IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, vs. RICKY BUSSEY, Appellee.	)	CASE NO: 64,966
STATE OF FLORIDA, Appellant, vs. HERBERT LEE GAINES, Appellee.	)	CASE NO: 64,967
STATE OF FLORIDA, Appellant, vs. JAMES EARL DOTSON, Appellee.	)	CASE NO: 64,968

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellees were Defendants in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant was the Prosecution. In the District Court of Appeal, the State was the Appellant in the Ricky Bussey case and the Appellee in the James Earl Dotson and Herbert Lee Gaines cases. In the brief, the parties will be referred to as they appeared in the trial court.

The following symbols will be used:

RB	Record on Appeal in State v. Bussey
RD	Record on Appeal in Dotson v. State
RG	Record on Appeal in Gaines v. State.

STATEMENT OF THE CASE AND THE FACTS

Appellees, Ricky Bussey, James Earl Dotson and Herbert Lee Gaines accepts Appellant's statement of the case and facts with the following additions:

Appellee Dotson:

On January 18, 1984, the Fourth District Court of Appeal issued an opinion in Dotson v. State, ___ So.2d ___ (Fla. 4th DCA 1984) (Case No. 83-141, op. filed Jan. 18, 1984) which reversed the Defendant's conviction under Section 817.563, F.S. (1981), on the authority of State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984).

Defendant Earl Dotson was charged with sale of fraudulent controlled substance in violation of Florida Statute Section 817.563 (1983) by an information filed Steptember 10, 1982. The alleged crime occurred May 12, 1982 (RD-115). On December 3, 1982, a hearing was held before the Honorable John E. Born to dismiss the proceedings against the appellant (RD-1-13). Appellant challenged the constitutionality of Florida Statute 817.563 which was denied by the trial court (RD-125A).

Defendant Dotson was tried and convicted before a jury on January 17, 1983 (RD-15-110). During the course of the trial, Defendant Dotson renewed his motion to dismiss on the grounds that Section 817.563 was unconstitutional, inter alia, since it did not require the state to show that an accused had the necessary mens rea to commit the crime (RD-65). The court found that the statute did not say anything about whether the crime had to be done knowingly and denied appellant's motion (R-65,66,67). At the jury charge conference the following colloquy ensued:

> THE COURT: I am just going to give the one thing. It will be very simple. I am going to form it on the basis of the statute; I will read it: Cocaine is a controlled substance and the elements are that James Dotson offered to seell cocaine, that he did actually sell in fact not something, cocaine, but something that wasn't in fact a controlled substance, and that then define sold, and that's it.
>
> MR. SUSANECK [State Attorney]: I have no objection to that.
>
> THE COURT: Okay.
>
> MS. BRADY [Defense Attorney]: Okay, the only thing I would like is knowledge but that is not the statute.
>
> THE COURT: Right, that's not the statute.

(R-96).

Appellee James E. Dotson challenged the constitutionality of Section 817.563 in the lower court. In addition, Appellee James E. Dotson contends on appeal that the trial court erred in failing to properly instruct the jury on the intent element of the crime involved. This jury instruction issue was not reached by the Fourth District Court of Appeal in light of their opinion in State v. Bussey, supra.

ARGUMENT

SECTION 817.563, FLORIDA STATUTES (1981) IS UNCONSTITUTIONAL.

Appellant contends that Section 817.563, Florida Statutes (1981) is constitutional citing State v. Thomas, 428 So.2d 237 (Fla. 1st DCA 1983) and M.P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983). Appellees respectfully request this Honorable Court to declare Section 817.563, Florida Statutes (1981) unconstitutional on the grounds stated by the Fourth District Court of Appeal in State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984) and on the arguments presented infra.

Section 817.563, F.S. (1981)[Laws 1981 ch. 81-53, sec 1, eff. October 1, 1981] provides:

> 817.563 Controlled substance named or described in s. 893.03; sale of substance in lieu thereof -- It is unlawful for any person to agree, consent, or in any manner offer to unlawfully sell to any person a controlled substance named or described in s. 893.03 and then sell to such person any other substance in lieu of such controlled substance. Any person who violates this section with respect to:
>
> (1) A controlled substance named or described in s. 893.03(1), (2), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) A controlled substance named or described in s. 893.03(5) is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

As a preliminary matter, section 817.563 is a fraud statute, not a drug or counterfeit statute. It does not proscribe the sale of "counterfeit controlled substances" as eluded to by the Appellant

in its brief. The sale, manufacture, or delivery of "counterfeit controlled substances" is proscribed by section 831.31, Florida Statutes (1981).[1] The constitutionality of section 831.31 F.S. (1981) is not before this Honorable Court. Even a superficial examination of both statutes, sections 817.563 and 831.31, reveal that each statute proscribes different conduct. There is absolutely no reference in section 817.563 to a "counterfeit controlled substance." Section 817.563 proscribes the fraudulent sale of a substance in lieu of a controlled substance, not the sale of "counterfeit controlled substances."

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[1] 813.31 Counterfeit controlled substance: sale, manufacture, delivery, or possession with intent to sell, manufacture, or delvier.

(1) It is unlawful for any person to sell, manufacture, or deliver, or to possess with intent to sell, manufacture, or deliver, a counterfeit controlled substance. Any person who violates this subsection with respect to:

(a) A controlled substance named or described in s. 893.03(1), (2),(3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A controlled substance named or described in s. 893.03(5) is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) For purposes of this section, "counterfeit controlled substance" means:

(a) A controlled substance named or described in s. 893.03 which, or the container or labeling of which, without authorization bears the trademark, trade name, or other identifying mark, imprint, or number, or any likeness thereof, of a manufacturere other than the person who in fact manufactured the controlled substance; or

(b) Any substance which is falsely identified by its container or labeling as a controlled substance named or described in s. 893.03.

(e.s.)

I Section 817.563 Violates Due Process Because the Statute Does Not Require Guilty Knowledge As to the Sale Element of the Crime.

All common law crimes consist of the criminal act or omission and the mental element commonly called intent. Mills v. State, 58 Fla. 74, 51 So. 278 (1909); Simmons v. State, 151 Fla. 778, 10 So.2d 936 (1942); See 14 Fla. Jur. Criminal Law, Section 41. Criminal statutes are to be strictly consrued. State v. Wershow, 343 So.2d 605 (Fla. 1977).

Section 817.563 proscribes a particular type of fraudulent practice. Said statute is contained under Chapter 817, Fraudulent Practices, Part I, False Pretenses and Frauds generally. See State v. Bussey, supra. Within Chapter 817 of the Florida Statutes under section 817.29 F.S. (1981) there is proscribed the crime of cheating: "Whoever is convicted of any gross fraud or cheat at common law shall be guilty of a felony of the third degree...."

In State v. Peterson, 192 So.2d 293 (Fla. 2d DCA 1966), the defendant was charged with uttering a forged instrument. The court cited the cheating statute, Section 817.29 and held:

> Section 2.01, F.S.A., provides, with certain exceptions, that the common law and statute laws of England, as of July 4, 1776, to be the law of Florida.
>
> By reason of the said sections 2.01 and 817.29, F.S.A., it seems clear that the English Statute 30 Geo. II c.24 (1757), the first section of which makes it a crime to obtain money or goods with intent to cheat or defraud by false and untrue pretense is the law of this state. Id. at 295.

The court cited this English statute which in pertinent section provides:

> ..., all persons who knowingly and designedly, by false pretence or pretences, shall obtain

> from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same:....

The court went on to hold:

> However prosecution under the English statute, 30 Geo. II c. 24 supra as the law of this state is not exclusive. It clearly appears that Section 811.021, F.S.A. is sufficiently broad enough to have permitted prosecution of the defendant under that statute for larceny. Sapp v. State, 157 Fla. 605, 26 So.2d 646. Section 811.021, supra, did not operate to repeal the common law in respect to the offenses therein prescribed; the statute was merely cumulative to the common law in that respect, since both have a common ofjective. Id. at 295.

See also H.L.A. v. State, 395 So.2d 250 (Fla. 1st DCA 1981). Based on Section 2.01, Florida Statutes (1981) and 817.29 the common law crime of "cheat" as embodied in English Statute 30 Geo. II c. 24 (1757) is valid law in Florida.

Section 817.563 is a mere specialized type of cheat or "fraud". At common law, all crimes consisted of an act or omission coupled with a requisite mental intent or mens rea. Morissette v. United States, 342 U.S. 246 (1952), Simmons. It is true that the legislature has the power to dispense with the element of intent. State v. Oxx, 417 So.2d 287, 289 (Fla. 5th DCA 1982). The Court in Oxx also noted:

> However, this power is limited by certain constitutional constraints. First, an overall general distinction is drawn between statutes codifying crimes recognized at common law and statutes that proscribe conduct not prohibited at common law. The common law crimes were commonly referred to as crimes mala in se or "infamous" crimes; as such, intent was considered to be so inherent in the idea of the offense that it was deemed included as an element, even though the statute codifying the offense failed to specify an intent element.

> In contrast, the latter category of crimes (those proscribing conduct not prohibited at common law) were generally classified as crimes mala prohibita, and the doing of the act was considered punishable, regardless of intent. Id. at 289 (footnote omitted).
>
> * * *
>
> 4. The mala prohibita crimes were considered to be regulatory in nature and were enacted to protect the public health, safety and welfare. Unlike their common law counterparts, many such crimes result from neglect where the law requires care, or inaction where the law imposes a duty to act; they may not result in direct injury to persons or property but merely create a danger or possibility of danger that the law seeks to minimize. In this sense, whatever the intent of the violator, the injury is the same. Thus, where codifying crimes mala in se, intent is required, Morissette v. United States, but where codifying crimes mala prohibita, intent can be disposed of. (e.s.) Id., at 289 n.4.

Appellee maintains that since 817.563 is a mere specialized type of "cheat", it is not a mala prohibita crime rather a mens rea offense and specific intent would thereby be required. Morissette, Oxx, supra.

Even in a civil action for fraud, there must be a finding of a false representation of a past or existing fact, knowledge, intent to defraud, and reliance to establish a fraud or fraudulent civil action. See Amazon v. Davidson, 390 So.2d 383, 385 (Fla. 5th DCA 1980). Also these elements are necessary to establish a criminal false pretense charge. See Green v. State, 190 So.2d 614 (Fla. 1966); Youngker v. State, 215 So.2d 318 (Fla. 4th DCA 1968).

In State v. Bussey, the Fourth District held:

> We certainly think the legislature has power to control the sale of counterfiet drugs and to make it unlawful for a person to sell or attempt to sell anything representing it to be a controlled substance or any other unlawful substance. How-

> ever, to do away with intent in a fraud statute is to violate the common law concepts of the crime. It is similar to the problem faced by the Florida Supreme Court in State v. Allen, 362 So.2d 10 (Fla. 1978), dealing with the deletion of specific intent in theft; and Bell v. State, 394 So.2d 979 (Fla. 1981), dealing with specific intent in robbery cases.
>
> * * *
>
> In conclusion, we find Section 817.563 to be a fraud statute and as such, it was a violation of due process to prosecute the defendant under the statute which makes no provision for specific intent as to the sale of uncontrolled substance.
>
> Id., at 64-65.

This Honorable Court should adopt this holding of Bussey and declare this fraud statute, Section 817.563, in violation of the due process clause because said statute makes no provision for a specific intent as to the sale of the uncontrolled substance. This Honorable Court therefore should strictly construe Section 817.563, refuse to supply the missing element of scienter (as to the sale of the uncontrolled substance) and find this statute unconstitutional.

Appellant argues before this Honorable Court that Section 817.563 "is not rendered unconstitutional by the absence of an express requirement of proof of intent to sell a counterfeit drug" (AB p. 6). In addition, according to Appellant what distinguishes Bell v. State, 394 So.2d 979 (Fla. 1981) and State v. Allen, 362 So.2d 10 (Fla. 1978) "from the instant case is that in those cases, it was unclear whether the legislature had intended to eliminate specific criminal intent as an element of the offense proscribed. By contrast,

in the instant case, the legislature had the power to, and did, dispense with the element of intent in defining the crime of offering to sell a controlled substance and then selling a counterfeit one" (AB p.6). Then Appellant states that: "Section 817.563 requires only that an individual knowingly and intentionally engage in the sale of a substance represented to be controlled under Fla. Stat. 893.03" (AB p.7).

Initially, Appellees must emphasize that a sale of a "counterfeit drug" is not an element of the crime proscribed by Section 817.563. A "counterfeit drug" is defined under Section 831.31, F.S. (1981). The sale of a "counterfeit drug" is proscribed by Section 831.31. The substance sold in lieu of the controlled substance under Section 817.563 need not resemble a controlled substance. A person can offer to sell cocaine and then sell a soda, a bottle of paint, a pencil or even a Buick (any substance) and still be in violation of this statute! Hence proof of intent to sell a "counterfeit drug" is inapplicable to a prosecution under this fraud statute, Section 817.563. This basic misconception and false impression created by Appellant by referring to this statute as a sale of "counterfeit drug" statute is the major flaw in the arguments advanced by Appellant. This Honorable Court must lay to rest this misconception.

Appellant's suggestion that the "intent element" has been dispensed with by the legislature of that Section 817.563 is a "strict" liability offense can be rejected by Appellant's argument found in its brief that an individual must knowingly and intentionally engage in the sale of a substance represented to be controlled

(AB p.7). In addition, Judge Anstead in this dissenting opinion in Bussey stated:

> I would construe the statute, as the state conceded at oral argument it should be construed, as requiring an intent to deceive, and uphold the constitutionality of the statute with that construction. Cf. State v. Allen, 362 So.2d 10 (Fla. 1968) and Bell v. State, 394 So.2d 979 (Fla. 1981).
>
> Id., at 65 (e.s.)

In any event, the Thomas court rejects the "strict liability" argument.

In State v. Thomas, supra, the First District citing State v. Allen, supra, held that Section 817.563 requires a mens rea and is not unconstitutional for lack of said element. The Court stated:

> We begin our analysis with the language of the statute itself. "It is unlawful for any person to agree, consent, or in any manner offer to unlawfully sell to any person a controlled substance...." (emphasis added). We cannot assume that the insertion of the word "unlawfully" by the legislature was merely accidental or redundant. It appears clear that the legislature intended to require scienter as to the offer to unlawfully sell. We therefore hold that this statute requires specific intent as to its first element, i.e., the State must 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). As such, section 817.563 requires mens rea and is not unconstitutional for lack thereof. See State v. Allen, 362 So.2d 10 (Fla. 1978).
>
> Id., at 329-330 (e.s.)

The Thomas Court then focused on the second element of the statute "...and then sell to such person any other substance in

lieu of such controlled substance." The Court held:

> Turning to the second element of this crime, the statute states that after a person has offered to unlawfully (knowingly) sell a controlled substance, the defendant must "then sell to such person any other substance in lieu of such controlled substance." The second element of this crime consists of the actual sale of an uncontrolled substance. There is nothing in the language of section 817.563 which evidences any intent on the part of the legislature to require a knowledge of the substance sold as an element of this crime. The scienter, or guilty knowledge, required by this statute relates to the offer to sell and not to the actual sale of the substance. 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.

Id., at 330.

As to the first element of the crime (agree, consent or offer to unlawfully sell), the Thomas court indicated "that section 817.563 focuses upon the offer to sell. It is the offer to sell a controlled substance which must be proven by the State to sustain a conviction." ..."If one knowingly offers a controlled substance but sells an uncontrolled substance in lieu thereof, he can be charged with a violation of section 817.563." Id., at 331. The Thomas court found that section 817.563 required "scienter or guilty knowledge" as to the "offer to sell" element of the crime. Appellees maintain that the Thomas court is right to the extent that section 817.563 requries "guilty knowledge." However Appellees contend

that contrary to the holding of Thomas, guilty knowledge is also necessary to the second element of the crime ("and then sell to such person any other substance in lieu of such controlled substance"). The Bussey decision supports this contention. In Bussey, the court held that "Section 817.563 to be a fraud statute and as such it was a violation of due process to prosecute the defendant under the statute which makes no provision for specific intent as to the sale of the uncontrolled substance." Id., at 65.

Without the elements of "guilty knowledge," as to the offer element and specific intent as to the sale of the uncontrolled substance, a defendant may be convicted of a crime under any of the following hypotheticals:

(1) A's mother has over-the-counter diet pills and A takes them occasionally to keep her awake to study. A refers to the pills as "speed". A does not intend to provide a controlled substance or even know that "speed" may also be a controlled substance. A offers her roommate B some of this "speed". B takes the diet pill believing it contains methamphetamine, commonly known as "speed". B believed that A offered and sold a controlled substance. A believed that her conduct was innocent.

(2) A's mother has over-the-counter diet pills. A falsely believed the pills contain a "speed" element methamphetamine. A takes the diet pills while studying for exams to stay awake. A offers B some "speed" and gave her the diet pill which A mistakenly thinks contains methamphetamine.

(3) A agrees to provide B with "speed" or methamphetamine and gives B aspirin intending to provide the "speed" at a later time. A does not disclose that she is providing the aspirin.

A never supplies B with "speed".

(4) B is a guest in A's home. B asks A for some "Quaaludes" before driving home. A decides not to give B the drug because B may injure someone while driving. A then decides for B's own good to supply B with an over-the-counter sleeping pill and represents to B that said sleeping pill is a "Quaalude" to prevent B from obtaining the drug from another source on this evening. A supplies the sleeping pill to B indicating falsely to B that it is a Quaalude. B ingests the sleeping pill. It is clear that A in these hypotheticals did not knowingly and intentionally commit a fraudulent act.

Therefore, Appellees contend that Section 817.563 is unconstitutional on the grounds that said statute does not expressly require that an individual knowingly offer to sell a controlled substance and then knowingly sell an uncontrolled substance in lieu of the controlled substance. A strict construction of Section 816.563, a fraud not a drug or counterfeit statute, reveals that this statute fails to supply <u>both</u> grounds of scienter or mens rea. Consequently, Section 817.563 violates due process and is thus unconstitutional. This Honorable Court should thereby affirm the decision in <u>Bussey</u> on this point.

II <u>Section 817.563 Shifts the Burden of Proof to the Accused to Prove that he Mistakenly Sold an Uncontrolled Substance.</u>

Assuming arguendo this Honorable Court does not infer the "mens rea elements," Appellees contend that 817.563 so construed would shift the burden of proof of an essential element to the accused. If an individual mistakenly sells an uncontrolled substance as a controlled substance, then the state will be able to

prove a violation of 817.563 by the mere fact of an offer to sell a controlled substance followed by a sale of an uncontrolled substance. The inevitable consequence of the prosecution of 817.563 is to shift the burden of proof of a mistaken sale to the defendant.

The principles of due process categorically prevent the state from expressly shifting the burden of proof to the Defendant by a statutory presumption or omission of definitional language that establishes an essential element of the charge. In Re Winship, 397 U.S. 90 S.Ct. 1068 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975). Knowledge and mens rea are elements of a violation of 817.563 (See Point I, supra).

III Section 817.563 is Not a Valid Exercise of the State Police Power and is a Violation of Substantive Due Process of Law.

In State v. Bussey, the Fourth District found that Section 817.563 is a fraud measure contained in Chapter 817, Florida Statutes, governing "Fraudulent Practices." The court noted that:

> "The trial court found the statute to be unconstitutional as an improper exercise of police power. The court found that the state had no proper purpose in enacting laws to enforce quality control in illegal drug transactions. The same rationale is stated in State v. Manucy, 417 So.2d 1021 (Fla. 1st DCA 1982), where the First District held that the sale of an uncontrolled substance in lieu of a controlled substance could not be grand theft by fraud in violation of Section 812.014, Florida Statutes (1979). The court reasoned that the theft statute was meant to vindicate only reasonable expectations of the consumer and that such consumer protection concepts simply have no application in illegal drug transactions. In short, the court held that purchasers of illegal drugs were not entitled to consumer protection under the theft statute."
>
> Id., at 64.

The court held that "[a]s a fraud statute Section 817.563 is not a proper exercise of the police power an is unconstitutionally vauge." Id., at 65.

In State v. Manucy, 417 So.2d 1021 (Fla. 1st DCA 1982), law enforcement officers purchased one pound of white powder from a codefendant. The officers believed they were purchasing cocaine based on price and their understanding of the codefendant's representation. The powder was later found to be 100% lidocaine, a substance not controlled under Chapte 893, Florida Statutes (1979). The defendants were charged with grand theft in violation of Section 812.014, Florida Statutes (1979). The First District held in affirming a Fla.R.Crim.P. 3.190 (c)(4) motion to dismiss that the facts do not state a prima facie case of consumer fraud under the grand theft statute. The court held:

> The theft statute in this situation is meant to vindicate the reasonable expectations of the consumer. It is not reasonable to expect to receive contraband, even when that is what has been promised, and it is not reasonable to expect the criminal laws of the state to enforce quality control in illegal drug transactions. Where the buyer consents to part with his money on the assumption that he is to receive cocaine, the "contract" between buyer and seller is already voided by the illegal and unenforceable nature of the proposed transaction. The buyer is clearly on notice that the person he is dealing with is necessarily a criminal if he delivers, a liar if he doesn't, or both. "... [N]either law nor equity relieves against one's own credulousness and inexcusable indifference to one's own interest in a transaction where one has no legal right to rely upon the statements, representation and descriptions of another in the nego-

> tiation." Smith v. Hollingsworth, 85 Fla. 431, 434, 96 So. 394, 395 (1923). See Ramel v. Chasebrook Construction Company, 135 So.2d 876 (Fla. 2nd DCA 1961), and Morton v. Young, 311 So.2d 755 (Fla. 3rd DCA 1975). Id., at 1022. (e.s.)

The identical conduct engaged in Mauncy is the identical conduct engaged in at bar which is proscribed by Section 817.563.

Appellees contend the enforcement of Section 817.563 is not valid exercise of the police power because (1) the statute does not benefit the general public except in protecting the public from fraud or theft by fraud (2) if the objective of the statute is to prevent drug use or abuse then the statute will not actually achieve that goal. The statute is also in violation of Appellee's substantive due process rights.

The Supreme Court in Goldblatt v. Town of Hemstead, New York, 369 U.S. 590, S.Ct. 987 (1962) defined the limits upon the police power:

> "To justify the state in...interposing its authority in behalf of the public, it must appear-first, that the interests of the public...require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 81 S.Ct. at 990.

This Honorable Court in Horsemen's Benev. v. Division of PariMutual, 397 So.2d 692 (Fla. 1981) formulated the test for a valid exercise of the police power:

> "Indisputably, the state, through the exercise of the police power, has the right to regulate, control and supervise horse racing in Florida. (Citations omitted). But this power must be exercised for a public purpose. (Citations omitted). Further the statutory enactment must

> be reasonabley appropriate to accomplish the purpose of the act. (Citations omitted). 397 So.2d at 694 (emphasis supplied).

The Mauncy decision clearly points out the improper, illogical and invalid basis of the statute at bar. If the legislature wants to prevent and discourage the use of controlled substances then the enforcement of the extensive body of laws directly prohibiting the use will better achieve the state's interest.

In State v. Thomas, the court found that Section 817.563 was a valid exercise of the state's police power, holding:

> The statute protects the health of individuals who intend to take a controlled substance and believe that a controlled substance is being ingested.
>
> Counterfeit controlled substances create no physical tolerance as to genuine drugs, so that when real narcotics are later consumed, unintended overdoses are likely. Further, the legislature was concerned with the contradictory information concerning drug use presented to Florida youth. Drug education programs caution young people against the use of illegal drugs due to the harmful side effects. Youths who consume what they believe is a controlled drug, but which in reality is a counterfeit substance, do not experience the effects described in the drug education programs. Thus, youthful counterfeit drug users will not believe the information presented in drug edcuation programs, and the programs are rendered meaningless. The legislature was also concerned with the proliferation of fake drugs throughout the state via organized racketeering networks, thereby enriching organized crime. The legislature has broad discretion in determining necessary measures for the protection of the public health, safety, and welfare. When the legislature acts in these areas, the courts may not substitute their judgment for that of the legislature concerning the wisdom of such acts. State v. Yu, 400 So.2d 762 (Fla. 1981), appeal dismissed, 102 S.Ct. 988, 71 L.Ed.2d 286 (1982).
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> Id., at 331.

The Thomas decision is based on the erroneous notion that a person must sell a "counterfeit controlled substance". Section 817.563 does not proscribe the sale of "counterfeit controlled substances". The Thomas decision merely articulated reasons to support the legislature exercise of its police power in Section 831.31, F.S. (1981). Section 817.563 is an entirely different statute. A person need not sell a "counterfeit contraband" or a "look-a-like" drug or a substance resembling a controlled substance to be in violation of Section 817.563.

In State v. Bussey, the Fourth District disagreed with the Thomas court's rationale in that the statute was a valid exercise of the police power as follows:

> While we agree that the legislature has broad discretion in determining necessary measures to protect the health, safety and welfare of the public, we disagree with the First District's rationale because it appears this statute is supposed to be a fraud statute rather than a drug abuse statute. Protection of drug users from overdosing and protection of high school drug programs clearly deal with drug abuse and not with fraud. Further, there is already a counterfeit drug statute in this state. See Section 831.31, Florida Statutes (1981), which makes it unlawful for any person to sell any counterfeit controlled substance. This statute protects the public from counterfeit drugs - even if such drugs are harmless.

Id., at 64.

In Sipp v. State, 442 So.2d 392 (Fla. 5th DCA 1983), the court reversed the defendant's conviction for a violation of Section 817.563, where the defendant was arrested for selling marijuana before the sale to the arresting officer had been completed. The Sipp court noted that Section 817.563 "is not

a drug abuse prevention and control statute but is a fraudulent practice statute." Id., at 394.

In State v. Walker, ___ So.2d ___ (Fla. 2d DCA 1984)(Case No. 83-1047, op. filed Feb. 8, 1984)[9FLW368], the Second District held unconstitutional Section 893.13(2)(a)(7), Florida Statutes (1981), which provides as follows:

> (2)(a) It is unlawful for any person:
>
> ....
>
> 7. To possess a controlled substance lawfully dispensed to him by a pharmacist or practitioner, in a container other than that in which the controlled substance was originally delivered.

The court rejected the state's argument in support of the statute. The court citing this Honorable Court's decision in Robinson v. State, 393 So.2d 1076 (Fla. 1980) held:

> In the final analysis, section 893.13(2)(a) 7 criminalizes activity that is otherwise inherently innocent. We do not believe that taking a lawfully prescribed medication from its original container and placing it in a different container, whether for convenience, dosage, or for some other personal reason, is criminal behavior. In Robinson v. State, 393 So.2d 1076 (Fla. 1980), our supreme court considered the constitutionality of a statute prohibiting the wearing of any covering over the face so as to conceal identity. Obviously, a general prohibition against wearing a mask would assist law enforcement officers in determining the identity of persons involved in criminal activity. Yet, because the statute was susceptible of application to entirely innocent activities, the court struck it down as creating prohibitions which completely lacked any rational basis. In the same manner, even if section 893.13(2)(a)7 helps law officers in deciding whom to arrest, the blanket prohibition against carrying prescription drugs which are controlled substances except in original containers causes activities which are otherwise entirely innocent to become

> criminal violations. Without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose of controlling drug distribution. See Schultz v. State, 361 So.2d 416 (Fla. 1978); Foster v. State, 286 So.2d 549 (Fla. 1973).
>
> 9FLW at 369.

Appellees contend that the protection of illegal drug users from fraudulent sales of any substance or even bogus drugs is not a valid exercise of the state's police power. Possession of a controlled substance is a crime under Section 893. Should our state be in the business of enforcement of quality control in prospective drug purchases? A "truth-in-drug-dealing" law would make a mockery of our Section 893, controlled substance laws and undermine its goals. In fact, thorough enforcement of Section 817.563 may encourage illegal drug use because potential drug purchasers may feel that the "phony" or "fake" drug dealers have been removed from a particular neighborhood through effective enforcement of Section 817.563. A deterrent to the purchase of illegal drugs, i.e., the belief that the "drug deals" will provide "phony" or "fake" drugs is lost or totally undermined.

In Sipp, supra, the Fifth District notes:

> In fact, it is probably true that many law abiding people would think it alright for one to sell lawn grass to a "druggie" in the guise of marijuana. The rationale being that "it serves them right!" Of course no law abider would apply the same rule to policement who are endeavoring to stop unlawful drug sales. To bilk them out of money should be, and by this statute is, unlawful but to violate the statute the sale must have been truly completed - delivery (actual or constructive) of the substance the police were let to believe was controlled but turned out not to be, and a payment for it.
>
> Id., at 394

If this is in fact a legitimate use of the state's police power, Section 817.53 is not drafted to expressly apply to said situation because the substance actually sold need not resemble a controlled substance or the purchaser can be a drug buyer. Appellees respectfully submit that another narrowly drawn constitutional statute which proscribed the sale of "look-a-like" contraband to police officers can be drafted instead of this vague, overbroad fraud statute.

IV Section 817.563 is Void for Vagueness.

The doctrine of vagueness originates in the due process clause of the Fourteenth Amendment. It is a fundamental tenet of due process that "(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L.Ed. 888, 59 S.Ct. 618 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." United States v. Harriss, 347 U.S. 612, 617, 98 L.Ed. 989, 74 S.Ct. 808 (1954). Void for vagueness means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.

A vague statute does not give adequate "notice of the required conduct to one who would avoid its penalties," Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330 96 L.Ed. 367, 371 (1951), is not "sufficiently focused to forewarn of both its reach and coverage," United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9

L.Ed.2d at 566, and "may trap the innocent by not providing fair warning," Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227-28 (1972).

As the United States Supreme Court noted in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):

> "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt." 333 U.S. at 515-16, 68 S.Ct. at 670, 92 L.Ed.2d at 849-50 (citations omitted.).

The Winters court overturned a conviction for possession with intent to sell magazines "devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds or pictures, or stories of deeds of bloodshed, lust or crime." Id. Noting that the provision contained no "ascertainable standard of guilt," the court determined that "[w]here a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." 333 U.S. at 520, 68 S.Ct. at 672, 92 L.Ed. at 852.

It is clear under Florida law that a statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute.

In State v. Linville, 359 So.2d 450 (Fla. 1978) this Honorable Court held that Section 877.11, Florida Statutes (1975)("Inhalation

or possession of harmful chemical substances;") was unconstitutional. This Honorable Court stated that the statutory language does not convey sufficient definite warnings of the proscribed conduct when measured by common understanding and practice...." Id., at 452. This Honorable Court held:

> In sum, Section 877.11, Florida Statutes (1975), cannot withstand constitutional scrutiny because a man of common intelligence cannot be expected to discern what activity the statute is seeking to proscribe. This deficiency could be remedied if the legislature refined the definition of "chemical substance" to reflect more precisely its intent.

Id., at 453-454.

In Robinson v. State, 393 So.2d 1076 (Fla. 1980), this Honorable Court held Section 876.13, F.S. (1977)[3] unconstitutional because it deprived the defendant of due process because it is overbroad. This Honorable Court stated:

> Without speculating on whether the statute is intended to apply to any core activities which the legislature has an interest in preventing, we find that this law is susceptible of application to entirely innocent activities. It is susceptible ob being applied so as to create prohibitions that completely lack any rational basis. The exceptions provided by section 876.16, Florida Statutes (1977), are not sufficient to cure this fatal overbreadth.

Id., at 1077.

In Bussey, the Fourth District found that Section 817.563 "is vague in that it does not say whether the person selling the

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[3]Section 876.13, F.S. (1977) provides:

> No person or persons shall in this state, while wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, enter upon, or be, or appear upon or within the public property of any municipality or county of the state.

counterfeit drug must know it to be counterfeit or must know it not to be counterfeit." The court further found the following:

> In addition, the statute is inherently vague in its definition and in its penalty provisions. The statute does not actually state whether it is the drug intended to be sold or the substance actually sold which determines whether it is a felony or misdemeanor. Perhaps the only logical construction is that if a person offers to sell an illegal drug and then actually sells a legal substance the act is a felony or misdemeanor depending on which type of illegal substance was originally offered. However, the Second District in M.P. v. State, supra, has held that there is no necessity of any intent to actually sell a controlled substance. The First District held in Thomas that Section 817.563 only applies when the defendant actually knows that the substance sold is a legal substance and not when he has a mistaken belief that it is an illegal substance. A close reading of Thomas indicates the statute applies only when one knowingly offers an illegal drug and then knowingly sells a legal substance. The Thomas opinion is in disagreement with M.P. v. State, supra, which holds that there need be no intent to ever sell an illegal drug but only an offer to do so. After consideration of the statute and the cases construing it we conclude it is vague and thus constitutionally infirm.

Id., at 65 (e.s.).

Appellees respectfully request this Honorable Court to adopt this reasoning of the Bussey court and declare Section 817.563 unconstitutionally vague.

In Robinson, this Honorable Court considered the constitutionality of a criminal statute prohibiting the wearing of any covering over the face so as to conceal identity. Clearly, a general prohibition against wearing a mask would assist police officer in ascertaining the identity of felons. However, because that statute was susceptible

of application to entirely innocent activities, this Honorable Court declared said statute unconstitutional. Likewise, Section 817.563 is an overly broad, ambiguous, and vague statute which is susceptible of application to innocent activities. For example:

> (1) B requests A to supply him with "speed". A falsely says he will supply B with "speed". But, in fact, supplies B with an over-the-counter sleeping pill for B's own well-being.
>
> (2) A agrees to supply B with "speed". And A intends to supply B with "speed". However, after the offer to sell is made, A delivers B some other legal substance, for B's own well-being.
>
> (3) A agrees to supply B with "speed". And A intends to supply B with "speed". However, after the offer to sell is made, A decides not to supply some other substance but said substance is negligently or inadvertently delivered to B.
>
> (4) A agrees to sell "speed" to B. A then says to B "Here, take this orange, instead." A has violated Section 817.563.

Also, the reference to "controlled substances" (Section 893) in this statute creates an entirely vague and ambiguous statute. A drug dealer is not likely to "bargain" in statutory terms and refer to his "product" by that found in Section 893, Florida Statutes. It cannot be held that an offer to sell and then deliver "speed" is a per se offer to sell or deliver a controlled substance. It is insufficient for the state to prove that sometimes people on the steeet when they use the word "speed" means a controlled substance. A fatal ambiguity and vagueness is inherent in this statute. A person could honestly believe that "speed" refers to legal diet pills.

It is abundantly clear in our society that drug addicts have their own special vocabulary ("acid", "speed", "snow", etc.). See

David Bernheim, Defense of Narcotics Cases (Vol. 2, 1983), Section 7.34, "The Argot of the Addict." Mere vague flexible ephemeral street slang expressions are being turned into elements of the Florida Statutes. A person on the street will bargain in the "Argot of the Addict." He may sell "speed" to an undercover police officer with the intent to supply a legal, over-the-counter diet pill which he and/or his peers refer to as "speed". The definition of "speed" may change from one location to another. This person may never have even conceived of providing a methamphetamine. But an honest misconception can set in motion a felony conviction. In fact, this person's innocence is the cause of his conviction under Section 817.563. A supplies "speed" believing it to be legal diet pills to an undercover officer. The officer purchases this "speed" and the subsequent test, of course, reveals that it is not methamphetamine. A is charged with a felony punishable by up to five (5) years in prison. An honest belief under this scenario leads almost inevitably to a felony conviction under Section 817.563.

In United States v. Reese, 92 U.S. 214 (1875), the court held:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

Section 817.563 suffers from this identical constitutional infirmity outlined in United States v. Reese, supra.

Appellees respectfully request this Honorable Court to declare Section 817.563 unconstitutionally vague and thereby affirm the Fourt District Court of Appeal's decision in State v. Bussey, supra.

CONCLUSION

Based on the authority and grounds cited herein, Appellees respectfully request this Honorable Court to declare Section 817.563, Florida Statutes (1981) unconstitutional and affirm the decision of the Fourth District Court of Appeal in State v. Bussey, supra.

Assuming arguendo, this Honorable Court decides to reverse the decision in Bussey, Appellee, James E. Dotson requests this Honorable Court to remand to the Fourth District to resolve an issue in that cause (trial court's failure to properly instruct the jury on the intent elements of the crime), not reached by the Fourth District in light of its decision in State v. Bussey, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to JOY B. SHEARER, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 29th day of March, 1984.

Cynthia Calvello