district will be leaving the courtroom as third-degree felons and defendants charged with the same crime will leave the Fifth District classified as first-degree felons.

\textbf{VII. ADDENDUM}

On September 23, 1998, the Fourth District Court of Appeal of Florida aligned itself with \textit{State v. Baxley}, \textsuperscript{204} a Fifth District Court of Appeal decision, by allowing aggregation of the total weight of a substance containing hydrocodone, in \textit{State v. Hayes}. \textsuperscript{205} In \textit{Hayes}, the defendant called in a fake prescription of Lorcet\textsuperscript{206} to a pharmacy, under the guise of being the employee of a doctor. \textsuperscript{207} The drug store was not able to verify the prescription and thus called the police. \textsuperscript{208} When Hayes went to pick up the prescription, the police were waiting. \textsuperscript{209} They arrested her and recovered forty tablets of the drug Lorcet. \textsuperscript{210} Hayes was charged under the trafficking statute, \textsuperscript{211} since the aggregate weight of the tablets was more than twenty-eight grams. \textsuperscript{212} The trial court dismissed the case, based on \textit{State v. Holland}. \textsuperscript{213}

The Fourth District Court of Appeal disagreed. \textsuperscript{214} In reaching its decision, the court looked to some of the legislative history of section

\textsuperscript{203} \textit{FLA. STAT.} § 775.021(1) (1997).
\textsuperscript{204} 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996). See \textit{supra} notes 19–24 for a discussion of the \textit{Baxley} case.
\textsuperscript{206} Lorcet is a painkiller similar to Vicodin. See \textit{supra} note 1. Its make-up is mostly acetaminophen with a small amount of hydrocodone. \textit{Id}.
\textsuperscript{207} \textit{Hayes}, 23 Fla. L. Weekly at D2185.
\textsuperscript{208} \textit{Id}.
\textsuperscript{209} \textit{Id}.
\textsuperscript{210} \textit{Id}.
\textsuperscript{211} \textit{FLA. STAT.} § 893.135(1)(c)(1) (1997).
\textsuperscript{212} \textit{Hayes}, 23 Fla. L. Weekly at D2185.
\textsuperscript{213} 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997). See \textit{supra} notes 33–38 for a discussion of the \textit{Holland} case.
\textsuperscript{214} \textit{Hayes}, 23 Fla. L. Weekly at D2185.
893.135(1)(c)(1) of the Florida Statutes. The court noted that section 893.135(1)(c)(1) of the Florida Statutes was amended in 1995 to include hydrocodone within the ambit of the trafficking statute. In its interpretation of the legislative history, the court opined that this amendment was due to the increasing amount of defendants who had been avoiding conviction for trafficking because of the absence of the substance in the statute. Therefore, the court concluded, Hayes was exactly the kind of person that the legislature was trying to allow the state to prosecute when it broadened the statute.

The court recognized, however, that the statute is still not clear as to which quantities fall under the SCHEDULE II classification and which are merely SCHEDULE III substances, keeping them from the reach of the trafficking statute. Due to the absence of clear authority in Florida, the court looked to the federal cases in search of an answer to this question, and was the first Florida Court to do so. The court examined Chapman v. United States and United States v. Rolande-Gabriel in its opinion. Using the analysis from these two opinions, the court opined that, with respect to the Lorcet tablets in the instant case, "[t]he 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." Based on this analysis, along with the legislative intent and the Supreme Court's "mixture" definition, this court concluded that the "aggregate weight of the tablets seized from Hayes, and not the amount

215. Id.
216. Id.
217. Id.
218. Id.
220. Id.
222. 938 F.2d 1231 (11th Cir. 1991).
223. Hayes, 23 Fla. L. Weekly at D2185.
224. Id.
225. The United States Supreme Court stated in Chapman that "mixture" is defined as: "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." Chapman, 500 U.S. at 461 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986)). The Chapman Court also looked to another dictionary for a definition: "A 'mixture' may also consist of two substances blended together so that the particles of one are diffused among the particles of the other." Id. at 461 (citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)).
of hydrocodone per dosage unit, is the determinative weight for prosecution under section 893.135(1)(c)(1) for trafficking in a SCHEDULE II drug."²²⁶

Though this court at least attempted to look to other sources for its information, this analysis fails for the same reasons that the case with which it aligned itself did; it is too over-inclusive. The defendant in this case is now a first-degree felon for the possession of forty pills. Granted, punishment for forty pills is more conceivable than being sentenced as a first-degree felon for possession of ten pills. Yet, this decision would uphold a prosecution for as little as ten pills. So, essentially, this decision just serves to render more confusion across the state. Until either the Supreme Court of Florida or the Florida Legislature takes notice of this discord, the quandary survives.

*Heather A. Perry*

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²²⁶ *Hayes*, 23 Fla. L. Weekly at D2185.
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Last year, Mr. Berman and CDT coordinated the Citizens Internet Empowerment Coalition (CIEC) – 47 online publishers, communications firms, and public interest groups – that challenged the Communications Decency Act. CIEC attorneys argued this landmark First Amendment case in the Supreme Court (Reno v. ACLU).

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