

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

MAR 15 1985

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

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

Case No: 65,793

ON APPEAL OF THE DISTRICT COURT  
OF APPEAL OF FLORIDA IN AND FOR THE SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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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 no 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. This Court accepted jurisdiction on January 25, 1985.

SUMMARY OF THE ARGUMENT

Jurisdiction of this cause was urged based on a conflict with State v. Bussey, 444 So.2d 630 (Fla. 4th DCA 1984). The Bussey decision concerned only the constitutionality of the substantive portion of Section 817.563, Florida Statutes. Since the opinion on the penalty portion of the statute does not conflict with any other decision, it cannot be used to show conflict and cannot be properly before this Court. However, assuming the issue can be raised here, that portion of the statute is constitutional. The penalty provisions of Section 817.563 are reasonably related to the purposes of the statute.

Petitioner's argument that the substantive portion of the statute is unconstitutional has already been held to be meritless in State v. Bussey, \_\_\_So.2d\_\_\_ (Fla. 1985, 10 FLW 105, Case No. 64,966, 64,967 & 64,968, Opinion filed February 7, 1985).

ARGUMENT

ISSUE I

THE PENALTY PROVISIONS OF  
SECTION 817.563, FLORIDA  
STATUTES ARE CONSTITUTIONAL

In the jurisdictional briefs in this Court the parties stated this case was in conflict with State v. Bussey, 444 So.2d 630 (Fla. 4th DCA 1984). The conflict was, in fact, pertaining to the substantive portion of the statute. The Bussey opinion did not address the issues presented here concerning the penalty sections of the statute. Therefore, the decision in Houser v. State, \_\_\_ So.2d \_\_\_ (Fla. 2d DCA 1984, Case No. 84-199, Opinion filed July 27, 1984) could not and did not conflict with Bussey on this point. Since this Court's jurisdiction could not be invoked on this issue, it should not be addressed.

However, should this Court wish to consider the matter Respondent submits the penalty provisions of the statute pass constitutional scrutiny.

Petitioner essentially argues the penalty provisions of Section 817.563, Florida Statutes, are unconstitutional because they are based on schedules of controlled substances when no controlled substances were in fact sold. Respondent respectfully submits there is a rational relationship between the penalties imposed under this section and the controlled substance offered for sale.

It is well settled law that the power to define criminal offenses and proscribe the punishment for those found guilty of vio-

lating the law resided wholly with the legislature. See Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432 63 L.Ed.2d 715 (1980). The maximum and minimum penalties for violations of the law are purely matters within the legislative prerogative. See State v. Benitez, 395 So.2d 514 (Fla. 1981) and Rummell v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382 (1980).

In State v. Thomas, 428 So.2d 327 (Fla. 1st DCA 1983) the court indicated the legislature has broad discretion in determining necessary measures for the protection of the public health, safety and welfare. The court in Thomas addressed itself to the constitutionality of Section 817.563 and the legislative intent behind this enactment. The court listed the following important policies which the Statute advances:

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 do 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 substance, 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 education 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. (Text at 428 So.2d p. 331).

The Thomas court makes it clear one of the purposes of the statute is to protect the public health.

There can be no doubt that Chapter 893, Florida Statutes, was likewise enacted, inter alia, to protect the public health. Section 893.03, the schedule of controlled substances, divides the controlled substances into five schedules. Schedule I lists those drugs with a high potential for abuse and no currently accepted medical use in the United States; the schedules go in descending order of potential for abuse until Schedule V which lists those substances with a low potential abuse. Section 817.563(1) makes it a felony of the third degree to offer to sell one of the controlled substances in Schedules I, II, III or IV and then sell to such person any other substance in lieu thereof. Subsection (2) makes it a misdemeanor of the second degree to offer to sell a controlled substance from Schedule V and then sell to such person any other any other substance in lieu thereof.

These penalty provisions are rationally related to one of the stated purposes of the statute to protect the health of individuals who, in fact, intend to ingest controlled substances. For example, if one who intends to take a substance controlled under Schedule I and is in fact sold some other substance, the potential for harmful side effects is great.<sup>1</sup>

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1/ It is general knowledge that one who is addicted to a controlled substance must be gradually weaned or his body goes through serious withdrawal symptoms.

Since the potential for abuse of Schedule V substance is low, the harmful effects of taking another substance in lieu thereof is correspondingly low. The penalties are thus related to the potential harm to the public.

Petitioner's examples concerning the money and water do not change the facts. The amount of money involved is not persuasive. Even under the penalty sections of Chapter 893 one can receive a greater sentence for a small amount quantity and money of cocaine than for a large amount of cannabis. And if one ingested bleach or acid instead of a controlled substance, the defendant would think a violation of this section was small potatoes compared to the murder charge he would be facing.

Based on the foregoing analysis, Respondent respectfully submits the penalty provisions of Section 817.563 are not unconstitutional as they are reasonably related to the purposes of the statute.

ISSUE 2

SECTION 817.563, FLORIDA STATUTES  
IS NOT AN IMPROPER EXERCISE OF THE  
POLICE POWER AND IS NOT UNCONSTITU-  
TIONALLY VAGUE.

This Court in State v. Bussey, supra and Growden v. State,  
\_\_\_ So.2d\_\_\_ (Fla. 1985, 10 FLW 114, Case No. 64,407, Opinion  
filed February 7, 1985) found Section 817.563 to be constitutional  
against challenges on vagueness and improper exercise of the po-  
lice power. Petitioner challenges the law on the same grounds,  
but he has not asserted any compelling new argument which would  
require this court to revisit Bussey and Growden.

CONCLUSION

Based on the foregoing the opinion of the Second District Court of Appeals should be affirmed.

Respectfully submitted,

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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, Esq. 2000 E. Edgewood Dr.-#106-B, Lakeland, FL 33803; on this 13<sup>th</sup> day of March, 1985.

  
OF COUNSEL FOR RESPONDENT