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DEC 18 1991
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
VS.
DENNIS THOMPSON,
Respondent.

CASE NO. 78,728

# RESPONDENT'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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ATTORNEY FOR RESPONDENT

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## STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth by Petitioner in her brief.

## SUMMARY OF ARGUMENT

A defendant may not properly be convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft where both charges arise from the same fraudulent sale. To allow dual convictions would violate a defendant's constitutional right to be free from double jeopardy. Specifically, for purposes of the double jeopardy analysis, these offenses are the same in that one is a specific form of the more general theft crime. As such, the legislature did not intend dual convictions based on alternate forms of proving the same offense. The decision of the Fifth District Court of Appeal is correct and should be approved.

## ARGUMENT

**A** DEFENDANT MAY NOT BE CONVICTED OF BOTH FRAUDULENT SALE OF A COUNTERFEIT CONTROLLED SUBSTANCE AND FELONY PETIT THEFT WHERE BOTH CHARGES AROSE FROM THE SAME FRAUDULENT SALE.

Petitioner argues that a defendant may properly be convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft since each offense has an essential element that the other lacks. Thus, as Petitioner asserts, the Blockburser[1] test is met. Additionally, Petitioner asserts that since both offenses are the same degree crimes, they are not lesser-included offenses of each other and thus separate convictions **are** proper. Unfortunately, Petitioner's analysis although correct, is incomplete.

As the Fifth District Court of Appeal noted below, the historical development of the theft statute in Florida precludes separate convictions. In promulgating Chapter 817, the legislature was specifying particular kinds of thefts. Prior to this promulgation, these offenses were properly prosecuted under the general theft statute. In fact, it **appears** that they may still be prosecuted under the general theft statute. What the legislature has done is to provide an alternative means of permitting the State to secure a conviction. **In** Sipp v. **State**,

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[1] Blockburser v. United States, **284** U.S. **299, 52** S.Ct. **180,** 76 L.Ed.2d 306 (1932).

442 So.2d 392 (Fla. 5th DCA 1983) the defendant was convicted of sale of a counterfeit controlled substance and appealed. In analyzing the sale of a counterfeit controlled substance statute, the Court stated:

> For good reason the statute in this case is not a drug abuse prevention and control statute but is a fraudulent practices statute. Before enactment of the statute there was no specific crime proscribing this conduct so the larceny (now known as theft) statute was employed to punish those who induced undercover agents to part with money when it was thousht drug cases were being made but drug cases were not being made.

Id. at 394 (emphasis added) Thus, the Court recognized that the sale of a counterfeit substance in lieu of a controlled substance statute was for all intents and purposes the same offense that had been previously punished under the theft statute. Both statutes punish the offense of theft by false pretenses. As the court below noted the fraudulent sale of a counterfeit controlled substance is merely a more specific form of the general theft statute. Thus, the Court reasoned, the offenses defined in Chapter 817 are merely different degrees of the more general. theft offenses defined in Chapter 812. While the State could choose to prosecute under either statute, the Court reasoned that the legislature did not intend for the same act of criminal fraud to be prosecuted under both statutes as separate offenses. Since the specific theft by fraud offenses are, as the Court noted, "theoretically subsumed" by the general theft statute separate

convictions are not permitted.

This Court has recognized the validity of this analysis in its previous decision in Houser v. State, 474 So.2d 1193 (Fla. 1985) wherein the Court held that a defendant could not be convicted and sentenced for both DUI Manslaughter and Vehicular Homicide where there was but a single death. While recognizing that the offenses were separate for purposes of the Blockburser analysis, this Court found no impediment to ruling that dual convictions were nevertheless barred. As this Court noted: "The assumption underlying the Blockburser rule is that [the legislature] ordinarily does not intend to punish the same offense under two different statutes." [Citing Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)]. In essence, what this Court ruled, is that while the legislature is free to offer alternative methods of prosecuting a person for a single criminal act, it cannot permit dual convictions under both alternatives for a single act. Houser was recently cited with approval and thus reaffirmed in Gaskin v. State, 16 FLW S 762 (Fla. December 5, 1991) wherein this Court held that the defendant could not be convicted of both premeditated murder and felony murder for the same death.

If, as Petitioner asserts, the Blockburger test is the sole test to be applied in an analysis of double jeopardy, absurd results could be reached. For example, the legislature has determined that the offense of grand theft can be committed in several ways. Grand theft can be committed where one steals

property of another valued at more that $300. It may also be committed where one steals a car, regardless of the value. Thus, under Petitioner's argument, for one act of stealing a car valued at more than $300, a person could be convicted of two counts of grand theft despite the fact that a single object - an automobile - was stolen. Surely, the legislature did not intend this result. This example illustrates the fact that the Blockburser test while a useful tool in determining legislative intent, may nevertheless not be the sole tool used.

Finally, Petitioner cites this Court's decision in State v. Bussey, 463 So.2d 1141 (Fla. 1985) for the proposition that sale of a counterfeit controlled substance is a drug abuse law rather than a fraud law. While this Court certainly did rule that way, it is important to note the context in which this holding was reached. This Court was faced with the question of whether Section 817.563, Florida Statutes (1983) was constitutional. The District Court of Appeal had ruled that there was no rational purpose for the legislature to enact such a statute. This Court disagreed and noted that the purpose of the statute is to prevent drug abuse and to assist in prosecution of drug dealers. In this respect, the Court noted that the offense although nominally a fraud statute, was in effect a drug abuse prevention statute. Respondent **does** not really contest this holding. However, the offense is not punished as a drug offense. In sentencing someone convicted of sale of a counterfeit controlled substance, a category 6 scoresheet must be used. The

covers thefts, forgeries, and frauds and specifically includes convictions under Chapter 817. This Court approved the use of this scoresheet and thus it must be assumed that it intended to treat this offense as a fraud statute, notwithstanding the fact that it is also aimed at deterring would-be drug dealers. The decision of the Fifth District Court of Appeal can be approved notwithstanding this Court's holding in State v. Bussey.

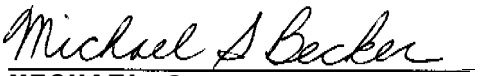
In summary, Respondent urges that this Court answer the certified question in the negative and approve the decision of the Fifth District Court of Appeal. In so ruling, this Court should hold that for double jeopardy purposes, sale of a counterfeit substance in lieu of a controlled substance is merely a more specified form of the general theft statute. Thus, while the legislature has provided alternative ways of prosecuting the single offense of a fraudulent sale of a controlled substance, dual convictions under both alternatives are not permitted.

## CONCLUSION

Based on the foregoing cases, argument and authorities, Respondent respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Dennis Thompson, No. B 745000, P. O. Box 158, Lowell, FL 32663 on December 16, 1991.

Michael S. Becker

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ASSISTANT PUBLIC DEFENDER