IN THE SUPREME COURT OF FLORIDA

STACY BURCH,
KENNY MIKE BROWN,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,826

PETITIONERS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the prosecuting authority below, will be referred to as "Respondent" or the " State". Petitioner, Kenny Mike Brown, the criminal defendant below, will be referred to as "Petitioner Brown". Petitioner Burch, the criminal defendant below will be referred to as "Petitioner Burch".

References to the two-volume record on appeal in the Brown case (DCA Case No. 88-930) will be designated" "BR". References to the two-volume record on appeal in the Burch case (DCA Case No. 88-904) will be designated "R".

STATEMENT OF THE CASE AND FACTS

Kenny Mike Brown - DCA Case No. 88-930

Respondent-State filed an information in the Seventeenth Judicial Circuit, Broward County charging that Petitioner-Brown on December 11, 1987, committed the first degree felony of sale, purchase, manufacture, or delivery of narcotics within one thousand (1000) feet of a school, in violation of § 893.13-(1)(e)[1], Fla. Stat (1987). (BR 31). Petitioner through counsel, then filed a Fla.R.Crim.P. 3.190 Motion to Dismiss (BR 32-33) and Memorandum of Law in support of said motion to dismiss. (BR 36).

A hearing was held in the trial court on Petitioner's motion, and those of numerous other defendants, before the Honorable Daniel Futch of the Seventeenth Judicial Circuit on March 11, 1988. (BR 1-30). In addition to Petitioner's trial

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[1] This statute reads, in pertinent part, as follows:

> Except as authorized by this chapter, it is unlawful for any person to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school. Any person who violates this paragraph with respect to:
>
> 1. A controlled substance named or described in § 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) is guilty of a Felony of the first degree, punishable as provided in § 775.082, § 775.083 or 775.084.

counsel, Assistant Public Defender Susan Porter, Ms. Pollack and Ms. Huard of that office also argued that said statute was unconstitutional.

At this hearing, defense counsels urged that because their clients had purportedly purchased drugs from undercover police agents within one-thousand (1000) feet from various schools during the evening hours, they were either entrapped as a matter of law, or otherwise treated fundamentally unfairly, requiring the dismissal of the charges against them under various constitutional theories. (BR 3-12).

As to the factual setting in this case, State v. Kenny Mike Brown, Petitioner Brown in his written Motion to Dismiss states that he "was arrested at approximately 8:00 p.m. for purchasing cocaine at 2563 Northwest 16th Court in Ft. Lauderdale, Florida (BR 11). This occurred within 1000 feet of Dillard High School (BR 11, 32). Petitioner Brown was arrested for violating section 893.13(1)(a) which had become effective October 1, 1987." (BR 32).

According to Petitioner Brown, the Broward County Sheriff's Office "set up a reverse stinq operation within 1000 feet of Dillard High School. Defendant [Petitioner Brown] was arrested for purchasing cocaine from an officer." (BR 36). Judge Futch in his written order concluded that "law enforcement agencies have set up reverse-sting operations with police officers posing as drug sellers or buyers. The reverse-sting operations have taken

place after school hours and in residential neighborhoods." (BR 55).[2]

At the motion hearing, Petitioner Brown's counsel also argued that there is an additional ground to declare said statute unconstitutional not contained in her written motion. (BR 20). Citing Bunnell v. State, 453 So.2d 808 (Fla. 1984)

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2 In State v. Wilson, Case No. 88-1417, appeal pending, No. 88-0881, the defendant Wilson was charged with purchasing two cocaine rocks from undercover detectives. (BR 5-7). The purchase occurred on January 22, 1988 at 7:15 p.m. at 2563 Northwest 13th Court which is near Dillard High School. (BR 5). All of the sales of cocaine rocks by the undercover police officers to the defendants took place during the evening hours when the schools were closed and not in session. (BR 6). Another defendant, Kurris Pressley, was charged with purchasing one (1) cocaine rock from an undercover officer at the same location near Dillard High School. (R 8). A defendant, Janice Jackson, was charged with purchasing one (1) cocaine rock from an undercover officer at 6:53 p.m. near Deerfield Beach High School. (BR 9). Two other defendants Pamela Quince and Joyce Johnson also were charged with purchasing cocaine rocks. (BR 9-10).

In a similar case, Judge Coker of the Seventeenth Judicial Circuit in his written opinion found in State v. Montgomery, No. 87-21037 CF (17th Cir. March 16, 1988) appeal pending, No. 88-0854 (Fla. 4th DCA) (See Appendix 2) the following facts:

> 1. Mae Montgomery allegedly purchased three (3) cocaine rocks at approximately 7:20 p.m. on Friday, December 11, 1987.
> 2. The seller was a Broward Sheriff's Office deputy. This enforcement technique is commonly referred to as a "reverse sting."
> 3. Pursuant to measurements made by the Broward Sheriff's Office, they set up their reverse sting within 1,000 ft. of Dillard High School.
> 4. It has not been established that school was in session on the date and time in question or that any school age children were in the area.
> 5. Mae Montgomery had no prior criminal history.

Petitioner Brown argued that section 893.13(1)(e) which was part of the "Crime Prevention and Control Act", of 1987 Chapter 87-243, Laws of Florida violates the "One Subject Rule" contained in Article 111, Section 6 of the Florida Constitution (1968). (BR 38).

At the motion hearing, prosecuting counsel answered defense counsel's arguments with a legal discourse directed at the allegations of Petitioner Brown's written motion, and also urged that the police activity and methods utilized were a reasonable and necessary response to the high volume of ongoing drug trade in the sundry school neighborhoods. (BR 12,22,27-28).

At the conclusion of the hearing, Judge Futch GRANTED the defendant's Motion to Dismiss and declared Section 893.13(1)(e) UNCONSTITUTIONAL. At the motion hearing, the trial court ruled:

> THE COURT: If the police would quit selling drugs, some of the users wouldn't be able to get it.
>
> MR. SEIDMAN [Prosecutor]: I understand the Court's position, but we respectfully object.
>
> THE COURT: You've got to go with it. I think the way it's done is an improper exercise of the police power. I think the statute is overly broad and accordingly -- did you want to say something else on the record.?
>
> * * *
>
> THE COURT: What about the hours of operation? Is a school a school after there's no school?
>
> MR. SEIDMAN: Sure it is, Judge.

MS. HUARD [defense counsel]: If these cases are taking place in the daylight in front of the school, I can understand the police's conduct. Rut this is taking place in an area where you can't even see the school, it's nighttime there's no school children out and about.

THE COURT: I've got all kinds of problem. I've heard this argument two weeks ago, I've been thinking about it a lot, I read your memos, I've been giving it a lot of thought.

MR. SEIDMAN: I know you have.

THE COURT: I don't do it lightly, but I think it's overbroad, improper exercise of police power in this particular circumstance the way it's being done. Accordingly, I grant the motion to dismiss as unconstitutional.

(BR 26-27).

In his written order granting Petitioner Brown's Motion to Dismiss, the trial court found that:

1. The Statute F.S. 893.13(1)(e) as written, is vague and overbroad in its language.

The application of the Statute by law enforcement agencies is an abuse of the police power and fails to follow the legislative intent in that the law enforcement agencies have set up reverse-sting operations with police officers posing as drug sellers or dealers. The reverse-sting operations have taken place after school hours and in residential neighborhoods. (BR 55).

Stacy Burch - DCA Case No. 88-904

Respondent-State filed an information in the Seventeenth Judicial Circuit, Broward County charging that Petitioner Burch on November 24, 1987, committed the first degree felony of sale,

purchase, manufacture , or delivery of narcotics within one thousand (1000) feet of a school, in violation of § 893.13(1)(e), Fla. Stat. R 31. Petitioner Burch through counsel, then filed a Fla.R.Crim.P. 3.190 motion to dismiss and Memorandum of Law in Support of Motion to Dismiss. R 34-41. As to the factual setting in this case, State v. Stacy Qurch, the written Motion to Dismiss alleges that Petitioner Burch "was arrested on the evening of November 24, 1987, for selling cocaine within one-thousand (1000) feet of a school under the new statute § 893.-13(1)(e), that had become law on October 1, 1987." R 32.

Petitioner's trial counsel indicated at the hearing:

> "That took place on November 24, 1987, 6:05 p.m. that was near Collins Elementary School and was in essentially the same position that Mr. Huard just pointed out in the 100 block of Northwest 6th Avenue. It was Officer Curry of the Hallendale Police Department who was working with Detective Maran and Detective Clawdale of the Dania Police Department in Dania." (R 12).

In addition to Judge Futch in the cases of Brown and Burch, supra, Judge Coker of the Seventeenth Judicial Circuit in a written order declared section 893.13 (1)(e) unconstitutional in the case of State v. Montgomery, No. 87-21037CF (17th Cir. Mar. 16, 1988), appeal pending, (Fla. 4th DCA No. 88-0854) (See Appendix 2). Judge Korda of the Seventeenth Judicial Circuit declared the statute unconstitutional in State v. Brinegar, No. 88-4821CF (17th Cir. 1988), appeal pending, (Fla. 4th DCA No. 88-1555). Judge Moe of the Seventeenth Judicial Circuit declared

the statute unconstitutional in State v. Mitchell, Case No. 87-18767CF (17th Cir. 1987), appeal pending, (Fla. 4th DCA NO. 88-1400). Judge Tyson of the Seventeenth Judicial Circuit in a written order declared section 893.13(1)(e) unconstitutional in State v. McPhaul, No. 88-1422CF (17th Cir. April 29, 1988), appeal pending, (Fla. 4th DCA No. 88-1268). (See Appendix 3). And finally, Judge Polen declared section 893. 13(1)(e) unconstitutional in a written order in State v. Ferguson, No. 87-18756CF (17th Cir. April 27, 1988), appeal pending, (Fla. 4th DCA NO. 88-1227). (See Appendix 4).

On February 8, 1989, in this case the Fourth District Court of Appeal in a written opinion, State v. Burch, 14 F.L.W. 382 (Fla. 4th DCA Feb. 8, 1989), reversed the order of the trial court and declared Section 893.13(1)(e), Florida Statutes (1987) constitutional. The Fourth District also rejected the argument advanced solely by Petitioner Brown who was charged with purchasing cocaine within 1000 feet of a school that the misconduct of the police officers in this cause rose to the level of entrapment as a matter of law and/or a violation of the constitutional due process rights of Petitioner Brown. Hence the Fourth District rejected this alternative basis advanced solely by Petitioner Brown to uphold the trial court's order dismissing the information filed against him. However the Fourth District after noting the "multiplicity of appeals statewide" and that "many trial judges in our district have disagreed" on the issue

of the constitutionality of Section 893.13(1)(e), Florida Statutes (1987) certified the following question to this Honorable Court as a matter to be of great public importance:

> IS SECTION 893.13(1)(e), FLORIDA STATUTES (1987) CONSTITUTIONAL?

Petitioner timely filed a notice to invoke the jurisdiction of this Honorable Court in the lower tribunal.

SUMMARY OF ARGUMENT

POINT I

The Trial Court declared Section 893.13(1)(e), Florida Statutes (1987) unconstitutional on its face and as applied. The Trial Court ruled that said statute as written was void for vagueness. The Trial Court further ruled that the enforcement of Section 893.13(1)(e) was not a valid exercise of the police power.

Petitioners contend Section 893.13(1)(e) is also unconstitutional on other grounds not expressly adopted by the trial court. Petitioners contend that Section 893.13(1)(e) is violative of the Equal Protection Clause of both the Federal and Florida Constitutions, fails to include a knowledge or mens rea element, violates the "one subject rule" provision of Article 111, Section 6 of the Florida Constitution and violates Article 111, Section 12 of the Florida Constitution.

Petitioners further contend that said statute violates the Eighth Amendment prohibition against Cruel and Unusual Punishment. One of the most shocking and outrageous aspect of this unconstitutional statute is the penalty provided for violators. It is the essence of cruel and unusual punishment. Hence the decision of the Fourth District Court of Appeal declaring said statue consitutional should be reversed.

POINT II

Even if the objective entrapment defense has been transformed into a jury question by the operation of Section 777.021, F.S. (1987), Petitioner Brown who was charged with purchasing cocaine within 1000 feet of a school maintains that the due process clause still remains to protect our citizens from the conduct of law enforcement agents so outrageous and shocking that due process principles would bar the State from invoking the judicial process to obtain a conviction.

It was only because of the deliberate police ploy of setting-up a reverse-sting operation at night in an area within 1000 feet of a school to lure unsuspecting drug purchasers to the proscribed area that Petitioner Brown opted to purchase cocaine within the specified proscribed area contained in Section 893.13(1)(e).

Hence in the context of the instant case, the trial court did not err in dismissing this enhanced first degree felony charge filed against Petitioner Brown on the alternative basis of the due process defense and/or entrapment as a matter of law.

POINT I

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING PETITIONERS' MOTION TO DECLARE SECTION 893.13(1)(e) UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Section 893.13(1)(e) was passed as part of the "Crime Prevention and Control Act," Chapter 87-243 (Section 4), Laws of Florida, and provides:

> (e) Except as authorized by this chapter, it is unlawful for any person to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 1000 feet of the real property comprising a public or private elementary, middle or secondary school. Any person who violates this paragraph with respect to:
>
> 1. A controlled substance named or described in § 893.01(1)(a), (1)(b), (2)(a), or (2)(b) is guilty of a felony of the first degree, punishable as provided in § 775.082, § 775.084.
>
> 2. A controlled substance named or described in § 893.03(1)(c), (2)(c), (3) or (4) is guilty of a felony of the second degree, punishable as provided in § 775.083, or § 775.084.

The trial court declared Section 893.13(1)(e) unconstitutional. Petitioners maintain that Section 893.13(1)(e) is unconstitutional on the ground that it was passed into law in violation of Article 111, Section 6, of the Florida Constitution (1968) which is commonly called the "one subject rule." Petitioners also maintain that said statute is unconstitutional on the alternative grounds that it is void for vagueness, violates

the Equal Protection Clause, lacks a mens rea element, and violates the Eighth Amendment prohibition against Cruel and Unusual Punishment. The question certified by the Fourth District Court of Appeal should be answered in the negative and Section 893.13(1)(e) should be declared UNCONSTITUTIONAL on its face and as applied to Petitioner. Hence the decision of the Fourth District in the instant case should be reversed.

A. SECTION 893.13(1)(e) VIOLATES ARTICLE 111, SECTION 6, FLORIDA CONSTITUTION.

Article 111, Section 6, of the Constitution of the State of Florida includes a limitation on the passage of new legislation in Florida which is commonly called "the one subject rule":

> Laws -- Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.. ..

This provision, which has ancient roots[3] and exists in one form or another in the constitutions of most of our sister states[4] serves an extremely important function. The consti-

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3 The Lex Caecilia Didia, enacted by the Romans in 98 B.C., prohibited the lex satura, a bill containing unrelated provisions. See Luce, Legislative Procedures 548 (1922).

4 As reported in 1982, forty-one state constitutions provided that an act shall not embrace more than one subject or object. (1A Sutherland Statutory Construction § 17.01, p. 1 (4th ed., 1985 rev.) The only states that have no such provision are Arkansas, Connecticut, Maine, Massachusetts, Mississippi, New Hampshire, North Carolina, Rhode Island and Vermont. (Id. at 3, n. 2.)

tutional requirement that every law shall have but one subject does not exist to hamper or impede the legislative process.

"The purpose of the requirement that each law embrace only one subject and matter properly connected with it is to prevent subterfuge, surprise, 'hodge-podge' and logrolling in legislation." Santos v. State, 380 So.2d 1284, 1285 (Fla. 1980). See also Brown v. Firestone, 382 So.2d 654, 663 (Fla. 1980); State v. Lee, 356 So.2d 276, 282 (Fla. 1978); Williams v. State, 459 So.2d 319, 320 (Fla. 5th DCA 1984), app. dismissed, State v. Williams, 458 So.2d 274 (Fla. 1984). As this Court recently stated in Smith v. Department of Corrections, 507 so.2d 1080, 1085 (Fla. 1987), quoting State v. Lee, supra at 282:

> The purpose of the constitutional prohibiton against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having a necessary or appropriate connection with the subject matter.

Our constitution commands that each law shall embrace one subject (and matters properly connected therewith). A real distinction between subject and object has been maintained by this Court. The subject has been said to be the matter to which the act relates; the object has been construed as the general purpose(s) of the particular legislation. See State v. Canova, 94 So.2d 181, 184 (Fla. 1957); Nichols v. Yandre, 151 Fla. 87, 9 So.2d 157, 158 (Fla. 1942); Spencer v. Hunt, 109 Fla. 248, 147 So. 282, 284 (1933).

In the analysis of what constitutes "one subject," this Court has held that "wide latitude must be accorded the legislature in the enactment of laws," and this Court will strike down a statute "only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject." Lee, 356 So.2d at 282. A bill's subject may be as broad as the legislature chooses provided there is a "natural and logical connection" among the matters contained within. Id. at 282. This Court in State v. Canova, supra, explained:

> "In determining if matters are properly connected with the subject, the test is whether such provisions are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subjects."

Id. at 184.

The corollary of this formulation is that the challenged provision must not be designed to accomplish an object or purpose separate from that of the remainder of the legislation. State, ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (Fla. 1935); Pilot Equipment Co. Inc. v. Miller, 470 So.2d 40, 42 (Fla. 1st DCA 1985).

It follows therefore that an act will not encompass only one subject if it was designed to accomplish separate and dissociated objects of legislative effort. Since 1868, the constitution of our State has contained a mandatory consitutional "one subject rule" provision. See Fla. Const., Article

IV, Section 14 (1868). This important constitutional provision should not be trivalized or degraded by application of some illogical or irrational "common sense" test that severely undermines the above test developed by this Court over the last one hundred years.

Where legislation fails the Article 111, Section 6 "one subject rule", the courts must strike it down because the "wide latitude" standard does not place legislation beyond review. Courts must balance the deference due the legislative branch with the duty to protect our State Constitution and proper governmental process. There are, therefore, definite limits to how broad a scenario the legislature may envision when passing multiple matters and subjects under the title and vote of one bill. For example, in Colonial Investments Co. v. Nolan, 131 So. 178 (Fla. 1930), provisions requiring a sworn tax return and a provision prohibiting deed recording without the stating of the grantor's address were held too independent and unrelated to satisfy the constitutional requirement. Similarly, the prohibition of the manufacture and trafficking of liquor and a provision criminalizing voluntary intoxication failed the "one subject rule." Albritton v. State, 89 So. 360 (Fla. 1921).

The most recent criminal legislation[5] scrutinized for multiplicity of subjects is also the closest on point with the statute here at issue. Chapter 82-150, Laws of Florida, contained just four (4) subsections, which can be summarized as follows:

> 1. created the new crime of "prohibiting the obstruction of justice by false information."
>
> 2. changed membership rules for the Florida Council on Criminal Justice.
>
> 3. repealed certain sections of the Florida Criminal Justice Council Act.
>
> 4. provided an effective date for the bill.

This legislation was found violative of the "one subject rule." The Fifth District Court of Appeal in Williams v. State, supra, reasoned:

> The bill in question in this case is not a comprehensive law or code type of statute. It is very simply a law that contains two different subjects or matters. One section creates a new crime and the other section amends the operation and membership of the Florida Criminal Justice Council. The general object of both may be to improve the criminal justice system, but that does not make them both related to the same subject matter.

Id. at 320.

This Court agreed. In Bunnell v. State, 453 So.2d 808 (Fla. 1984), Justice Shaw wrote for a unanimous Court:

> We recognize the applicability of the rule that legislative acts are presumed to be constitu-

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[5] Civil legislation passed by the Legislature need not be strictly construed. Whereas, of course, penal statutes are to be strictly construed. See Section 775.021(1), Florida Statutes (1987); State ex rel. Washington v. Rivkind, 350 So.2d 575, 577 (Fla. 3d DCA 1977).

> tional and that courts should resolve every reasonable doubt in favor of constitutionality. Nevertheless, it is our view that the subject of section 1 has no cogent relationship with the subject of sections 2 and 3 and that the object of section 1 is separate and disassociated from the object of section 2 and 3. We hold that section 1 of 82-150 was enacted in violation of the one-subject provision of article III, section 6, Florida Constitution. [citations omitted].

Id. at 809.

Turning to the present case, Section 893.13(1)(e), is included in the "Crime Prevention and Control Act", Chapter 87-243, ~~Laws of~~ Laws of Florida. Section 4 of Chapter 87-243 creates the new offense of § 893.13(1)(e) (sale, purchase, manufacture, or delivery of a controlled substance within 1,000 feet of a school.). No such crime had previously existed in Florida.

Chapter 87-243, Laws of Florida is similar in key respects to Chapter 82-150 which was stricken by the Court in Bunnell. Certain sections create new crimes (Sections 4, 35, 39, 49 inter alia), similar to Section (1) of Chapter 82-150. Others create a study commission (Section 54), neighborhood improvement districts (Section 58-61), and a coordinating council (Section 51), similar to Sections (2) and (3) of Chapter 82-150.

Even employing wide latitude to combine multiple sections under single subject headings, e.g., "drug abuse laws," a conservative analysis discloses a minimum of sixteen (16) separate and distinct subject matters.

Short Titles: Sections 1, 30, 55

Titles are, of course, not subjects themselves and will not be counted as such. It is curious, though, how a bill which should be addressing "one subject" has three (3) separate sections identifying three (3) different short titles.

Section 1: Crime Prevention and Control Act

Section 30: Money Laundering Control Act

Section 55: Safe Neighborhoods Act

It is readily apparent the combination of separate bills on separate subjects was very thinly disguised by the Legislature.

Drug Abuse Crimes: Sections 2 through 9, 12, 75

Although sections 2 through 9, 12 and 75 relate to distinct subject of drug abuse, not all relate to drug abuse laws of Chapter 893. Section 6 relates to homicide, Sections 7 and 8 to nuisances, and Section 9 to fraud. Petitioners will not complicate the clearer issues by arguing these as separate subjects, however.

Education and Drug Abuse: Sections 10, 11 and 13 through 19

Various aspects of drug abuse programs and education in the state school system may be one subject, despite the variety of matters included, e.g., from expulsion criteria to teacher education to funding authorization. However, the common goal of a drug-free society does not make drug education "one subject" with the laws proscribing drug related criminal conduct, those of Sections 2-9, 12 and 75. These are dissimilar subjects. "(T)he

general objective of the legislative act should not serve as an umbrella for different substantive subjects." Williams 459 So.2d at 321.

Conveyances: forfeiture, title, registration: Sections 20 through 23, 28, 29

These provisions for vehicles, aircraft and vessels are a separate subject from drug abuse crimes and drug education. Only imagination could bring the three together as one.

Vessel operation crimes: Sections 51 through 54

These vessel D.U.I. and leaving the scene of a boating accident provisions create offenses on the water which have nothing to do with conveyance registration and forfeiture. Certainly vessel D.U.I. is a separate subject from the expansion of drug abuse crimes to the purchase of controlled substances and creating a 1000 foot drug free zone around schools.

Money Laundering Control Act: Sections 30 through 38

This group of sections is so much its own subject that it carries its own title. These provisions are not one with *any* of the other subjects contained in Chapter 87-243. This "act" originated as its own bill and only got tied up with Chapter 87-243 through prohibited legislative logrolling tactics.

Planting of a "hoax bomb": Section 39

There is no coherent relation of this new crime with any other section of the bill, except under the giant umbrella of "crime control". It has no relation to drug abuse or drug trafficking whatsoever.

Pawnbrokers and stolen property: Sections 40, 41

Here is another independent subject, having nothing coherently to do with vessel D.U.I., drug education, hoax bombs or obtaining controlled substances.

Entrapment: Sections 42, 43

This is a prime example of logrolling. It defines no substantial crime, nor does it aid drug education, but rather attempts to rewrite an affirmative defense to crime. To tie entrapment to an individual subject, i.e. the war on drug abuse, is an example of the dangers of multi-subject legislation, for the entrapment defense applies not just to narcotics prosecutions.

Attempted burglary: Section 44

Another independent subject having nothing to do with drug abuse, obtaining narcotics, vessels, money laundering or planting a "hoax bomb".

Witness tampering: Section 45

This is another isolated subject adrift in the sea of unrelated subjects, none of which have anything to do with witnesses, victims or informants.

Appeal by state: Section 46

Amidst substantive criminal offense matters (and education, etc.) stands this section altering procedural appeal rights by granting the state a right to appeal a ruling granting a motion for judgment of acquittal after a jury verdict in a criminal case. It has no coherent relation to anything else in this bill, including obtaining drugs within 1000 feet of a school.

Judgment costs at sentencing: Section 47

This subject is also entirely different in nature from all other bill sections, relating to costs imposed upon convicted defendants. It is distinct in subject from education, the various substantive crimes and appellate procedure. It is a fiscal matter which could carry the weight of favorable votes that other sections might not garner if on their own.

Bookmaking: Section 48

This is another independent topic having only in common with certain others of the sections that it is within the criminal sphere of law.

Operating chop shops: Section 49

This is yet another independent subject within the criminal sphere. The object in outlawing chop shops - to discourage theft and dealing in stolen property - is different from the object of outlawing the obtaining of drugs or drug abuse.

Crime prevention studies, training: Sections 50 through 54

These sections are markedly analogous to those of the stricken Chapter 82-150, See Bunnell, supra, relating to the Florida Council on Criminal Justice, coordinating councils, study commissions. Education provisions have no commonality with changes in substantive criminal offenses, other than under such a broad heading such as "criminal justice" or "crime prevention and control" as to be virtually meaningless.

Safe Neighborhoods Act: Sections 55 through 74

The "Safe Neighborhoods Act" is the death knell for a legislative bill already dying from the disease of multiple subjects. This collection of twenty (20) separate sections carries its own title, and it is absolutely unrelated to education, drug abuse, vehicle registration or any of the other previous sections. This "act" provides mechanisms and funding avenues for the governments and property owners to restructure existing neighborhood designs.

Chapter 87-243 is a paradigm example of a law embracing more than one subject. It encompasses a multitude of unrelated subjects that have separate and disassociated objectives. It containes seventy-six (76) sections and at least three (3) short titles which result in an official title containing no less than 1,410 words. (See Appendix 1). As previously applied, the one subject requirement kept in check the insidious leverage inherent in logrolling by ensuring that legislative acts only encompass

matters having a natural relation to one another. It is the variegated nature of the subject matters of this Act which preclude the title from complying with the constitutional mandate that its subject be "briefly expressed in the title."

In the face of this legislative cyclone the Fourth District blithely proclaims "in accordance with Smith," and its version of "common sense" that the provisions of Chapter 87-243 do not violate the one subject rule. This cryptic pronouncement is astounding! The Fourth District offers no explanation whatsoever for this incredible conclusion. How do the seventy-two (72) provisions relate? Why do the seventy-two (72) provisions relate? Can it be seriously argued that drug abuse is related to vessel D.U.I., money laundering, planting of a "hoax bomb" or the operation of "chop shops." If this seventy-two (72) section Act passes constitutional muster, one is hard put to envision a chapter which would not.

The nature of Chapter 87-243 as well as the manner of its passage through the legislature exhibit the worst of abuse of the "one subject rule." Petitioners need not prove, of course, that the Florida Legislature acted with any intent to violate the constitution or even that logrolling did in fact occur. Petitioners need not show that a different result would have occurred if the different subjects were continued to be processed separately. Petitioners need only show that more than one subject is included in the legislation. See Bunnell, Williams.

The proof of constitutional violation in Chapter 87-243 is evident. One, the Act includes numerous different areas relating to substantive criminal law, appellate procedure, fiscal resources, criminal defenses, educational structure, local neighborhood structuring, etc., and many of these areas themselves include different subjects. Two, the only arguable connection among all sections of the bill is "crime prevention and control." But this Court in Bunnell, expressly rejected the contention that many separate matters may be included together if all somehow relate to a broad general subject area such as "criminal justice" or "crime control." In Williams v. State, the Fifth District noted:

> The Bunnell [v. State, 447 So.2d 228 (Fla. 2d DCA 1983)] court reasoned that although not expressed in the title, it could infer from the provisions of the bill, a general subject, the criminal justice system, which was germane to both sections. Even if that subject was expressed, for example, in a title reading "Bill to Improve Criminal Justice in Florida," we think this is the object and not the subject of the provisions. Further, approving such a general subject for a non-comprehensive law would write completely out of the constitution the anti-logrolling provision of article 111, section 6.

Id. at 321 (emphasis supplied).

Here the extremely broad, general area of the Act must not be considered a single subject or the constitutional mandate would become meaningless. Article 111, Section 6 in essence

would be abolished. Three, the most recent cases on point struck down Chapter 82-150 for the same flaw cited here as among the multi-subject flaws of Chapter 87-243.

Chapter 87-243 is a gross indignity to the hallowed "one subject rule" of the Florida Constitution. No amount of deference to the Legislature can fairly camouflage its faults. Chapter 87-243 violates Article 111, Section 6, of the constitution of the State of Florida and must be invalidated. Section 893.13(1)(e) which was created by Chapter 87-243 is therefore unconstitutional. The trial court's order declaring Section 893.13(1)(e) unconstitutional should be upheld on this basis alone.

€3. ARTICLE III, SECTION 12

Petitioners contend that Section 893.13(1)(e) violates Article 111, Section 12 of the Florida Constitution. Said provision provides:

> Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subjects.

This provision is a corollary of Article 111, Section 6, which requires that all laws be limited to a single subject on matters properly related to the subject. Department of Education v. Lewis, 416 So.2d 455, 459 (Fla. 1982). In Brown v. Firestone, 382 So.2d 654 (Fla. 1980), this Court held:

> The enactment of laws providing for general appropriations involves different considerations and indeed different procedures than does the enactment of laws on other subjects. Our state constitution demands that each bill dealing with substantive matters be scrutinized

> separately through a comprehensive process which will ensure that all considerations prompting legislative action are fully aired. Provisions on substantive topics should not be ensconced in an appropriations bill in order to logroll or to circumvent the legislative process normally applicable to such action. Similarly, general appropriations bills should not be cluttered with extraneous matters which might cloud the legislative mind when it should he focused solely upon appropriations matters.

Id. at 664.

The opinion in Brown went on to establish two principles by which to test restrictions and provisos in appropriations bills to determine whether they violate Article 111, Section 12. See, Department of Education v. Lewis, at 461. First, if a provision in an appropriations bill changes existing law on any subject other than appropriations, it is invalid. Second, a qualification or restriction must directly and rationally relate to the purpose of the appropriation to which it applies.

Turning to Chapter 87-243 it appears that Section 47(9) and Section 66 are in effect appropriation bills. Section 47(9) involves the imposition of and collecting investigative costs. Section 66 establishes the safe neighborhood trust fund with various planning grants as technical assistance. Hence these provisions of Chapter 87-243 changes the funding formula as to how monies and expenses including salaries and current expenses are being distributed in order to achieve the goals and subject matter of the legislation. These two sections are in essence

appropriations bills. Hence the entire chapter which includes Section 893.13(1)(e) is invalid and unconstitutional under Article 111, Section 12 of the Florida Constitution.

C. THE ENFORCEMENT OF 893.13(1)(e) IS NOT A VALID EXERCISE OF THE POLICE POWER ON ITS FACE AND AS APPLIED.

All criminal laws must be a valid exercise of the police power and the police power is not absolute. Whitaker v. Parsons, 80 Fla. 352, 86 So. 247 (1920). Police regulations must be reasonable, not arbitrary or oppressive and the means to achieve the purposes of the police power must actually achieve the purpose. Griffin v. Sharpe, 65 So.2d 752 (Fla. 1953). This Court in Horsemen's Benevolent Association v. Division of Pari-Mutual, 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 reasonably appropriate to accomplish the purpose of the act. Id. at 694 (Emphasis added).

Section 893.13(1)(e) is not a valid exercise of the police power. It does not rationally follow that the mere purchase of the drugs within 1000 feet of a school (prohibited conduct) will, standing alone, have an adverse effect on school children who may or may not be nearby. For example, the statute prohibits purchasing drugs near a school even at night when the campus has

been closed for hours. It applies the same enhanced penalty to adults who wander into the protected zone and purchase drugs not from school children but, rather, from adults, including a reverse-sting scenario wherein law enforcement officers are posing as the sellers. The law would also mandate the enhanced penalty where an adult (with no children present) buys drugs from another adult in a private home within the protected area. In none of these situations is the purported goal of the statute, to create a "drug free zone" around schools in order to protect children, furthered.

The defect in the statute is exemplified in the present case, where the police set up a reverse sting operation within the 1000 foot perimeter: that is, the police themselves were supplying the drugs which were sold near the school. As noted in Griffin v. Sharpe, supra, police regulations must be reasonable and the means used to achieve the purposes of the police power must actually achieve the purpose. See generally 10 Fla.Jur.2d, Constitutional Law Section 218. This requirement is part of the due process clause of both the United States and Florida Constitutions. If the intent of the legislation was to create a "drug free zone" around schools to protect the welfare of children, setting up reverse-sting operations to lure drug users nearer to schools is in direct contravention of the purported purpose of the law.

The instant case, where the Petitioner Brown was a drug purchaser who could only commit his crime in an area where drugs were already available, must be distinguished from the case where the police target drug sellers, who are the source of the controlled substances sought to be banned. Inapplicable to the present prosecution, then, are those cases, e.g., decided under the federal statute, which is directed only at sellers, not purchasers.[6] None of the federal cases involve police selling the drugs. Obviously, the whole raison d'etre of the statute as defined in these federal cases loses its meaning when it is the police, as here, who are providing the drugs sold within the defined school perimeter.

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6 The federal statute, 21 U.S.C. section 845 a(b) (1984) provides:

> (b) Any person who violates section 841(a)(1) of this title by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school after a prior conviction or convictions under subsection (a) of this section have become final is punishable (1) by a term of imprisonment of not less than three years and not more than life imprisonment and (2) at least three times any special term authorized by section 841(b) of this title for a second or subsequent offense involving the same controlled substance and schedule. [emphasis added].

The Florida statute involved in the instant case is much more expansive than the federal provision. Section 893.13(1)(e) makes it unlawful for any person "to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture or deliver a controlled substance " within the prohibited zone.

It is clear that the Florida Legislature did not envision law enforcement officers setting up reverse-sting operations to enforce this law. It was projected that the passage of section 893.13(1)(e) would have no significant fiscal impact on the State budget. See, Senate Staff analysis and Economic Impact Statement of Senate Rill. R371-72. But in Broward County alone, there have already been over 200 arrests as a result of the reverse-sting operation which netted Petitioner Brown. Since each person arrested faces at least three and one half (3½) to four and one half (4½) years in prison,[7] this in turn will result in excess of two hundred (200) new prison admissions just from Broward County in the first two months the statute has been effective! If each police agency in the State embark on this same disputed law enforcement technique, the arrest and prison admissions figures would quickly skyrocket into the thousands, which is in sharp variance from the Department of Correction's own estimates to the Legislature, which cannot have included anticipation of the kind of operations engaged in by the Broward County police agencies which resulted in the present prosecution.

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7 This offense is a first degree felony which would be scored under Catagory 7: Drugs. A first-time offender without any prior convictions would receive a total guideline score of 137 points. This automatically places one in the 34-44 years in prison range for conduct which amounts to no more than buying one (1)piece of cocaine rock from an undercover police officer.

In short, the reverse-sting technique utilized by the law enforcement agencies below fosters exactly the type of activity the legislation was ostensibly designed to forestall. The police officers who posed as drug sellers lured their unsuspecting purchasers within the 1000 feet school zone for the express and sole purpose of obtaining an arrest for the newly created first degree felony. The technique used to arrest Petitioner Brown for violating section 893.13(1)(e) by purchasing cocaine from an undercover officer resulted in a violation of the police power as applied to the situation at bar. This patent contravention of the legislative intent requires this Court to mandate the dismissal of the charge and declare section 893.13(1)(e) unconstitutional as applied to Petitioner Brown, a purchaser of cocaine.

D. LACK OF MENS REA ELEMENT

Section 893.13(1)(e) does not expressly state that an individual must knowingly sell, purchase, manufacture, or deliver a controlled substance in, on, or within 10000 feet of a school.

A literal interpretation of the statute would compel the conclusion that one could be convicted and subjected to the enhanced penalties even though there was no knowledge that one was in fact within 1000 feet of a school. This is the crucial element added by the Legislature to enhance the offense to a first degree felony. This interpretation would violate notions of fundamental fairness and due process of law and such an inter-

pretation of the law would lead to true miscarriages of justice. An example might involve a visitor who is totally unfamiliar with the area. Would it be consistent with established notions of fairness to subject this individual to the enhanced penalty when it could not be established that he knew, or even should have known, that the purchase or sale of cocaine was near a school. The school may not be visible within 1000 feet. This failure to include a knowledge or mens rea element in the statute as to the location of the school violates the due process clause and renders Section 893.13(1)(e) unconstitutional.

E. SECTION 893.13(1)(e) IS SO VAGUE AND INDEFINITE AS TO BE UNCONSTITUTIONAL ON ITS FACE AS APPLIED.

Section 893.13(1)(e) is unconstitutionally vague on its face and as applied to Petitioners. As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855 (1982); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972). 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. Harris, 347 U.S. 612,

617, 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.

Section 839.13(1)(e) suffers from the same deficiency as other vague statutes. Petitioners contends that the statute does not put a person of reasonable intelligence on notice as to how to measure the distance between the location of the drug transaction and "the real property comprising a public or private elementary, middle, or secondary school." See Appendix (2), Order of Judge Coker of the Seventeenth Judicial Circuit in State v. Montgomery, No. 87-21037CF (17th Cir. March 16, 1988) appeal pending, No. 88-0854 (Fla. 4th DCA).

Section 893.13(1)(e) therefore violates the constitutional requirement of definiteness. It is vague and overbroad as written and applied to Petitioners. Reversal of the Fourth District's decision is thus required on this basis.

F. EQUAL PROTECTION

The statute is violative of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and Article I, Section 2 of the Florida Constitution. Petitioners assert that section 839.13(1)(e) denies them equal protection because the statute's enhanced penalties have a greater impact upon drug purchasers or seller who reside in inner city areas, where pop-

ulation density and the number of schools are higher than upon those in suburban or rural settings. Because members of racial minority groups represents a higher percentage statistically of the population in these inner city areas as opposed to suburban and rural areas, section 893.13(1)(e) has a disproportionate impact upon a "suspect class", the black minority group who inhabit our inner cities. This consequence results in the application of a heightened scrutiny, or "strict scrutiny" in the equal protection analysis. Since the statute in practice burdens one race more than another, this criminal law even if intended to serve neutral ends nevertheless is invalid absent compelling justification. None exist in light of the numerous drug statutes already in operation. Measured against this "strict scrutiny" standard, section 839.13(1)(e) violates the Equal Protection Clause.

Assuming arguendo, the statutory classification does not discriminate against a "suspect class," the test which must be used in determining whether a statutory classification satisfies the Equal Protection Clause is whether it rests on some basis bearing a reasonable relation to the object of the legislation. McLaughlin v. Florida, 379 U. S. 184 (1964); Soverino v. State, 356 So.2d 269 (Fla. 1978).

The statutory classification created by section 893.13(1)(e) is not reasonably related to the object of the legislation. The statutory classification is overinclusive because the classifi-

cation includes individuals and situations which are not reasonably or rationally related to the object of the legislation. And the purchase of the contraband from an undercover officer totally undermines it. The statute is also violative of the Equal Protection Clause because it is underinclusive. If the intent of the law is to protect the well-being of children and to shelter them from drugs then the law is not reasonably related to that end. The law does not provide for an enhanced penalty in cases where adults sell drugs at other locations frequented by children.

G. CRUEL AND UNUSUAL PUNISHMENT

The harsh penalties called for, upon conviction under section 893.13(1)(e), constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution. One of the most shocking and outrageous aspects of this statute is the penalty provided for violators. Upon conviction, Petitioners were subjected to a possible sanction of up to thirty (30) years in prison. A review of the Florida Statutes reveals that this is the same maximum sentence provided in such violent personal crimes as, robbery with a weapon, (F.S. 812.13(b)); manslaughter with a firearm (F.S. 782.07 and F.S. 775.087); aggravated battery

with a firearm (F.S. 784.045 and 775.087); arson of an occupied structure (F.S. 806.01(c)); and attempted first degree murder (F.S. 782.04 and 777.04(4)(a)).

Furthermore, the statute calls for a maximum sentence which is twice the exposure for such crimes as manslaughter (F.S. 782.07), sexual battery (F.S. 794.011(5)); robbery (F.S. 812.12(c)); burglary (F.S. 810.02(3)); or lewd and lascivious assault upon a child (F.S. 800.04(3)). A person would have to commit six (6) counts of aggravated assault with a deadly weapon (F.S. 784. 021) or six (6) batteries on law enforcement officers (F.S. 784.07 (2)(b)) before this exposure would reach thirty (30) years. The sentencing guidelines call for a range of three and one-half (3½) tour and one-half (4½) years in state prison upon conviction of section 893.13(1)(e) for an offender without a prior criminal record.

The above penalties are in sharp contrast to the recommended guidelines range for a first offender convicted of burglary of a dwelling (non-state prison sanction), robbery without a weapon (non-state prison sanction), battery on a law enforcement officer (non-state prison sanction), or lewd and lascivious assault upon a child (non-state prison sanction).

The essence of the prohibition against cruel and unusual punishment is that the sentence not be arbitrary and capricious and the punishment be commensurate with the severity of the crime. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972).

The United States Supreme Court addressed the issue of cruel and unusual punishment in the case of Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983). The Solem Court held that a sentence of life without possibility for parole imposed on a seven (7) time convicted felon charged with uttering a worthless check, constituted a violation of the Eighth Amendment. The Court held that the Eighth Amendment prohibits not only barbaric punishment, but also prohibits sentences which are disproportionate to the crime charged. When conducting a proportionality analysis under the Eighth Amendment, Courts should look to several objective criteria, including: the gravity of the offense compared to the harshness of the sentence; whether those convicted of more serious crimes in the same jurisdiction are subjected to the same or less severe penalties, and whether other jurisdictions impose the same sort of sanctions. Solem, 463 U.S. at 292.

Petitioners assert that 893.13(1)(e) provides for cruel and unusual punishment because:

> 1. An individual faces three and one half to four and one half years imprisonment for a crime which originally held probation for first time offenders.
>
> 2. The statute does not proscribe any evils that were not already addressed.
>
> 3. The State has not limited itself to prosecuting those persons corrupting minors in a school zone which may have been the legislative intent. Rather it is luring potential drug purchasers into this school zone to obtain first degree felony convictions while the iden-

> tical act 1001 feet from a school constitutes a third degree felony with a lesser guidelines sentence of "any non-state prison sanction."

In State v. Montgomery, supra (See Appendix 2), Judge Coker of the Seventeenth Judicial Circuit found that the harsh penalty provision of this statute:

> "...viewed in contrast to the any non-state prison designation for first offenders who commit crimes such as burglary, robbery, lewd and lascivious assault on a child etc., establishes a violation of Article 1, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments of the United States Constitution pertaining to cruel and unusual punishment. The prison sentence required would not be commensurate with the severity of the crime and would be arbitrary and capricious, in that the same offense committed 1,001 ft. from a school would place the Defendant in the any non-state prison range.
>
> There is no rational relationship between the arrest and conviction of a small quantity purchaser through a reverse sting operation and subsequent lengthy incarceration if 893.13 (1)(e) is applied, and the legislative intent to protect school age children and more severely punish those who would expose them to illegal drugs."

It is clear that the statute in question provides for a penalty which disproportionately punishes these relatively passive offenders when compared to other statutes and penalties in Florida. The statute disproportionately punishes the offender compared to the gravity of the offense. To suggest that a first time offender should be subjected to a term of thirty (30) years in prison for purchasing one small cocaine rock from an under-

cover police officer shocks the conscience. It is the essence of cruel and unusual punishment. Therefore, the penalty provision of section 893.13(1)(e) should be declared unconstitutional.

POINT II

THE TRIAL COURT DID NOT ERR IN DISMISSING THE CHARGE FILED AGAINST PETITIONER BROWN ON THE ALTERNATIVE GROUND THAT THE MISCONDUCT BY THE POLICE IN THE PROSECUTION OF THIS CAUSE ROSE TO THE LEVEL OF ENTRAPMENT AS A MATTER OF LAW OR A VIOLATION OF THE DUE PROCESS DEFENSE

This Honorable Court has jurisdiction over the entire cause based on the Fourth District's certification of a question of great public importance as to the constitutionality of section 893.13(1)(e). Once this Court has jurisdiction it may at its discretion consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986). Petitioner Brown asserts assuming arguendo this Honorable Court declines to hold section 893.13(1)(e) unconstitutional on its face or as applied to Petitioner Brown (But see Point I), there is an alternative basis to uphold the Trial Court's order granting Petitioner Brown's motion to dismiss the information filed against him.

Even if the objective entrapment defense (entrapment as a matter of law) has been abolished in Florida effective October 1, 1987, by the operation of Section 777.201, Florida Statutes (1987), See Gonzalez v. State, 525 So.2d 1005, 1006 n. 1 (Fla. 3d DCA 1988), Petitioner Brown contends that the due process clause of the Federal and Florida Constitutions still remains to protect our citizens from the conduct of law enforcement agents so outrageous and shocking that due process principles would bar the

State from invoking the judicial process to obtain a conviction. See United States v. Russell, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1642-1643 (1973).

In Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905 (1985) this Court cited the New Jersey Supreme Court's decision in State v. Molnar, 81 N.J. 475, 410 A.2d 37 (1980) for the proposition that the subjective entrapment defense can co-exist with the objective entrapment doctrine which "is a matter of law for the trial court to decide." Cruz at 521. The Cruz court also noted that:

> Subsequent to its Molnar decision, the New Jersey court held that statutory law has superseded the common law, placing the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact. State v. Rockholt. 96 N.J. 570 476 A.2d 1236 1984). Even though the New Jersey court concluded that its common law paradigm had been supplanted, it noted that there may still be situations where the government conduct is so outrageous that constitutional due process requires dismissal. See discussion at note 1, supra. There is no parallel to the New Jersey legislative action in Florida, and we conclude that the policy considerations of the Molnar decision remain valid in this case.

Id. at 521 n. 3, [Emphasis added].

The Florida Legislature in Section 777.021, F.S. (1987) may have superseded the common law and the Cruz decision by mandating that the subjective and objective entrapment defenses would henceforth be jury questions. However the due process defense remains firmly intact.

The history of the "due process defense" begins with U.S. v. Russell, at 431-42, 93 S.Ct. at 1642-43. There the Supreme Court did not set forth a definite outline of this defense but noted that a court could be presented with a situation in which "the conduct of law enforcement is so outrageous that due process principles would absolutely bar the government from invoking the judicial process to obtain a conviction." See also Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952) (pumping defendant's stomach to retrieve swallowed contraband shocks the judicial conscience).

In Russell, the Court did not find such a due process violation. However at least two United States circuit courts have found due process violations in the entrapment context. Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). See Also generally United States v. Lard, 734 F.2d 1290, 1296-1297 (8th Cir. 1984). A federal district court found such a due process violation in United States v. Gardner, 658 F.Supp. 1573 (W.D. P.a. 1987). And the courts in at least two states have also recognized and relied upon the due process defense to overturn criminal convictions. State v. Hohensee, 650 S.W.2d 268 (Mo.Ct.App.1982) (conviction based on burglar sponsored and operated by the police violated due process right to predisposed defendant who acted as lookout during burglary); People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d-

714, 378 N.E.2d 78 (1978) (police misconduct and trickery used to secure drug sales by predisposed defendant within state violated defendant's due process right, requiring dismissal of case).

In State v. Glosson, 482 So.2d 1082 (Fla. 1985) this Court explicitly broadened the federal due process defense as applied to our state: "We reject the narrow application of the due process defense found in the federal cases. Based upon the due process provision of Article I, Section 9 of the Florida Constitution, we agree with Hohensee and Isaacson that governmental misconduct which violates the constitutional due process right of a defendant, regardless of the defendant's predisposition requires dismissal of criminal charges."

At bar, Petitioner Brown can still be charged with the lesser offense of possession of cocaine. Petitioner Brown concedes a predisposition to commit that offense. This issue is not contested. However, Petitioner was not predisposed to purchase cocaine within 1000 feet of a school which enhances the penalty to a first degree felony. It is this "within 1000 feet of a school" element that must be the focus of this Court's scrutiny of the police conduct not Brown's predisposition. It was only because of the deliberate police ploy of setting-up a reverse-sting operation in an area which was within 1000 feet of a school that Petitioner Brown opted to purchase cocaine within the specified proscribed area contained in section 893.13(1)(e). The police purposefully and intentionally created a reverse-sting

operation at night in a residential area so that the school would not be noticed. This was done for the express purpose of luring potential buyers into the proscribed 1000 feet zone.

One of the cases cited with approval by this Court in Glosson was People v. Isaacson, supra. In Isaacson, one Breniman became a police informant as a a result of police brutalization. At the behest of the police, Rreniman contacted the defendant, a Pennsylvania resident with no prior record, who although initially unwilling and after persistent solicitation, agreed to sell Breniman drugs. He was deceitfully lured into New York State to do so. The court found the totality of government's conduct to be outrageous and reversed the conviction on due process grounds. No entrapment was shown because there was proof of defendant's predisposition.

The situation in Isaacson is analogous to the instant case. Petitioner Brown was deceitfully lured into the proscribed 1000 feet zone by undercover police officers posing as drug sellers. The police in this case took pains to set up their operation at night out of view of the school. The police carefully measured the distance to insure a sale within 1000 feet of the school. The police further supplied the contraband. But for the intentional luring of an unsuspecting potential drug purchaser into the proscribed zone, Petitioner Brown who was charged with purchasing cocaine within the proscribed zone would have been charged with simple possession of cocaine instead of the first degree felony

of section 893.13(1)(e). This is outrageous and shocking police conduct. See Judge Tyson of the Seventeenth Judicial Circuit Order in State v. McPhaul, supra. (Appendix 3).

It has been said that "due process unlike some legal rules is not a technical conception with a fixed content unrelated to time, place, and circumstances." Anti-Facist Committee v. McGrath, 341 U.S. 123, 162, 71 S.Ct. 624, 643 (1951). (Frankfurter, J., concurring). While due process is a flexible doctrine, certain types of police action manifest a disregard for fundamental fairness. To prevent improper and unwarranted police solicitation of crime, there is a need for courts to recognize and to uphold principles of due process. Judge Coker in Montgomery, supra, Judge Tyson in McPhaul, supra, and Judge Futch in the instant case have already done so. This is a case that surely demands the application of these principles. Based upon the due process provisions of Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution the misconduct of the police officers violated the constitutional due process right of Petitioner Brown who was charged with purchasing cocaine from an undercover police officer within 1000 feet of a school. Therefore the trial court in the context of the instant case did not err in granting Petitioner Brown's motion to dismiss the information on the basis of the due process defense. The decision of the Fourth District Court

of Appeal should be reversed and this cause remanded to the trial court for trial on the reduced charge of a simple possession of cocaine.

CONCLUSION

Based on the arguments contained herein Petitioners respectfully request this Honorable Court to reverse the decision of the Fourth District Court of Appeal and declare Section 893.13(1)(e) unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 13 day of April, 1989.

Of Counsel