IN THE SUPREME COURT OF FLORIDA

TERESA R. GROWDEN,
A/K/A CHERYL LYNN POWELL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case NO. 64,407



# BRIEF OF PETITIONER ON THE MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

In this brief references to the record on appeal that was before the Second District Court of Appeal will be designated by the symbol "R," followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

On May 17, 1982, Petitioner Teresa R. Growden, also known as Cheryl Lynn Powell, was charged by information with sale of a counterfeit controlled substance in violation of section 817.563(1) of the Florida Statutes (R 2).

Through her attorney, an assistant public defender, Growden filed a motion to dismiss the information on August 24, 1982 (R 4-6). The motion asserted that section 817.563 was unconstitutional, for several reasons (R 4-6). A hearing was held on September 1, 1982 before the Honorable Fred J. Woods, who granted the motion (R 18-26, 7-11). Judge Woods held section 817.563 to be unconstitutional because it does not require the State to prove scienter or mens rea, and

shifts the burden to the defendant to prove he mistakenly sold an uncontrolled substance, and because the statute conflicts with State v. Cohen, 409 So.2d 64 (Fla. 1st DCA 1982). Judge Woods expressly adopted the rationale and holding of Circuit Judge Thomas Oakley in State v. Thomas, Circuit Court Case Number 82-2656 CF, except that Judge Woods disagreed with Judge Oakley's conclusion that section 817.63 does not constitute a valid exercise of the State's police power (R 7-11, 26).

The State appealed the order dismissing the information to the Second District Court of Appeal, which reversed on September 16, 1983 on the authority of M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983), wherein that court held section 817.563 to be constitutional (Appendix, pp. 1-2).

Growden timely sought to invoke the discretionary jurisdiction of this Court because the decision of the Second District Court of Appeal expressly declared valid a state statute. On March 8, 1984 the Court accepted jurisdiction and dispensed with oral argument.

## ARGUMENT

### I

THE SECOND DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ORDER OF THE CIRCUIT COURT WHICH DISMISSED THE INFORMATION AGAINST PETITIONER TERESA R. GROWDEN AND HELD SECTION 817.563 OF THE FLORIDA STATUTES TO BE UNCONSTITUTIONAL.

The question of scienter, or mens rea, in relation to section 817.563 of the Florida Statutes was addressed in two cases which upheld the constitutionality of this law, State v. Thomas, 428 So.2d 327 (Fla. 1st DCA 1983) and M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983). However, neither case satisfactorily resolved the issue.

The Thomas court found the mens rea requirement to be supplied by the word "unlawfully" in the statute, which the court interpreted to require the State to

> prove beyond a reasonable doubt that the defendant agreed, consented or offered to sell a substance which the defendant knew to be a controlled substance (and then sold an uncontrolled substance in lieu thereof).

428 So.2d at 329-330. However, in M.P. the Second District Court of Appeal disagreed with the interpretation offered by the First District Court of Appeal. The Second District concluded that a person could be guilty of violating section 817.563 even if he intended from the beginning to sell an uncontrolled substance which he represented to the buyer to be a controlled substance. Thus, due to the disparate interpretations of section 817.563 in Thomas and M.P., the question of whether the law contains a scienter requirement has not been put to rest.

Further confusion is generated by the fact that the Thomas court, after initially finding that section 817.563 contains a scienter requirement, went on to reject such a requirement as it pertains to the actual sale of the uncontrolled substance. The basic problem with section 817.563 is that it does not require the State to prove that the defendant knew the substance he sold was an uncontrolled substance and was not, in fact, the controlled substance he represented it to be. Thomas expressly rejected any such requirement in the following language:

> We hold, therefore, that only general intent, the intent to do the act prohibited, is required as to the second element of this crime. In other words, a defendant's knowledge of the nature of the substance sold is irrelevant if the defendant knowingly offers to sell a controlled substance and then sells an uncontrolled substance in lieu thereof.

428 So.2d at 330. In M.P. the Second District Court of Appeal agreed with the interpretation of the Thomas court by adopting the reasoning of said court in its entirety, with the exception of the disagreement discussed above. Thus neither opinion actually either construed section 817.563 to require scienter, or explained why such a requirement is unnecessary.

Criminal law in the the United States generally requires a culpable mens rea in order for an offense to exist. United States v. Apfelbaum, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980); United States v. Bailey, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980); United States v. Unites States Gypsum Company, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).

Enlightened policy, as represented by the Model Penal Code, does not favor strict criminal liability. Under the Code, the only offenses based on strict liability are those punishable by a civil penalty rather than by imprisonment. Bailey, supra. See also United States Gypsum Company, supra.

Florida requires proof that the defendant knowingly had possession of a controlled substance before he can be convicted of possession of that substance. Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981); State v. Alford, 395 So.2d 201 (Fla. 4th DCA 1981); Shad v. State, 394 So.2d 1114 (Fla. 1st DCA 1981); State v. Savarino, 381 So.2d 734 (Fla. 2d DCA 1980); Harvey v. State, 390 So.2d 484 (Fla. 4th DCA 1980); Hively v. State, 336 So.2d 127 (Fla. 4th DCA 1976); Sindrich v. State, 322 So.2d 589 (Fla. 1st DCA 1975). Similarly, proof that the defendant knew the counterfeit character of the substance sold should be required to convict him under section 817.563.

The lack of a scienter requirement in section 817.563 presents serious due process problems. For example, this statute improperly shifts the burden of proof of an essential element, i.e., knowledge and intent, to the accused. See Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It does not require the State to prove that the defendant knew he was selling an uncontrolled substance as a controlled substance, but requires the defendant to assert his lack of knowledge that the substance in question was not a controlled substance in order to avoid conviction under this law.

The United States Supreme Court addressed the issue of knowledge and mens rea in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In Sandstrom the State of Montana, in connection with a charge of first degree murder, attempted to substitute the jury instruction, "the law presumes a person intends the ordinary consequence of his voluntary acts" for direct proof of a premeditated and intentional killing. The Court held that Montana must prove the accused specifically premeditated and intended the killing; the State could not avoid proof of an essential element by relying on the fact that if a person killed someone then the person intended to commit the murder.

The State cannot assume, like the State of Montana in Sandstrom, if a person offers to sell a controlled substance and sells an uncontrolled substance, then the seller knew the substance was, in fact, a controlled substance. As the Sandstrom Court emphasized, the State must prove every element of a criminal offense:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

99 S.Ct. at 2457, 61 L.Ed.2d at 48 (emphasis in original--quoting In Re Winship, 397 U.S. at 364).

Under the statute as written, with no proof of mens rea required, a person may be convicted of two crimes for the same conduct. If one intends to sell a controlled substance, but instead mistakenly

sells an uncontrolled substance, he would be guilty both of a violation of section 817.563, and of an attempted sale of a controlled substance. State v. Cohen, 409 So.2d 64 (Fla. 1st DCA 1982).[1] The First District Court of Appeal's attempt to distinguish between an "offer to sell" under section 817.563 of the Florida Statutes and a "sale" under section 893.13(1)(a) is unpersuasive. The court's assertion that a sale can exist without an offer is so speculative and remote that it cannot serve as a valid distinction between the statutes. The Thomas court recognized that there "may indeed be constitutional problems with" laws which make the same behavior criminal under two separate statutes. (428 So.2d at 330). See, e.g., Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978) and Busic v. United States, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), which are cited in Thomas.) These "constitutional problems" exist in section 817.563 due to the failure of the Florida Legislature to insert a scienter requirement which would distinguish this statute from the crime of attempted sale of a controlled substance.

Even if one accepts the premise that attempted sale of a controlled substance and sale of a counterfeit controlled substance constitute two discrete crimes for which a defendant may be separately convicted and punished (see section 775.021(4), Fla. Stat. (1981) and Bell v. State, 437 So.2d 1057 (Fla. 1983)), further analysis reveals an

1) The order of Circuit Court Judge Thomas Oakley, the reasoning of which Judge Woods adopted (in part) in dismissing the information against Teresa Growden, recognized that without a scienter requirement section 817.563 would conflict with Cohen (R 7-11).

additional due process problem. If one offered to sell a controlled substance but mistakenly sold an uncontrolled substance instead, then sought to defend on the basis of the mistake, he could be convicted both under section 817.563 and of an attempt in relation to section 893.13. Thus multiple punishments could result from the accused's defense in mitigation of the crime charged. The fundamental due process violation which occurs under these facts may be highlighted by comparison with the provisions of the Model Penal Code. Section 2.04(2) provides:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

In addition, section 817.563 may be viewed as an enhanced penalty statute. Depending upon the type of drug involved, a defendant could end up with a more severe sentence under section 817.563 than for attempted sale of the controlled substance, even though the same conduct would be involved in either offense. Here, for example, methaqualone is the drug in question (R 2). If convicted pursuant to section 817.563, Teresa Growden would be sentenced for a felony of the third degree. §§ 817.563(1), 893.03(2)(c), Fla. Stat. (1981). However, if she were convicted of attempted sale of methaqualone, she would only be subject to being sentenced for a misdemeanor of the first degree. §§ 893.03(2)(c), 893.13(1)(a)2., 777.04(4)(d),

Fla. Stat. (1981). As an enhanced penalty statute, the lack of a requirement in section 817.563 as to knowledge of the substance sold is fatal. See State v. Murray, 349 So.2d 707 (Fla. 4th DCA 1977).

The latest case to consider the constitutionality of section 817.563 is State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984). Unlike the Thomas and M.P. courts, the Fourth District Court of Appeal concluded in Bussey that the statute is unconstitutional. The court held the absence of any intent requirement in section 817.563, which is a fraud statute, to be fatal. The court further found the law to be unconsitutionally vague.

The very fact that appellate courts cannot agree on the proper construction of section 817.563 is evidence of its unconstitutionality. If the courts of this state cannot agree on its meaning, how can laymen ascertain what conduct the statute proscribes?

All things considered, it seems likely the Florida Legislature meant to pass a law prohibiting only the knowing sale of an uncontrolled substance claiming it to be controlled substance. However, the Legislature failed to accomplish this result as section 817.563 is currently written. In penal statutes, the crime "must be defined with appropriate definiteness." Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840, 849 (1948). Section 817.563 cannot be saved by a judicially-imposed scienter requirement, as this would invade the province of the Legislature. State v. Wershow, 343 So.2d 605 (Fla. 1977). Therefore, section 817.563 of the Florida Statutes is unconstitutional, as Judge Woods found, and his order dismissing the information against Teresa Growden should be affirmed.

## CONCLUSION

Petitioner, Teresa R. Growden, also known as Cheryl Lynn Powell, respectfully prays this Honorable Court to reverse the decision of the Second District Court of Appeal and remand this cause with directions to reinstate the order of the circuit court dismissing the information.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, this 28th day of March, 1984.

Robert F. Moeller

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