

IN THE  
SUPREME COURT OF FLORIDA

STEPHEN LOUIS HOUSER, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
STATE OF FLORIDA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. 65,793

**FILED**

SID J. WHITE

SEP 26 1984

CLERK, SUPREME COURT

By

Chief Deputy Clerk

DISCRETIONARY REVIEW FROM THE  
SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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## PRELIMINARY STATEMENT

The Petitioner, Stephen Louis Houser, was the Appellant in the Second District Court of Appeal and will be referred to in this brief as Petitioner. The Respondent, State of Florida, was the Appellee in the District Court and will be referred to as Respondent or State in this brief.

## STATEMENT OF THE CASE AND FACTS

By information dated September 9, 1983 Petitioner was charged with two counts of agreeing to sell a false controlled substance under Section 817.563, Florida Statutes. Petitioner filed a Motion to Dismiss alleging the penalty provisions of the statute were unconstitutional. The State filed an answer and a hearing was held on the motion on November 21, 1983. After listening to argument, the trial court denied Petitioner's motion to dismiss. Thereafter, Petitioner entered a plea of nolo contendere to both counts and received two years probation.

Appeal was taken to the Second District Court of Appeal raising the following two issues:

1. WHETHER THE PENALTY PROVISIONS OF SECTION 817.563, FLORIDA STATUTES ARE UNCONSTITUTIONAL IN THAT THEIR PROVISIONS LACK A RATIONAL BASIS BECAUSE THEY ARE PREDICATED UPON A SCHEDULE OF CONTROLLED SUBSTANCES WHEN NO CONTROLLED SUBSTANCES ARE INVOLVED IN THE CRIME.
2. WHETHER SECTION 817.563, FLORIDA STATUTES IS AN IMPROPER EXERCISE OF THE POLICE POWER AND UNCONSTITUTIONALLY VAGUE.

The Second District rejected Petitioner's contentions that either the substantive or penalty portions of the statute were unconstitutional. In so holding the court recognized that its opinion directly conflicted with State v. Bussey, 444 So.2d 630 (Fla. 4th DCA 1984).

A Notice to Invoke the Discretionary Jurisdiction timely followed.

#### ARGUMENT

WHETHER THE SECOND DISTRICT'S  
OPINION IN HOUSER V. STATE,  
DIRECTLY CONFLICTS WITH THE  
OPINION IN STATE V. BUSSEY,  
444 So.2d 630 (Fla. 4th DCA  
1984)?

The Second District Court of Appeals in Houser v. State, recognized that its opinion directly conflicted with that of State v. Bussey, supra. The Court in Bussey concluded Section 817.563, Florida Statutes, was not a proper exercise of the police power and was unconstitutionally vague. The Second District on the other hand, citing State v. Growden, 437 So.2d 783 (Fla. 2d DCA 1983); M. P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983) and State v. Thomas, 428 So.2d 327 (Fla. 1st DCA 1983), held the statute constitutional. It must be noted that this Court denied a Petition for review in Thomas. See Thomas v. State, 436 So.2d 101 (Fla. 1983).

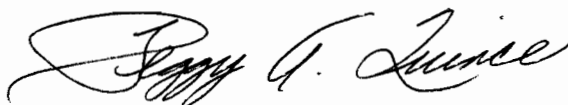
Additionally, the State of Florida filed an appeal in Bussey pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure. See State v. Bussey, Case No. 64,966, argued September 4, 1984.

CONCLUSION

Based on the foregoing Respondent recognizes the opinion in Houser v. State directly conflicts with the opinion in State v. Bussey.

Respectfully submitted,

JIM SMITH  
ATTORNEY GENERAL

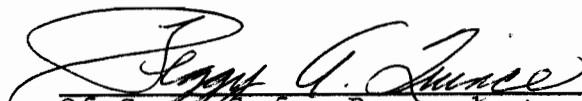


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas A. McDonald, Esquire, 2000 E. Edgewood Drive, #106B, Lakeland, Florida 33803, this 24th day of September, 1984.

  
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Of Counsel for Respondent