



TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
ARGUMENT	2
WHETHER THE DECISION RENDERED BY THE FLORIDA DISTRICT COURT OF APPEAL, SECOND DISTRICT, IN <u>Emshwiller v. State</u> , So.2d ____ (Fla. 2d DCA 1983), (Case No. 83-908, opinion filed Decem- ber 28, 1983), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT RENDERED IN <u>Tobe v. State</u> , 435 So.2d 401 (Fla. 3d DCA 1983).	
CONCLUSION	3
CERTIFICATE OF SERVICE	3

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Emshwiller v. State</u> , So.2d ____, (Fla. 2d DCA 1983), Case No. 83-908, opinion filed December 28, 1983	2
<u>Tobe v. State</u> , 435 So.2d 401 (Fla. 3d DCA 1983)	2
FLORIDA STATUTES:	
§812.014 (1981)	2
§812.015 (1981)	2

PRELIMINARY STATEMENT

DUDE EMSHWILLER, the Appellant in the Second District Court of Appeal and the defendant in the trial court, will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA, the Appellee in the Second District Court of Appeal and the plaintiff in the trial court, will be referred to as the "Respondent."

ARGUMENT

WHETHER THE DECISION RENDERED  
BY THE FLORIDA DISTRICT COURT  
OF APPEAL, SECOND DISTRICT, IN  
Emshwiller v. State, 435 So.2d  
\_\_\_\_ (Fla. 2d DCA 1983), (Case  
No. 83-908, opinion filed Decem-  
ber 28, 1983), EXPRESSLY AND  
DIRECTLY CONFLICTS WITH THE  
DECISION OF THE FLORIDA DISTRICT  
COURT OF APPEAL, THIRD DISTRICT  
RENDERED IN Tobe v. State, 435  
So.2d 401 (Fla. 3d DCA 1983).

In its Opinion rendered in the instant cause, the Florida District Court of Appeal, Second District, held that "retail theft" of merchandise, as defined in Section 812.015, Florida Statutes (1981), is not a separate criminal offense from "theft" as contemplated by Section 812.014, Florida Statutes (1981) where value is alleged and proved. In doing so, the Second District expressly acknowledged that conflict exists with the Third District Court of Appeal based upon that court's decision in Tobe v. State, 435 So.2d 401 (Fla. 3d DCA 1983). Your Respondent acknowledges the conflict inherent between the two decisions aforementioned. However, inasmuch as the jurisdiction of this Honorable Court is purely discretionary, your Respondent would suggest that, in view of the merits of the Opinion rendered by the Second District, this Honorable Court decline to exercise its jurisdiction.

CONCLUSION

Your Respondent requests this Honorable Court to decline accepting jurisdiction of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Deborah K. Brueckheimer, Esquire, Assistant Public Defender, Criminal Court Building, 5100 - 144th Avenue North, Clearwater, Florida 33520 on this the 13th day of February, 1984.

*Robert J. Krauss*  
\_\_\_\_\_  
Of Counsel for Respondent