

6-9-2014

## Confusion Under the Big Tent: Analysis of the North Carolina Court's Application of N.C.G.S. § 90-95(H)(4) to the Possession of Prescription Pharmaceuticals in Pill Form Containing Opium or Opium Derivatives in *State v. Ellison*

Sable K. Nelson

Follow this and additional works at: <https://archives.law.nccu.edu/siplr>

 Part of the [Food and Drug Law Commons](#)

---

### Recommended Citation

Nelson, Sable K. (2014) "Confusion Under the Big Tent: Analysis of the North Carolina Court's Application of N.C.G.S. § 90-95(H)(4) to the Possession of Prescription Pharmaceuticals in Pill Form Containing Opium or Opium Derivatives in *State v. Ellison*," *North Carolina Central University Science & Intellectual Property Law Review*: Vol. 7 : Iss. 1 , Article 7.  
Available at: <https://archives.law.nccu.edu/siplr/vol7/iss1/7>

This Notes and Comments is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central University Science & Intellectual Property Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

CONFUSION UNDER THE BIG TENT; ANALYSIS OF  
THE NORTH CAROLINA COURT'S APPLICATION OF  
N.C.G.S. § 90-95(H)(4) TO THE POSSESSION OF  
PRESCRIPTION PHARMACEUTICALS IN PILL FORM  
CONTAINING OPIUM OR OPIUM DERIVATIVES  
IN *STATE V. ELLISON*

*Sable K. Nelson*<sup>1</sup>

### Introduction

Many children love the circus. A riveting ringmaster captures the attention of the young and young at heart with at least three rings filled with captivating characters and contraptions that perform fascinating feats under one big tent. But, what if there was an act that was out of place? For example, it would be unorthodox to have elephants walking on a tightrope. Similarly, it would be imprecise for North Carolina courts to apply an antiquated statute that was enacted to deter large-scale trafficking of street drugs by dealers to the simple possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives by end-users.<sup>2</sup> However, that is exactly what is happening in North Carolina Courts.

“In 1980 the [North Carolina] General Assembly amended the [North Carolina] Controlled Substances Act [NCCSA] by adding a provision to further deter the distribution and use of opium derivatives.”<sup>3</sup> Considering the NCCSA in its entirety, “simple possession of [pharmaceuticals containing opium or opium derivatives] falls within two separate sections: [N.C.G.S. § 90-95(d)(2)] (possession of a . . . controlled substance) and [N.C.G.S. § 90-95(h)(4)] (trafficking

---

1. Sable K. Nelson is a student at North Carolina Central University School of Law, Juris Doctor Candidate, May 2014. She graduated from Howard University in Washington, DC with a Bachelor of Arts in Political Science and a Bachelor of Science in Biology in December 2007. Her future plans are to pursue a career in public health law/policy. The author would like to thank her parents, Stanford and Karen Nelson, and family for their support throughout the years and the North Carolina Central University School of Law Biotechnology and Pharmaceutical Law Review for their assistance with this article.

2. For the purposes of this case note, an “end-user” is a person who actually uses controlled substances.

3. *State v. Ellison*, 738 S.E.2d 161, 163 (N.C. 2013) (citation omitted).

in opium or heroin).<sup>4</sup> In 2013, the North Carolina Supreme Court resolved the legal issue of “whether N.C.G.S. § 90-95(h)(4) of the [NCCSA], N.C.G.S. §§ 90-86 to -113.8 (2011), applies in cases involving [the possession of] prescription pharmaceutical tablets and pills” in *State v. Ellison*.<sup>5</sup> In that case, both defendants were convicted of trafficking opium or opium derivatives by possession.<sup>6</sup> The controlled substances involved in the *Ellison* case were prescription pharmaceuticals: 90 pills of dihydrocodeinone (Lorcet) and 80 pills of alprazolam (Xanax).<sup>7</sup> Dihydrocodeinone is an opium derivative.<sup>8</sup> The Supreme Court of North Carolina held that N.C.G.S. § 90-95(h)(4) applied to prescription pharmaceuticals containing opium and opium derivatives in pill or tablet form.<sup>9</sup>

In North Carolina’s pursuit to deter the manufacture, sale, delivery and/or possession of controlled substances, the NCCSA resembles a “big tent.” Under the big tent at a circus, the audience observes a broad program that includes multiple entertainers with different talents. Likewise, the NCCSA is a broad piece of legislation that outlines North Carolina’s multifaceted approach to mitigating the manufacture, sale, delivery and/or possession of multiple drugs with different means of distribution and administration. The North Carolina General Assembly assumes the role of a ringmaster who introduces various acts for the audience’s entertainment. Likewise, the North Carolina General Assembly introduces various acts of legislation (which, if enacted, govern the state’s inhabitants and are applied by the courts). Both elephants and tightropes belong in a circus. In the same respect, prohibition and punishment of the unlawful possession of prescription pharmaceuticals containing opium or opium derivatives belong in the NCCSA.

However, to reason that the North Carolina General Assembly intended in 1980 for the NCCSA to be applied to the possession of prescription pharmaceuticals containing opium or opium derivatives in 2013 is as logically sound as believing a ringmaster would intend

---

4. Evan M. Musselwhite, Comment, *One Tough Pill To Swallow: A Call To Revise North Carolina’s Drug Trafficking Laws Concerning Prescription Painkillers*, 33 CAMPBELL L. REV. 451, 459 (2011).

5. *Ellison*, 738 S.E.2d at 162.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 164.

for a 9,000 pound elephant to walk on a tightrope. Not only is it illogical for an elephant to walk on a tightrope, it could lead to a perilous result if an elephant did in fact walk on a tightrope. If that were to occur, the tightrope could collapse under the enormous weight of the elephant. Likewise, unless the North Carolina General Assembly takes the necessary steps to revise the NCCSA and make it current with trends in prescription drug use and abuse, the North Carolina Courts could figuratively collapse under the elephantine weight of injustice due to the misguided application of an antiquated law.

This case note will begin with a summary of the relevant facts, holdings and court's reasoning for its decision in *Ellison*. Next, the case note will provide background on: (1) pertinent portions of the NCCSA related to the trafficking of opium and opium derivatives; (2) application the NCCSA by North Carolina courts; (3) germane North Carolina case law related to judicial interpretation of legislative intent as well as judicial construction; and (4) conflicting interpretations of legislative inaction. In the context of that background information, this case note will analyze the problems with applying the NCCSA, as the current plain language requires, and offer a solution. Lastly, this case note will conclude with a summary of key supporting points reflective of the thesis outlined within this note.

## The Case

In *Ellison*, the State presented evidence that a confidential informant told the Ashe County Sheriff's Office of an "ongoing arrangement" where Defendant James Edward Treadway transferred prescription medications in pill form to Defendant Lee Roy Ellison after purchasing them from Mr. John Shaw (Mr. Shaw), holder of a valid prescription for hydrocodone (Lorcet) and Xanax pills.<sup>10</sup> To check the validity of the confidential informant's tip,

. . . Detective Price [of the Ashe County Sheriff's Office], along with two other law enforcement officers, placed the CVS store [at which Mr. Shaw generally had his prescriptions filled] under surveillance and observed Mr. Shaw pull into the CVS parking lot, obtain his prescription medications at the pharmacy's drive-through window, and drive directly to Treadway's [sic] residence. The investigating officers watched Mr. Shaw enter and then depart from Treadway's residence. Shortly thereafter, Ellison arrived at and then departed from the same location. After Ellison

---

10. State v. Ellison, 713 S.E.2d 228, 232 (N.C. Ct. App. 2011).

left Treadway's residence, Detective Price stopped his truck and obtained Ellison's consent to a search of his vehicle. In the course of searching Defendant's vehicle, officers found two prescription pill bottles from which the labels had been removed. The pills contained in the bottles seized from Ellison's vehicle were sent to the State Bureau of Investigation for analysis.<sup>11</sup>

Forensic chemical analysis determined there were 90 pills of dihydrocodeinone<sup>12</sup> (Lorcet) weighing 75.3 grams in total.<sup>13</sup> There were also 80 pills of alprazolam (Xanax) weighing 10 grams in total.<sup>14</sup> "Using the aggregate [pill] weight,"<sup>15</sup> the State charged the defendants with multiple violations of the NCCSA including "trafficking in 28 grams or more of opium by possession."<sup>16</sup>

During his testimony at trial, Defendant Ellison asserted on the day he was stopped by the Ashe County Sheriff's Office he was visiting Defendant Treadway in order to lend him \$100.00 for an outstanding utility bill.<sup>17</sup> Subsequently, Ellison further asserted that the Lorcet and Xanax found and confiscated by the Ashe County Sheriff's Office were "prescribed for him by his physician."<sup>18</sup> Moreover, Mr. Ellison claims he had no knowledge that Lorcet pills were made with opium.<sup>19</sup>

The *State v. Ellison* case presented the legal issue "whether N.C.G.S. § 90-95(h)(4) of the North Carolina Controlled Substances Act, N.C.G.S. §§ 90-86 to -113.8 (2011), applies in cases involving [the possession of] prescription pharmaceutical tablets and pills."<sup>20</sup> At the trial court level, Defendants Ellison and Treadway presented a motion to dismiss the trafficking charges filed against them.<sup>21</sup> Defendants claimed the General Assembly did not intend for charges resulting from possession of prescription pharmaceuticals to be based

---

11. *Id.*

12. *Id.* at 233. During the *Ellison* trial, a forensic chemist testified that "[d]ihydrocodeinone. . . is a chemical compound in which hydrocodone is mixed with acetaminophen" and that "both hydrocodone and dihydrocodeinone. . . were opium derivatives."

13. *Ellison*, 738 S.E.2d at 162.

14. *Ellison*, 713 S.E.2d at 232.

15. *Ellison*, 738 S.E.2d at 162.

16. *Ellison*, 713 S.E.2d at 233.

17. *Id.* at 232-33.

18. *Id.* at 232.

19. *Id.* at 233.

20. *Ellison*, 738 S.E.2d at 162.

21. *Id.*

on its aggregate weight.<sup>22</sup> After the trial court denied the defendants' motions, the case proceeded and the jury returned verdicts convicting defendants of all charges.<sup>23</sup> As outlined in the NCCSA, the trial court "sentenced each defendant to 225 to 279 months of imprisonment plus a \$500,000 fine."<sup>24</sup>

On appeal, the Defendants argued "that the trial court erred by denying their motions to dismiss the trafficking charges."<sup>25</sup> Based on previous opinions it rendered with similar factual circumstances<sup>26</sup>, the North Carolina Court of Appeals "unanimously affirmed the trial court's decision."<sup>27</sup> Citing *State v. McCracken*,<sup>28</sup> the appellate court ". . . held that under the [NCCSA], 'liability for trafficking cases involving prescription medications hinges upon the total weight of the pills or tablets in question instead of the weight of the controlled substance contained within those medications.'"<sup>29</sup>

The North Carolina Supreme Court "allowed defendants' petitions for discretionary review. . . to determine whether the total weight of pills and tablets should be used to calculate liability under the trafficking provisions of the [NCCSA]."<sup>30</sup> In an opinion written by Justice Newby, this court affirmed the decision of the North Carolina Court of Appeals.<sup>31</sup> The North Carolina Supreme Court held "[b]ecause tablets and pills are mixtures, we conclude that defendants were properly sentenced under the opium trafficking statute."<sup>32</sup>

Although all three of the justices who participated in the consideration and decision of the *Ellison* case agreed on the outcome based on the particular facts at bar, two justices were troubled by the potential precedent the case set.<sup>33</sup> Justice Hudson wrote a separate concur-

---

22. *Id.*

23. *Ellison*, 713 S.E.2d at 233.

24. *Ellison*, 738 S.E.2d at 162

25. *Id.*

26. *Id.* The North Carolina Court of Appeals relied "on its own decisions in *State v. McCracken*, 157 N.C. App. 524, 579 S.E.2d 492 (2003) and *State v. Jones*, 85 N.C. App. 56, 354 S.E.2d 251, *disc. rev. denied*, 320 N.C. 173, 320 N.C. 174, 358 S.E.2d 61, *cert. denied*, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987)."

27. *Id.*

28. *McCracken*, 579 S.E.2d at 492.

29. *Ellison*, 738 S.E.2d at 162.

30. *Ellison*, 738 S.E.2d at 163.

31. *Id.* at 165.

32. *Id.* at 162.

33. *Id.* at 165.

rence outlining the concerns of Justice Jackson and herself.<sup>34</sup> In particular, Justice Hudson wrote she found “the result troubling in that it may permit prosecution of some persons whose activities are beyond the intended reach of the original legislation.”<sup>35</sup>

## Background

### A. Applicable North Carolina Legislation

The NCCSA outlines violative conduct and penalties, including the trafficking of opium and opium derivatives.<sup>36</sup> According to the NCCSA,

(a) . . .it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;<sup>37</sup>

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;<sup>38</sup>

(3) To possess a controlled substance.<sup>39</sup>

The State can meet its burden of proof by presenting evidence that satisfies the “two elements for the crime of trafficking in opium or heroin: ‘(1) knowing possession (either actual or constructive) of (2) a specified amount of heroin.’”<sup>40</sup> Considering the NCCSA in its entirety, “simple possession of [pharmaceuticals containing opium or opium derivatives] falls within two separate sections: N.C.G.S. § 90-95(d)(2) (possession of a . . .controlled substance) and N.C.G.S. § 90-95(h)(4) (trafficking in opium or heroin).<sup>41</sup>

#### 1. NCCSA Section applied by the Supreme Court of North Carolina in *Ellison*

In *Ellison*, the Supreme Court of North Carolina held N.C.G.S. § 90-95(h)(4) applied to trafficking prescription pharmaceuticals con-

---

34. *Id.*

35. *Id.*

36. N.C. Gen. Stat. § 90-95 (2011).

37. N.C. Gen. Stat. § 90-95(a)(1) (2011).

38. N.C. Gen. Stat. § 90-95(a)(2) (2011).

39. N.C. Gen. Stat. § 90-95(a)(3) (2011).

40. Evan M. Musselwhite, Comment, *One Tough Pill To Swallow: A Call To Revise North Carolina’s Drug Trafficking Laws Concerning Prescription Painkillers*, 33 CAMPBELL L. REV. 451, 459 (2011) (citation omitted).

41. *Id.*

2014]

STATE V. ELLISON

143

taining opium and opium derivatives.<sup>42</sup> This portion of the NCCSA states in part:

[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate. . . , including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as “trafficking in opium or heroin”. . .<sup>43</sup>

Moreover, N.C.G.S. § 90-95(h)(4) sets forth the following penalties:

. . . if the quantity of [opium or an opium derivative] or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 93 months in the State’s prison and shall be fined not less than fifty thousand dollars (\$ 50,000);<sup>44</sup>

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State’s prison and shall be fined not less than one hundred thousand dollars (\$ 100,000);<sup>45</sup>

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 282 months in the State’s prison and shall be fined not less than five hundred thousand dollars (\$ 500,000).<sup>46</sup>

“[N.C.G.S. § 90-95(h)(4)] uses gram weight to measure the quantity of the controlled substance, a unit in which heroin and opium are typically dealt [on the streets].”<sup>47</sup>

## 2. NCCSA Section Suggested by the Defendants in *Ellison*

Alternatively, the defendants in *Ellison* suggested the court apply N.C.G.S. § 90-95(d)(2) instead of N.C.G.S. § 90-95(h)(4).<sup>48</sup> Section 90-95(d)(2) states in pertinent part:

---

42. *Ellison*, 738 S.E.2d at 164.

43. N.C. Gen. Stat. § 90-95(h)(4) (2011).

44. N.C. Gen. Stat. § 90-95(h)(4) (2011).

45. N.C. Gen. Stat. § 90-95(h)(4) (2011).

46. N.C. Gen. Stat. § 90-95(h)(4) (2011).

47. *Musselwhite supra* note 4, at 460.

48. *Ellison*, 738 S.E.2d at 164.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates *G.S. 90-95(a)(3)* [possession of a controlled substance] with respect to:

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony.<sup>49</sup>

N.C.G.S. § 90-95(d)(2) “calculates criminal liability [for possession of a controlled substance] based on the number of ‘tablets, capsules, or other dosage units’ involved,”<sup>50</sup> “the same units in which. . .prescription drugs containing [opium and opium derivatives] are supplied and dealt.”<sup>51</sup> This led Defendants Ellison and Treadway to “assert that the rule of lenity requires courts to apply that statute in cases involving pills and tablets”<sup>52</sup> since applying N.C.G.S. § 90-95(d)(2) “apparently would have carried a lesser sentence in [their] case.”<sup>53</sup> However, the North Carolina Supreme Court disagreed with Defendants Ellison and Treadway when it held the method for measurement and associated penalties as outlined in N.C.G.S. § 90-95(h)(4) applies to possession of prescription pharmaceutical in pill or tablet form which contain opium or opium derivatives since N.C.G.S. § 90-95(d)(2) explicitly states that it is subject to N.C.G.S. § 90-95(h).<sup>54</sup>

## **B. Application of N.C. Gen. Stat. § 90-95(h)(4) by North Carolina Courts**

### **1. “Mixture” Defined**

The word “mixture” is not defined by the NCCSA.<sup>55</sup> In *Ellison*, the North Carolina Supreme Court adopted the definition quoted by the United States Supreme Court from *Webster’s Third New International Dictionary*: “[a] ‘mixture’ is defined to include ‘a portion of

---

49. N.C. GEN. STAT. § 90-95(d)(2) (2011).

50. *Ellison*, 738 S.E.2d at 164.

51. Musselwhite *supra* note 4, at 460.

52. *Ellison*, 738 S.E.2d at 164.

53. *Id.*

54. *Ellison*, 738 S.E.2d at 164.

55. *Id.* at 163.

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.”<sup>56</sup>

## 2. Pills are Mixtures

The North Carolina Court of Appeals used a similar definition when it decided *State v. McCracken*.<sup>57</sup> “In that case, the defendant was charged with trafficking between four and fourteen grams of opium or heroin for selling forty tablets of the prescription drug Oxycotin.”<sup>58</sup> In *McCracken*, one of the issues was whether “a pharmaceutical drug dispensed in tablet form is a “mixture” within the meaning of N.C.G.S. § 90-95(h)(4)”<sup>59</sup> Citing *State v. Jones* (“a case involving tablets containing opium derivatives where charges were brought under the opium trafficking statute”<sup>60</sup>), the North Carolina Court of Appeals held in *McCracken* that pills are mixtures since “[d]osage units like tablets and capsules, by their nature, contain commingled substances that are identifiable and thus regarded as retaining their separate existence.”<sup>61</sup> In *Ellison*, the North Carolina Supreme Court adopted the reasoning in *McCracken* when it held “[c]onsequently, the pills at the heart of th[e] *Ellison* case are, by definition, a “mixture” as contemplated by the opium trafficking statute.”<sup>62</sup>

## 3. Pill Mixtures are Measured Using Aggregate Weight

Citing *McCracken*<sup>63</sup>, Justice Newby used the aggregate weight of the pharmaceuticals in *Ellison* where the North Carolina Supreme Court held “[b]ecause defendants possessed more than 28 grams of a mixture containing an opium derivative, the trial court correctly sentenced defendants under the opium trafficking statute.”<sup>64</sup> In *Ellison*, the North Carolina Supreme Court also cited *Jones* where the North

---

56. *Chapman v. United States*, 500 U.S. 453, 462 (1991) (citation omitted).

57. *McCracken*, 579 S.E.2d at 493.

58. *Musselwhite supra* note 3, at 461.

59. *McCracken*, 579 S.E.2d at 494.

60. *Ellison*, 738 S.E.2d at 163.

61. *McCracken*, 579 S.E.2d at 495.

62. *Ellison*, 738 S.E.2d at 163.

63. *Musselwhite supra* note 4, at 462. Applying another holding from *Jones*, the North Carolina Court of Appeals in *McCracken* “used the aggregate weight of the oxycodone pills in determining the weight of the controlled substance.

64. *Ellison*, 738 S.E.2d at 164.

Carolina “Court of Appeals held that ‘[c]learly, the legislature’s use of the word ‘mixture’ establishes that the total weight of the dosage units . . . is sufficient basis to charge a suspect with trafficking.’”<sup>65</sup> Justice Newby reasoned “the statute’s plain language that prohibits trafficking in mixtures containing opium derivatives, such as the pills in this case.”<sup>66</sup>

In her concurrence, Justice Hudson agreed “. . . the plain language of the statute allows for the mass of an entire ‘mixture’ to be considered and that this definition could apply to prescription pills or tablets as well.”<sup>67</sup> However, Justice Hudson asserted “[t]aking total mass into account makes sense in the street drug context: drug dealers often “cut” their product with other substances to increase the number of customers and to thus make a larger profit.”<sup>68</sup> Justice Hudson further asserted “that logic does not apply when examining prescription pills. Instead of the drug dealer mixing the substance, it is the pharmaceutical company, with different incentives, that creates the tablet or pill.”<sup>69</sup> To support her assertions, Justice Hudson quoted *State v. Perry*: “[t]he mixing and packaging into dosage containers of a controlled substance with other noncontrolled [sic] substances indicates intent to distribute the controlled substance on a large scale.”<sup>70</sup>

### C. North Carolina Law Related to Interpreting Legislative Intent & Judicial Construction

In the *Ellison* majority opinion, Justice Newby articulated the rule as it relates to judicial interpretation of legislative intent and judicial construction. Quoting *State v. Perry*, Justice Newby’s opinion in *Ellison* delineated the duties of the legislature and the courts as it relates to establishing criminal penalties: “. . . the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes.”<sup>71</sup> Justice Newby opined the Court’s objective is to “apply the law consistently with the intent of the General Assembly.”<sup>72</sup> Citing *N.C. Dep’t of*

---

65. *Id.* at 163 (quoting *Jones*, 354 S.E.2d at 258).

66. *Id.* at 164.

67. *Ellison*, 738 S.E.2d at 166.

68. *Id.*

69. *Id.* (quoting *Perry*, 340 S.E.2d at 459).

70. *Id.*

71. *Id.* at 164 (quoting *Perry*, 340 S.E.2d at 459).

72. *Id.*

*Corr. v. N.C. Med. Bd.*, Justice Newby asserted “. . .the legislature’s ‘actual words,’ codified in our General Statutes, ‘are the clearest manifestation of its intent.’”<sup>73</sup> Finally, Justice Newby cited *Lee v. Gore* where the opinion stated that “‘there is no room for judicial construction’ when the ‘language of a statute is clear and unambiguous.’”<sup>74</sup>

Defendants Ellison and Treadway “assert[ed] that the rule of lenity requires courts to apply that statute in cases involving pills and tablets”<sup>75</sup> since applying N.C.G.S. § 90-95(d)(2) “apparently would have carried a lesser sentence in [their] case.”<sup>76</sup> However, Justice Newby disagreed when he stated: “[j]udicial construction, like the rule of lenity, only applies when a statute is ambiguous.”<sup>77</sup> Having synthesized applicable precedent, Justice Newby neither used judicial construction nor the rule on lenity in *Ellison* “[b]ecause the opium trafficking statute is clear and unambiguous.”<sup>78</sup>

#### **D. Conflicting Interpretations of the Purpose of the NCCSA & Legislative Inaction**

The defendants in *Ellison* also argued:

. . .that the General Assembly intended for the opium trafficking statute to apply only to large-scale drug distribution operations, not cases involving “amounts typical of individual users.” According to defendants, if the pills’ total weight is determinative, then the weekly dosage recommended by physicians would trigger the highest level of punishment under the statute. Defendants thus contend that the sentences required by the plain language of the opium trafficking statute are absurd and unjust and not in accord with the statute’s purpose.<sup>79</sup>

In her concurrence, Justice Hudson included a quote from the public papers of Governor James B. Hunt<sup>80</sup> to persuade the court of the North Carolina General Assembly’s intent<sup>81</sup>:

---

73. *Id.* (quoting *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 675 S.E.2d 641, 649 (2009)).

74. *Id.* at 164 (quoting *Lee v. Gore*, 717 S.E.2d 356, 358 (2011)).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 165. Gov. Hunt requested that the General Assembly enact changes to the NCCSA.

81. *Id.*

*We must strengthen our commitment to fighting the big-time drug dealer. . . [W]e will present to the General Assembly next month emergency legislation which will impose extremely harsh mandatory prison terms and large fines for those persons convicted of dealing in large quantities of four kinds of drugs which have become a serious [sic] problem. These are marijuana, methaqualone, cocaine, and opium derivatives.*

This legislation will not change the penalties for those convicted of the possession, manufacture, or sale of those drugs in small quantities as provided in the current law. But for those who *are obviously dealing for profit*, the penalties will be very tough.<sup>82</sup>

However, in the majority opinion, Justice Newby noted the North Carolina General Assembly's failure to enact legislation to modify the NCCSA as evidenced by the court applying N.C.G.S. § 90-95(h)(4) as the legislature intended.

. . . [A]fter our Court of Appeals addressed this issue in *McCracken and Jones*, the General Assembly considered legislation that would have amended the opium trafficking statute so that criminal liability would be based on the number of prescription pills involved rather than total weight. H. 1307, 149th Gen. Assemb., Reg. Sess. (N.C. 2009) ("An Act To Clarify That Possession of Certain Prescription Drugs Is Not Punishable As Trafficking in Opium or Heroin and To Set Out the Criminal Penalty for That Offense"). The General Assembly, however, declined to make that change. Act of July 1, 2010, ch. 49, 2009 N.C. Sess. Laws (Reg. Sess. 2010) 255 (amending the state constitution on an unrelated matter).<sup>83</sup>

To support his assertion, Justice Newby quoted *Young v. Woodall*, where the Supreme Court of North Carolina stated: "[t]he failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation."<sup>84</sup>

Justice Hudson's concurrence disagreed with Justice Newby's reasoning as it relates to judicial interpretation of legislative inaction. While Justice Hudson acknowledged Justice Newby's reliance on *Young v. Woodall*, she also noted the Supreme Court of North Carolina has also asserted

---

82. *Id.* at 164 (quoting James Baxter Hunt, Jr., North Carolina Governor, Statement on Increased Penalties for Drug Dealers (May 21, 1990), in *1 Addresses and Public Papers of James Baxter Hunt, Jr.* (Memory F. Mitchell ed., 1982) at 735 (emphasis in original)).

83. *Id.* at 163.

84. *Young v. Woodall*, 471 S.E.2d 357, 359 (1996).

[w]e must be leery, however, of inferring legislative approval of appellate court decisions from what is really legislative silence. “Legislative inaction has been called a ‘weak reed upon which to lean’ and a ‘poor beacon to follow’ in construing a statute.” 2A N. Singer, *Sutherland Statutory Construction* 407 (1984). “[It is] impossible to assert with any degree of assurance that [legislative inaction] represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.”<sup>85</sup>

Justice Hudson also cited two additional cases decided by the North Carolina Supreme Court<sup>86</sup> to support her reasoning as it relates to judicial interpretation of legislative inaction. Moreover, Justice Hudson found “. . .the reasoning in *Di Donato* more compelling than the reasoning in *Young*, and more in line with United States Supreme Court precedent<sup>87</sup>.”<sup>88</sup> This led justice Hudson to conclude “I would not accord much weight, if any, to the General Assembly’s failure to ultimately amend N.C.G.S. § 90-95(h)(4).”<sup>89</sup>

---

85. *Di Donato v. Wortman*, 358 S.E.2d 489, 490 (1987) (the last sentence quotes *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 672 (Scalia, J. & Rehnquist, C.J., dissenting)).

86. *Ellison*, 738 S.E.2d 166. Justice Hudson cited the following North Carolina Supreme Court cases: “*N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) (“That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite.”); *Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 589-91 (1971) “[O]rdinarily the intent of the legislature is indicated by its actions, and not by its failure to act.”)

87. *Id.* at 166-67. Justice Hudson cited the following U.S. Supreme Court cases: “*United States v. Craft*, 535 U.S. 274, 287, 122 S. Ct. 1414, 1425, 152 L. Ed. 2d 437 (2002) (stating that ‘[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction’ (alteration in original) (citation and quotation marks omitted)); *Schweiker v. Chilicky*, 487 U.S. 412, 440, 108 S. Ct. 2460, 2476, 101 L. Ed. 2d 370 (1988) (‘Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent’ (Brennan, Marshall & Blackmun, J.J., dissenting) (citations omitted)); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 2678, 110 L. Ed. 2d 579 (1990) (“But subsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier’ Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” (internal citations omitted)).”

88. *Ellison*, 738 S.E.2d at 166.

89. *Id.* at 167.

## Analysis

### A. The Problem

The NCCSA is antiquated and needs to be revised as it relates to the possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives for three reasons. First, the North Carolina General Assembly did not intend for the NCCSA to apply to the possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives. Current trends in drug use and abuse are vastly different from when the statute was enacted. It was not until the late 1980s that the World Health Organization “advocated [for] the [medical] use of opioid analgesics<sup>90</sup> for pain management in cancer patients.”<sup>91</sup> It was not until the 1990s that the medical use of opium analgesics was expanded to treat chronic pain in non-cancer patients.<sup>92</sup> “Subsequent years have seen a striking increase in the medical use of opioid analgesics, including a 402.90% increase from 1997 to 2002.”<sup>93</sup>

Moreover,

[t]he statistics clearly show that the drugs most commonly abused were street drugs, not prescription medications. It stands to reason then, that at the time that the General Assembly crafted the new laws, the goal of preventing or deterring the trade in tablets of opium derived prescription drugs was simply not one that legislators could have had, as the problem had not yet arisen.<sup>94</sup>

For example, the arrest records in North Carolina from 1975 show the arrests for the manufacture or distribution of heroin and/or other opiates was the second highest at 339 arrests.<sup>95</sup> That same year, the arrests for possession of heroin and/or other opiates also totaled 339<sup>96</sup>

---

90. Musselwhite *supra* note 4, at 456. Medications containing opium are called opium analgesics and are commonly prescribed by licensed medical professionals for pain relief.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 465.

95. *Id.* at 464.

96. This case note finds it interesting that the number of arrests for the manufacture or distribution of the street drug form of heroin and/or other opiates and possession of for the manufacture or distribution of the street drug form of heroin and/or other opiates in 1975 were both equal to 339. Further analysis should be conducted to see if those who were charged with the manufacture or distribution were the only ones charged with possession. If that were the case, this case note’s argument that N.C.G.S. § 90-95(h)(4) was enacted to deter large scale trafficking of

arrests.<sup>97</sup> “By comparison, the total number of arrests for distribution of synthetic narcotics . . . was one for the year 1975. During that year there was also only one arrest for [distribution of] a forged prescription.”<sup>98</sup> Arrests for possession of a forged prescription “. . .remained very low at only thirteen arrests.”<sup>99</sup>

It was that vastly different context that informed the development of N.C.G.S. § 90-95(h)(4). Although Justice Newby<sup>100</sup> relies on the plain language of N.C.G.S. § 90-95(h)(4) and N.C.G.S. § 90-95(d)(2), this note finds the evidence presented by Justice Hudson<sup>101</sup> more persuasive that the North Carolina General Assembly was concerned with street drugs, not prescription pills at the time the section prohibiting the trafficking of opium and opium derivatives. Moreover, this note agrees with Justice Hudson’s reasoning<sup>102</sup> that the North Carolina General Assembly intended for N.C.G.S. § 90-95(h)(4) to outline the punishments for large-scale drug dealers and for N.C.G.S. § 90-95(d)(2) to outline the penalties for end-users.

Second, legislative inaction is not acceptance of the status quo. This note agrees with reasoning of the cases presented by Justice Hudson.<sup>103</sup> Merely because the North Carolina General Assembly has not chosen to act does not mean the legislature agrees with the status quo. Even Justice Newby’s opinion concedes that while the North Carolina General Assembly considered legislation that would amend the NCCSA, the state constitution was amended regarding a different topic.<sup>104</sup> The North Carolina General Assembly’s decision to act on something the court admits was unrelated should not be considered evidence the North Carolina General Assembly agreed with how the North Carolina courts have held regarding cases related to the possession of pharmaceuticals in pill or tablet form which contain opium or opium derivatives.

---

the street drug form of opium and opium derivatives by dealers as opposed to simple possession of possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives by end users would be bolstered.

97. *Musselwhite supra* note 4, at 464.

98. *Id.*

99. *Id.* at 464-65.

100. *See supra* notes 76-77.

101. *See supra* notes 80-81.

102. *Id.*

103. *See supra* text accompanying notes 85-86.

104. *See supra* text accompanying note 82.

Third, applying N.C.G.S. § 90-95(h)(4) to the possession of prescription pharmaceuticals in pill or tablet form which contain opium or opium derivatives could have dangerous consequences. The first area of concern is the ramifications for the general public. In her concurrence, Judge Hudson noted the plain language of the NCCSA could result in a person who holds a valid prescription for pharmaceuticals containing opium or opium derivatives being convicted under the N.C.G.S. § 90-95(h)(4).<sup>105</sup> There is no exception currently written in the NCCSA for the many individuals who use prescription pharmaceuticals in pill or tablet form which contain opium or opium derivatives as instructed by their doctor to remedy their health issues. Everyone is someone's child. Public policy should not support the disruption of a family (and ultimately a community) for someone holding a valid prescription and merely trying to relieve moderate to severe pain as directed by their doctor. If the NCCSA is not revised, otherwise law abiding citizens with valid prescriptions could be convicted of trafficking opium or opium derivatives by possession. It would be unfortunate if these people were convicted under N.C.G.S. § 90-95(h)(4) for the simple possession of their prescription pharmaceuticals in pill or tablet form which contain opium or opium derivatives. Since the NCCSA currently does not address this issue, and it should, the NCCSA should be revised.

Defendant Ellison claimed to have a valid prescription for the pharmaceuticals in his possession.<sup>106</sup> However, the factual context of Defendant Ellison's arrest could lead a fact finder to believe Defendant Ellison was trafficking opium by the possession of prescription pharmaceuticals in pill or tablet form which contains opium or opium derivatives.<sup>107</sup> For example, the sequence of events, the fact that the prescription pharmaceuticals were in unlabeled pill bottles, and there was no proof discovered in the record that Defendant Ellison had a valid prescription for the Xanax and Lorcet found in his possession. Justice Hudson noted in her concurrence the amount in question was a "single end-user amount of 90 Lorcet pills" and "[u]nder this interpretation of the statute, a defendant would need to possess a mere five Lorcet pills (less than the daily maximum dosage) to be charged

---

105. *Ellison*, 738 S.E.2d 165. In her concurrence, Justice Hudson stated "[w]hile the State maintained at oral argument that such an occurrence is unlikely, it has already happened."

106. *Ellison*, 713 S.E.2d at 232.

107. *See supra* text accompanying note 10.

with trafficking.”<sup>108</sup> Justice Hudson noted such cases have been presented to the North Carolina courts but have been dismissed on alternative grounds (leaving that specific issue unresolved).<sup>109</sup>

The second area of concern is the ramifications for sentencing. The legislature appears to have intended for lighter penalties for end-users and stricter penalties for large-scale distributors. The penalties under N.C.G.S. § 90-95(h)(4)<sup>110</sup> are harsher than the penalties under N.C.G.S. § 90-95(d)(2).<sup>111</sup> It is unfortunate that a defendant who has been found guilty of being in possession of prescription pharmaceuticals in pill form containing opium or opium derivatives are limited to the remedy of petitioning the Governor for clemency as suggested by Justice Newby.<sup>112</sup>

## B. The Solution

North Carolina courts have not applied the NCCSA in contradiction with the statute’s plain language. N.C.G.S. § 90-95(d)(2) explicitly states it is subject to N.C.G.S. § 90-95(h)(4).<sup>113</sup> If any changes

---

108. *Ellison*, 738 S.E.2d 165.

109. *Id.* Justice Hudson offered the following cases as examples: “*State v. Burrow*, 721 S.E.2d 356, vacated and remanded on other grounds, 736 S.E.2d 484 (2012) (per curiam order), argued a month after these cases, the defendant was convicted of trafficking by possessing only twenty-four oxycodone pills. In addition, this Court has considered numerous Petitions for Discretionary Review involving similar fact patterns. See, e.g., *State v. McAllister*, 731 S.E.2d 276, 2012 WL 3571069 (2012) (unpublished) (upholding a trafficking conviction based on nine oxycodone pills), disc. rev. denied, 736 S.E.2d 491 (2013); *State v. Seamster*, 716 S.E.2d 440, 2011 WL 4553120 (2011) (unpublished) (involving a conviction for twenty hydrocodone pills), disc. rev. denied, 722 S.E.2d 606 (2012). The Court of Appeals has also apparently seen these types of charges in cases that were not appealed to this Court. See, e.g., *State v. Davis*, 733 S.E.2d 191, 192 (2012) (involving a conviction for trafficking by transportation and possession of 29 Percocet—a combination of oxycodone and non-controlled substances—pills); *State v. Romero*, 729 S.E.2d 731, 2012 WL 3192738, at \*1-2 (2012) (unpublished) (involving a conviction for trafficking by possession of 30.5 oxycodone pills).”

110. N.C. GEN. STAT. § 90-95(h)(4) (2011). Offenses under this portion of the NCCSA are labeled felonies. See *supra* text accompanying note 42-44.

111. Musselwhite *supra* note 4, at 458. “If a person unlawfully possesses less than 100 “tablets, capsules or other dosage units” of a [controlled] substance they are guilty of a Class 1 misdemeanor. However, if the quantity of the tablets or dosage units is greater than 100, the punishment is elevated to a Class I felony. Thus, under this provision the unlawful possession of up to ninety-nine . . . tablets is only punishable as a Class 1 misdemeanor.”

112. *Ellison*, 738 S.E.2d at 165.

113. See *supra* notes 48-53.

are to be made to the sentencing guidelines for possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives, the North Carolina General Assembly must make those changes. The majority opinion written by Justice Newby<sup>114</sup>, the concurrence written by Justice Hudson<sup>115</sup> and this case note all agree the North Carolina General Assembly is responsible for revising the NCCSA. Moreover, since it is the legislative branch's responsibility to create the laws (and not the judicial branch),<sup>116</sup> this note also agrees it would be improper for the court to sentence a convicted defendant differently than the statute mandates. Courts would overstep their boundaries if it acted in contradiction with a given statute.

## Conclusion

The North Carolina courts have properly applied the plain language of the NCCSA as it relates to the possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives. However, the NCCSA is antiquated law that needs to be revised by the North Carolina General Assembly as it relates to possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives for the following reasons: (1) to be consistent with the North Carolina General Assembly's original intent to punish large-scale drug traffickers and to be consistent with the current trends in drug use and abuse; (2) because legislative inaction is not acceptance of the status quo; and (3) to avoid dangerous consequences for the general public and sentencing phase of trial for those convicted of trafficking opium or opium derivatives by possession.

The ringmaster's adoring public waits with bated breath for him to dramatically open the circus with the signature phrase: "ladies and gentlemen, boys and girls, children of all ages. . . ." Similarly, the

---

114. *Ellison*, 738 S.E. 2d at 164-65. In the majority opinion, Justice Newby stated "[h]ad the General Assembly intended for prescription tablets and pills to fall outside the scope of the statute, it could have easily included plain language to that effect. Defendants' argument therefore would be better addressed to the legislature."

115. *Ellison*, 738 S.E.2d at 166. In her concurrence, Justice Hudson stated "I would suggest that the General Assembly reconsider whether it intends that 'mixtures' of illegal street drugs be treated differently from prescription pills for the purposes of subsection 90-95(h), and if so, to consider acting accordingly."

116. N.C. CONST. art. I, § 6.

2014]

STATE V. ELLISON

155

North Carolina General Assembly's constituents should await eagerly (if not demand outright) the revision of the North Carolina Controlled Substances Act as it relates to possession of prescription pharmaceuticals in pill or tablet form containing opium or opium derivatives. Hopefully, the deafening silence of the North Carolina General Assembly will neither have to lead to an overwhelming outcry from its constituents nor the inequitable (if not unconscionable) administration of the law by the North Carolina courts.