

Docket No.

In the
Supreme Court
of the
State of Florida

RICHARD VINCENT PAEY,

Defendant-Petitioner,

v.

STATE OF FLORIDA,

Plaintiff-Respondent,

PETITION SEEKING DISCRETIONARY REVIEW
FROM A 2-1 PANEL DECISION IN THE SECOND DISTRICT COURT OF APPEAL,
CASE NO. 2D04-2318, AN OPINION FILED DECEMBER 6, 2006

PETITIONER'S BRIEF ON JURISDICTION

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I. PRELIMINARY STATEMENT

Petitioner Richard Vincent Paey, a chronic pain patient, was the defendant in the Circuit Court of the Sixth Judicial District, in and for Pasco County, and charged with “trafficking” in controlled substances, in accordance with Section 893.135(1)(c), Fla. Stat., although, in truth and fact, and this is undisputed by the parties hereto, he only “possessed” pain medication (Percocet) that was critically necessary to his medical condition; in other words, there was no “importing” or “distributing” or “trafficking” of any controlled substances,¹ and Petitioner Paey was thus impermissibly prosecuted and punished for his “status” as a chronic pain patient requiring medication. *Compare Robinson v. California*, 370 US 660, 666, 82 S. Ct. 1417, 1420, 8th Ed 2d 758 (1962).

When Petitioner Paey was convicted for “trafficking” for merely “possessing” his pain medication, he was sentenced to a mandatory minimum of 25 years for “trafficking”; Petitioner Paey met the mandatory minimum’s highest threshold (of 28 grams), based on the quantity at issue, but that was because the controlled substance (of Oxycodone, comprising .15% of the mixture) was aggregated (mixed) with over-the-counter Tylenol (Acetaminophen, comprising 99.85% of the mixture); otherwise, Petitioner Paey would not have even qualified

¹ Petitioner Paey, currently confined, is receiving more pain medication in custody than was the subject of this “trafficking” prosecution, confirming the medical necessity that Petitioner has asserted from the outset of this prosecution.

for the lowest mandatory minimum (of 4 grams) for “trafficking” which is three years – because the total quantity of the controlled substance, for all the charges, for which he was convicted, exclusive of any other non-controlled substance, was only 3 ½ grams of Oxycodone.

Petitioner Paey was the appellant in the Second District Court of Appeal. Petitioner Paey appealed his conviction and sentence, raising various issues including whether the sentence wasn’t “cruel and unusual” under the federal and state constitutions. Respondent herein was the prosecution and appellee in the lower courts.

On December 6, 2006, the Court of Appeals for the 2nd District concurred that the mandatory sentence of 25 years imposed on Petitioner Paey for “possessing” pain medicine for a medical condition was unjust but the three-judge panel disagreed in a 2-1 decision, rendered 8 months after oral argument, as to the appropriate relief.

The appellate issues considered by the panel in its written decision was whether the state statute for “trafficking”, as applied to Petitioner Paey, was valid as applied, was “cruel and unusual” in violation of the federal and state constitution, and whether this Court’s earlier decision in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981) supported their decision; the dissenting opinion concluded that the statute was not valid as applied to Petitioner Paey, that the sentence imposed

was unconstitutional as “cruel and unusual”, and that the *Benitez* decision had been misapprehended by the Majority; the majority opinion, however, concluded that, while Petitioner Paey’s sentence was unjust, the court of appeals did not have the jurisdictional competence to correct it, and insisted instead that Petitioner seek clemency from the Governor.

Petitioner Paey timely filed a notice of appeal from the decision in the 2nd District, and does now respectfully submit this brief, requesting that this Honorable Court invoke its discretionary jurisdiction.

II. SUMMARY OF ARGUMENT

A. BASIS OF DISCRETIONARY JURISDICTION

This Court has discretionary jurisdiction in accordance with Article V, Section 3(b)(3) of the Florida Constitution when “any decision of a district court of appeal ..”:

- (a) “expressly declares valid a state statute,” or
- (b) “expressly construes a provision of the state or federal constitution”, or
- (c) “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.”

This Court also has the same discretionary authority, based on these constitutional provisions, memorialized in Rule 9.030(a)(2)(A)(1)(i), (ii), and (iv) of the Florida Rules of Appellate Procedure.

This petition is filed in reliance on these selfsame constitutional provisions and the Florida Rules of Appellate Procedure.

B. ISSUES MERITING DISCRETIONARY JURISDICTION

1. **The validity of the “trafficking” statute.** Is Florida’s drug “trafficking” statute, Section 893.135(1)(c), Fla. Stat., “valid” when invoked in the prosecution of a chronic pain patient for “possessing” and exclusively “using” the medication, comprised of controlled substances, that are necessary to treat his chronic pain? The majority upheld the validity of the statute as applied to Petitioner Paey’s exclusive “possession” of medication for treating his chronic pain.

2. **The constitutionality of the statute and the mandatory sentence.** Is it constitutionally impermissible, consisting of “cruel and unusual punishment”, not only to prosecute a chronic pain patient for his status *qua* chronic pain patient, but also to impose a mandatory sentence of 25 years for “possessing” the medication necessary to treat a medical condition? The majority concluded that the imposition of a mandatory minimum of twenty five years was not constitutionally infirm.

3. **The conflict of case authority.** Is the majority decision in the 2nd District in conflict with *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), upholding the statute’s mandatory minimum for “trafficking”, meaning “from the importer-organizer down to the pusher on the street.” The Majority concluded that there was no distinction between “possessing” a quantity of drugs that might arguably be sold

and “possessing” medication exclusively intended for medical use.

III. STATEMENT OF THE CASE AND FACTS

A. Richard’s chronic pain – its origin and its effect

Richard Paey has suffered severe and unremitting back pain ever since an auto accident in 1985 because of an unsuccessful surgery, the damage to his spine, and because of the deteriorating effects of Multiple Sclerosis (MS).

B. The “investigation” of Richard Paey

In 1997, the State of Florida’s law enforcement officer conducted a surveillance that uncovered no evidence that Mr. Paey ever gave or sold his medication. Nor did they find any unexplained source of funds.

C. Investigative “techniques” employed

DEA and the Florida investigators told the physician that he could go to prison if he had issued Mr. Paey any out-of-state prescriptions. In response, the physician insisted that he hadn’t. The physician signed repeated affidavits swearing this under oath. Several Florida pharmacists, however, told law enforcement that they had spoken to the New Jersey physician to confirm he had written the scripts.

D. The prosecution

The prosecutor argued in his final summation, that, if the jury found that the physician had committed a crime, by issuing an invalid prescription in bad faith,

then the prescription was invalid for all purposes, and the jury had to convict Richard for possessing the controlled substances generated by the illegal prescription. There was also a jury instruction that “trafficking” in drugs didn’t really mean “trafficking” or “distributing” drugs. Simply “possessing” the medicine was enough to prove “trafficking.”

IV. ARGUMENT

A. THIS COURT MAY EXERCISE ITS DISCRETION TO REVIEW THE VALIDITY OF THE “TRAFFICKING” STATUTE.

This Court has never had to consider the question, whether it is valid to apply the state’s “trafficking” statute, Section 893.135(1)(c), Fla. Stat., to the mere “possession” of controlled substances exclusively used by a chronic pain patient for treating a medical condition.

Justice England in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), held that this drug “trafficking” statute “was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution from the importer-organizer down to the pusher on the street.” Justice England understood “trafficking” meant “distribution”, “importing,” and “pushing” drugs, and not simply “possession” for personal medical use.

The state statute cast an “expansive net”, Associate Judge James H. Seals said in his dissent, when drug “trafficking” caught up “mere knowing possession”

and that sweep, Judge Seals found, was “beyond [the statute’s] logical limits.” In his discussion of the *Benitez* case, Judge Seals said “this [trafficking] statute ended on the street” and “[i]t did not go into the home of the consumer” where we find Petitioner Paey. The State may not criminalize patients for possessing their medication.

The Supreme Court, in *Robinson v. California*, 370 US 660, 666, 82 S. Ct. 1417, 1420, 8th Ed 2d 758 (1962), held that it was “cruel and unusual punishment”, a violation of the 8th Amendment, to make it a crime to be an addict: “A State may not punish a person for being ‘mentally ill, or a leper or . . . afflicted with a venereal disease’, or for being addicted to narcotics.” *Id.* In this case, if this statute is valid, then the State may punish a person for being a chronic pain patient, that is, for having a disease, and for possessing and using the medication necessary for his treatment.

The *Robinson* Court said “To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being.” The Court said the fact “[t]hat the punishment is not severe, ‘in the abstract,’ is irrelevant”. It is the disproportion between the conduct and the penalty. “Even one day in prison,” the Court said, “would be cruel and unusual punishment for the ‘crime’ of having a common cold.” *Id.*, at 667,

82 S. Ct. at 142. Twenty-five years for suffering from chronic pain is perforce both cruel and unusual.

B. THIS COURT MAY EXERCISE ITS DISCRETION TO REVIEW THE CONSTITUTIONALITY OF THE “TRAFFICKING” STATUTE.

Associate Judge James H. Seals disagreed with the Majority in his dissent, concluded that the appropriate available constitutional remedy was to overturn the sentence imposed as “cruel and unusual”.

Judge Seals explained that the purpose of mandatory minimums was to cabin off certain crimes so “egregious or so threatening to public health”. Given this analysis, Judge Seals insisted that Richard Paey’s “offense” didn’t fit this category of “egregious” offenses as Richard had not committed any “odious, parasitic activity.”

Judge Seals focused on what Richard did, his moral guilt, and not what “might have” occurred. The U.S. Supreme Court said that “[t]o be constitutionally proportionate, punishment must be tailored to a defendant’s personal responsibility and moral guilt.”

By this standard, Judge Seals found a twenty-five year sentence for “the mere possession of unlawfully obtained medicine for personal use” to be “illogical, absurd, unjust and unconstitutional under both the Eighth Amendment and article 1, section 17.”

It was “cruel”, Judge Seals concluded, for a “man with an undisputed medical need for a substantial amount of daily medication management to go to prison for twenty-five years for using self-help means to obtain and amply supply himself with the medicine he needed.” Judge Seals found it “unusual” that Mr. Paey could “go to prison only to find that the prison medical staff is prescribing the same or similar medication he had sought on the outside but could not legitimately obtain.” Judge Seals found that the fact that Richard was receiving similar medication in prison was proof of “his intent for purchasing the drugs” for his medical condition, and lamented this “tragic irony”. By allowing this conviction to stand, Judge Seals concluded that the State had evaded the rule of law that guaranteed “fairness, probity and equity.”

The State, Judge Seals noted, said it had offered a lesser prison term before trial and Richard Paey had declined their offer. Judge Seals argued that “the State’s willingness to offer a much, much lighter sentence [before trial]... compounds the absurdity of the [charging] decision and further highlights and magnifies the disproportionality between the real crime and the lengthy mandatory sentence.”

The federal and state constitutions were intended as a shield to protect Richard from a prison term that was cruel and unusual, Judge Seals said, but, instead of shielding him, the majority opinion “merely expresse[d] sympathy,

proclaims them to be the wrong shields, and suggests that executive clemency is the proper shield.”

Judge Seals said he would have vacated the mandatory sentence for these reasons and remanded for re-sentencing to the trial court in line with the sentencing guidelines for a defendant who had never been in trouble with the law before.


**C. THIS COURT MAY EXERCISE ITS DISCRETION
TO REVIEW THE CONFLICT WITH *BENITEZ*.**

As the discussion above indicates, while the Majority sought support from *Benitez*, as a matter of law, its holding is in conflict with the Majority’s decision below.

V. CONCLUSION

For the reasons stated herein, based on the accompanying appendix containing the 2nd District decision, and because that decision upheld the validity of a state statute as applied to petitioner, considered the constitutionality of the statute and the mandatory sentence imposed on petitioner, and because that decision misapprehended *Benitez* and contradicted its holding, Petitioner respectfully submits that his request for discretionary review should be granted and briefing on the merits ordered forthwith.

RESPECTFULLY SUBMITTED,



JOHN P. FLANNERY
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)

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I, Michel Haroutunian , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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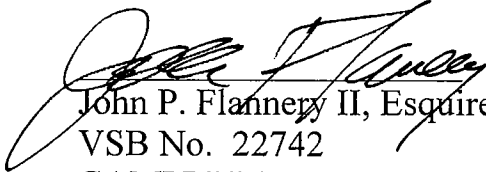
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I certify that pursuant to Florida Rules of Appellate Procedure 9.210 (2) the attached jurisdictional brief is proportionally spaced, has a 14-point typeface, with 1 inch margins and does not exceed ten (10) pages, exclusive of tables and certificates, and any statutory appendix that may be attached.



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