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IN THE SUPREME COURT OF FLORIDA

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S.D. J. WHITE
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Chief Deputy Clerk

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DEBBIE ANN TODD,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Case No. 66,061

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

DEBBIE ANN TODD,)
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 Petitioner,)
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 vs.) Case No. 66,061
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 STATE OF FLORIDA,)
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 Respondent.)
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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information filed in the Circuit Court of Orange County, Florida with one count of sale of a counterfeit substance in lieu of a controlled substance in violation of Section 817.563, Florida Statutes (1981). (R 8) On December 6, 1983, Petitioner's motion to dismiss, grounded on the unconstitutionality of the Statute under which she was charged, was denied. (R 8) Petitioner entered a plea of nolo contendere to the charge, reserving the right to appeal the denial of the motion to dismiss. (R 11-15) Petitioner was placed on probation for a period of two years. (R 13-14, 37-38)

Notice of appeal was timely filed on February 3, 1984 and on September 20, 1984, the Fifth District Court of Appeal affirmed. Todd v. State, 455 So.2d 1154 (Fla. 5th DCA 1984). Notice to invoke this Honorable Court's jurisdiction was filed October 19, 1984.

SUMMARY OF ARGUMENT

Petitioner urges that the Fourth District Court of Appeal correctly held Section 817.563, Florida Statutes (1981), to be unconstitutional in State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984), and the reasoning therein should be adopted by this Honorable Court.

ISSUE

WHETHER THE FIFTH DISTRICT COURT OF
APPEAL ERRED IN UPHOLDING THE CONSTITU-
TIONALITY OF SECTION 817.563, FLORIDA
STATUTES (1981).

The Fifth District Court of Appeal affirmed Petitioner's orders of probation and found Section 817.563, Florida Statutes (1981), to be constitutional. The District Court noted that its decision was contra to State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984). Todd v. State, 455 So.2d 1154 (Fla. 5th DCA 1984).

Petitioner had relied upon the Fourth District Court of Appeal's ruling in State v. Bussey, supra, in arguing to the Fifth District Court that the statute was unconstitutional. Since the time of the District Court's decision in this case, this Honorable Court has reversed the Fourth District Court of Appeal's ruling, in State v. Bussey, 10 FLW 105 (Fla. February 7, 1985). In Bussey, this Honorable Court held that although the statute is contained in Chapter 817 governing "fraudulent practices," the statute is not a fraud but a drug abuse prevention statute; that the statute's making an act "unlawful" furnished its criminal intent requirement; and that no specific state purpose is required to render a law constitutional. Although the First and Second District Courts of Appeal found the statute to be valid for opposite reasons, this Honorable Court has held that it is not void for vagueness.¹

¹ M. P. v. State, 430 So.2d 523 (Fla. 2d DCA 1983), held there need be no intent to sell an illegal drug but only an offer to do so; State v. Thomas, 428 So.2d 327 (Fla. 1st DCA), review denied

Because Petitioner's appeal was grounded solely upon the constitutionality or not of Section 817.563, the issue in this cause appears to have been disposed of by State v. Bussey, 10 FLW 105 (Fla. February 7, 1985). Petitioner, however, would respectfully urge that this Honorable Court reconsider its ruling in that case and thereupon adopt the well-reasoned conclusion of the Fourth District Court of Appeal in State v. Bussey, 444 So.2d 63 (Fla. 4th DCA 1984).

436 So.2d 101 (Fla. 1983), saw the statute as clearly requiring proof that the seller actually knows the substance sold is a legal substance and knowingly offers to sell an illegal substance.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the Fifth District court of Appeal's decision herein, and order that this cause be remanded to the trial court with directions that Petitioner be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Ms. Debbie Ann Todd, Route 2, Box 254, Aynor, South Carolina 29511 this 28th day of March, 1985.

Michael S. Becker

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