IN THE SUPREME COURT OF THE STATE OF FLORIDA

STACY BURCH and
KENNY MIKE BROWN,

Petitioners

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,826

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioners, Stacy Burch and Kenny Brown, the criminal defendants and appellees below in the appended State v. Burch, 14 F.L.W. 382 (Fla. 4th DCA February 8, 1989), review granted, Case No. 73,826 (Fla. 1989), will be referred to individually as "Petitioner Burch" or "Petitioner Brown," and collectively as "Petitioners." Respondent, the State of Florida, the prosecuting authority and appellant below, will be referred to as "the State."

References to Petitioner Burch's two-volume record on appeal will be designated "(R:);" to Petitioner Brown's like record, "(BR:)." The State also appends pursuant to Fla. R.App.R. 9.220, certain materials relating to the panel decision of three judges of the Tenth Judicial Circuit that the statute petitioners' challenge here, § 893.13(1)(e), Fla. Stat. is constitutional. Bennett v. State, Case No. CF-88-0691 A1-XX (10th Jud. Cir. June 16, 1988; unreported), appeal pending, Case No. 88-02633 (Fla. 2nd DCA 1989).

For the sake of clarity and exposition, the State will take the liberty of discussing petitioners' two interrelated points on certiorari as one compound question, in the form certified by the Fourth District.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioners' "statement of the case and facts" as a reasonably accurate narrative synopsis of the events below for the purpose of resolving the issue presented upon certiorari, subject to the additions and clarifications contained in the argument portion of this brief.

SUMMARY OF ARGUMENT

The Fourth District properly determined that Chapter 87-243, Laws of Florida, of which § 893.13(1)(e) is a part, was not enacted in violation of either the "single subject rule" of legislation, or the "appropriations limitation rule" of legislation.

Moreover, the Fourth District also correctly determined that § 893.13(1)(e) is a rational exercise of the State's police power; need not require a "mens rea;" is not unconstitutional on due process grounds as "vague," for its meaning is clear; is not unconstitutional on equal protection grounds as having a disparate impact upon racial minorities; and does not prescribe cruel and unusual punishment. Furthermore the conduct of the police in selling Petitioner Brown cocaine was not so "outrageous" as to constitute a due process violation.

ISSUE

(PETITIONERS' POINTS I & 11)

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

ARGUMENT

The State respectfully contends that this Honorable Court should answer the above-certified question in the affirmative, and will discuss and refute petitioners' eight constitutional and quasiconstitutional challenges to the statute sequentially.

I

§893.13(1)(e) IS NOT UNCONSTITUTIONAL AS ENACTED IN VIOLATION OF THE "SINGLE SUBJECT RULE" OF LEGISLATION

Petitioners first allege that 893.13(1)(e) is unconstitutional because Chapter 87-243, Laws of Florida, of which it is a part, was enacted in violation of the "single subject rule" of legislation.[1] The State disagrees.

This Court has established:

> Where all the provisions of an act are germane to the subject and are properly connected with it, the criticism that it violates constitutional provisions restricting each law to one subject is not well founded.

State ex. rel. Oglesby v. Hand, 119 *So.* 376, 378 (Fla. 1929).

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[1] Article 111, Section 6, Constitution of the State of Florida.

> The test to determine whether legislation meets the single-subject requirement is based on common sense. It requires examining the act to determine if the 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 subject.

Smith v. Dept. of Insurance, 507 So.2d 1080, 1087 (Fla. 1987) (secondary attribution omitted). The State contents that the various sections of Chapter 87-243 all fairly bear upon the single subject of its title, "Crime Prevention and Control."

In State v. Lee, 356 So.2d 276 (Fla. 1978), this Court considered whether Chapter 77-468, Laws of Florida, relating to insurance and tort reform, violated the "single subject rule" because it dealt with both insurance and torts. The act contained 45 sections, most of which dealt with the problem of an increase in automobile insurance rates and related insurance difficulties. However, sections 38-41 dealt with certain aspects of tort litigation. The Court rejected the claim that the act violated the "one subject rule," id., 356 So. 2d 276, 282. In arriving at that conclusion, the Court reasoned that Article III section 6 was "not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation." Id. The Court noted that it "has consistently held that wide latitude must be accorted the legislature in the

enactment of laws," and emphasized that it "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 which is expressed in the title." Id. "The subject of a law may be as broad as the legislature chooses provided the matters included in the law have a natural and logical connection." Id.

In Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), this Court debated whether Chapter 76-260, Laws of Florida, was unconstitutional because it contained provisions covering medical malpractice, tort litigation, and insurance reform. Its preamble detailed broad and differentiated legislative findings, including that there was a medical malpractice insurance crisis that threatened the quality of health care service; that the tort law/liability insurance system for medical malpractice would eventually break down; and that the continuing crisis demanded immediate and dramatic legislative action. The Court ruled, in Chenoweth, that Chapter 76-260 did not violate the "one subject rule." The Court reiterated that "the subject of an act may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection." Id., 396 So. 2d 1122, 1124. The Court held that "[w]hile Chapter 76-260 covers a broad range of statutory provisions dealing with medical malpractice and insurance reform, these provisions do relate to tort litigation and insurance, which have a natural or logical connection." Id.

In Smith v. Dept. of Insurance, the Court considered whether the **1986** Tort Reform and Insurance Act, Chapter **86-160,** Laws of Florida, violated the "single subject rule." The Court found that the act was the legislative solution to the commercial insurance liability crisis. The Legislature had set forth its findings that such a crisis existed in the preamble of the act, stating that there was a financial crisis in the liability insurance industry; that there was a dramatic increase in the cost of insurance coverage; that the absence of insurance was adverse to the Florida economy; and that if the crisis was not abated, people would be unable to purchase insurance and injured persons would be unable to recover damages. Id., 507 So. 2d **1080, 1084.** The Court reviewed its previous holdings on this matter and once again stated that the subject of an act "may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection." Id., 507 So. 2d **1080, 1085.**

The Court found that this extensive, 70-section act covered five basic areas:

1. Long-term insurance reform

2. Tort reform

3. Temporary insurance reform

4. Creation of a task-force to study tort reform and insurance law

5. Modification of financial responsibility requirements applicable to physicians.

Id., 507 So. 2d 1080, 1086. The Court, in upholding the constitutionality of Chapter 86-160, found that the Legislature had explained in the preamble of the act how the tort reform and the insurance regulation provisions were connected. Id. It emphasized, as noted, that the test to determine whether the "legislation meets the single-subject requirement is based on common sense." Id., 507 So. 2d 1080, 1087. The test "requires examining the act to determine if the provisions are fairly and naturally germane to the subject of the act, or are such as necessary incidents to or tend to make effetive or promote the objects and purposes of legislation included in the subject." Id. (secondary attribution omitted). This Court held that the act did not violate the single subject requirement because the legislation dealt with one goal, i.e., "the availability of affordable liability insurance," and that "civil litigation does have an effect on insurance and there is no reasonable way that we can say they are not properly connected." Id.

In the instant case, petitioners' claim that Chapter 87-243 violates the "single subject rule" is contrary to the holdings of Lee, Chenoweth and Smith. The act contains 76 sections, all of which are naturally and logically connected. The Legislature in enacting Chapter 87-243 found that Florida is facing a crisis because of the rapidly increasing crime rate. Its findings were set out in the preamble:

> WHEREAS, Florida is facing a crisis of dramatic proportions due to a rapidly increasing crime rate, which crisis demands urgent

and creative remedial action, and

WHEREAS, Florida's crime rate crisis affects and is affected by numerous social, educational, economic, demographic and geographic factors, and

WHEREAS, the crime rate crisis throughout the State has ramifications which reach far beyond the confines of the traditional criminal justice system and cause deterioration and disintegration of businesses, schools, communities and families, and

WHEREAS, the Joint Executive/Legislative Task Force on Drug Abuse and Prevension strongly recommends legislation to combat Florida's substance abuse and crime problems, and asserts that the crime rate crisis must be the highest priority of every department of government within the State whose functions touch upon the issue, so that a comprehensive battle can be waged against this most insidious enemy, and

WHEREAS, this crucial battle requires a major commitment of resources and a non-partisan, non-political, cohesive, well-planned approach, and

WHEREAS, it is imperative to utilize a proactive stance in order to provide comprehensive and systematic legislation to address Florida's crime rate crisis, focusing on crime prevention, throughout the social strata of the State, and

WHEREAS, in striving to eliminate the fragmentation, duplication, and poor planning which would doom this fight against crime, it it necessary to coordinate all efforts toward a unified attack on the common enemy, crime....

Just as the Legislature showed the connection between the various aspects of Chapter 86-160 in its preamble, so too has it shown the connection between the various aspects of Chapter 87-243 here.

The bill may be divided into three basic areas:

1. Comprehensive Criminal Regulations and Procedures (sections 1-29, 39-54; 75-76);
2. Money Laundering (sections 30-38); and
3. Safe Neighborhoods (sections 55-74).

These areas all clearly involve the legislative goal of controlling crime, whether through the traditional method of providing for imprisonment, or through the innovative methods of both taking away the profits of crime and promoting education and safe neighborhoods. Applying the test as set out in Smith v. Dept. of Insurance, 507 So. 2d 1080, 1087, this Court must conclude that all of the provisions of Chapter 87-243 are fairly and naturally germane to the very legitimate goal of fighting crime.

Petitioners, in tacitly urging this Court to ignore the detailed precedents of Lee, Chenoweth and Smith, rely almost exclusively upon the Court's cursory opinion in Bunnell v. State, 453 So.2d 808 (Fla. 1984). See also Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984), appeal dismissed, 458 So.2d 274 (Fla. 1984). In Bunnell, the Court struck down a statute criminalizing giving false information to the authorities because other portions of the act of which it was a part involved the workings of a council on criminal justice. The State has never pretended that the legislation it seeks to defend here could pass "single subject" muster under the highly restrictive Bunnell standard. However, the State vigorously submits that since the Bunnell holding is plainly inconsistent not only with this Court's prior decisions taking a broader view of the parameters of the "single

subject rule," see e.g. Trawick v. State, 1 So. 2d 641, 642 (Fla. 1941), Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 698-699 (Fla. 1969), Lee v. State, and Chenoweth v. Kemp, but also with subsequent decisions taking the same view, Smith v. Dept. of Insurance and In Re Advisory Opinion To The Governor, 509 So.2d 292, 312-313 (Fla. 1987), it is simply not controlling, compare Eustis Packing Co. v. Martin, 122 F. 2d 648, 650 (5th Cir. 1941), State ex. rel. Garland v. City of West Palm Beach, 193 So. 297, 298 (Fla. 1940), appeal dismissed, 309 U.S. 639 (1940). The Fourth District, in the unanimous decision under review, accepted the State's contention to this effect. State v. Burch, 14 F.L.W. 382, 385-386. Accord, Blankenship v. State, 14 F.L.W. 950 (Fla. 2nd DCA April 12, 1989).

It is viable, and certainly no insult to this esteemed Court, to suggest that Bunnell and Smith conflict sub silentio. In his majority opinion in Albernaz v. United States, 450 U.S. 333, 343 (1981), Justice Rehnquist suggested that in the double jeopardy area, the United States Supreme Court's "decisional law...it is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator;" the same is true of the Court's decisions in the single subject area. Given that the Florida Legislature in enacting Chapter 87-243 could in good faith have concluded that Smith rather than Bunnell controlled, the State would question whether the Court might hold that §893.13(1)(e) was not unconstitutionally enacted even if a violation of Article 111, Section 6 arguably occurred. Cf.

United States v. Leon, 468 U.S. 897 (1984). The State would further question whether an appropriate remedy for any such arguable violation would be to declare some of the less substantial sections of the act void, rather than its centerpiece. Moreover, the State would note that any single subject violation in the enactment of Chapter 87-143 by the 1987 Florida Legislature will be prospectively cured by the 1989 Legislature's anticipated reenactment of its statutory sections, including §893.13(1)(e). See State v. Combs, 388 So.2d 1029 (Fla. 1980), Santos v. State, 380 So.2d 1284 (Fla. 1980), and Florida Statutes, Vol. I (1987), "Preface," p. vi.

II

§893.13(1)(e) IS NOT UNCONTSITUTIONAL AS ENACTED IN VIOLATION OF THE "APPROPRIATIONS LIMITATION RULE" OF LEGISLATION

Petitioners next allege that §893.13(1)(e) is unconstitutional because Chapter 87-243, of which it is a part, was enacted in violation of the "appropriations limitation rule" of legislation.[2] The State disagrees.

The fatal flaw in petitioners' argument is their view that sections 47(9) and 66 of Chapter 87-243, which provide for recoupment of criminal investigative costs and grants for safe neighborhoods, respectively, are either "laws making appropriations for salaries of public officers" or "laws making

[2] Article 111, Section 12, Constitution of the State of Florida

appropriations for...other current expenses of the state" such that the act of which they are a part "shall contain provisions on no other subject" under Article III, Section 12. Clearly, neither section directly appropriated any particular sum of available money, either for any public officers' salary or for any current State expenses. Instead, these sections merely appear to allocate anticipated revenues for the narrow prospective purposes of investigtive cost recoupment and neighborhood protection, respectively. Compare *Amos* v. Moseley, 77 So. 619, 623-626 (Fla. 1917), establishing that the appropriations limitation rule of legislation now embodied in Article III, Section 12 pertains only to "general appropriations bills" rather than those bills which merely authorize "incidental" expenditures "necessary [and] proper" to secure their objects; see also Brown v. Firestone, 382 So.2d 654, 663 (Fla. 1980) and Dept. of Education v. Lewis, 416 So.2d 455, 459 (Fla. 1982). Moreover, the "Commentary" to Article 111, Section 12 provided in Florida Statutes Annotated, Vol. 25A, p. 779 (1970) also makes it plain that not every legislative monetary allocation is covered by this clause. The Fourth District, of course, agreed with the State's views on this issue. State v. Burch, 14 F.L.W. 382, 386.

III

§893.13(1)(e), ON ITS FACE AND AS APPLIED, DOES NOT CONSTITUTE AN UNREASONABLE EXERCISE OF THE STATE' "POLICE POWER"

Petitioners further allege that §893.13(1)(e), on its face and as applied, constitutes an unreasonable exercise of the State's "police power." See generally 10 Fla. Jur. 2nd "Constitutional Law" §§ 185, 200-203 (1979). The State disagrees.

A similar issue was addressed United States v. Agilar, 612 F.Supp. 889, 890 (D.C.N.Y. 1985), wherein the court stated regarding our statute's federal counterpart, 21 U.S.C. § 845(a) of the Comprehensive Drug Abuse Prevention & Control Act of 1970 (BR 47):

> The statute must only satisfy a test of rationality. Only if the statute establishes a presumption that is irrational will it violate due process and be held invalid. See Cleveland Board of Education v. La Fleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed 2d 52 (1974); United States Department of Agriculture v. Murry, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed 2d 767 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed 2d 551 (1972). Congress has a legitimate and powerful interest in protecting school children from the detrimental effects of the sale of narcotics and enhanced the penalties which are to be imposed upon dealers who distribute narcotics within one thousand feet of a school, presumably on the assumption that a drug dealer who knew that an enhanced penalty would be imposed is less likely to distribute narcotics near a school. By focusing on the single transaction involved in this indictment, and not on the more general presumed prophylatic effect of § 845(a), Agilar has challenged what appears to be a rational exercise of Congress' authority.

Petitioners cite Griffin v. Sharpe, 65 So.2d 751, 752 (Fla. 1953 for the proposition that "police regulations must be

reasonable, not arbitrary or oppressive, and the means used to achieve the purposes of the police power must actually achieve the purpose." See also Horseman's Benevolent & Protective Assoc., Florida Division v. Division of Pari-Mutual Wagering, 397 So.2d 692 (Fla. 1981). In the reverse-sting operation conducted in this case, the means were not only reasonable, but necessary to achieve the desired purpose: reduced availability of drugs around school zones. The location of the arrests was already heavily used for drug activity, and undercover police activity was the only reasonable means available to combat such conduct. (R 12-22). Common sense dictates that the drug activity would not have been intervened by the presence of uniformed police officers.

Petitioners' argument that the reverse-sting operation in this case contravenes legislative intent is without merit. This case does not involve a situation wherein the police set up shop in an invidious manner to trap unsuspecting, innocent citizens. Rather, this was a continuing operation to fight drug activity in a specific area where the illegal activity was already occurring on a regular basis and the nature of the reverse-sting operation was necessary to effective crime prevention.

Petitioners point out that the police conducted their sting operation at night when the school was closed. In United States v. Jones, 779 F.2d 121 (2nd Cir. 1985), cert. denied, 475 U.S. 1031 (1986), the defendant was adjudicated for selling drugs at night inside a bar and numbers joint at least 2½ blocks away from

an elementary school, and he rgued th t his activities did not involve any possibility of affecting school children. The court's response in affirming the judgment was that "one of the evils that the statute seeks to remedy is the availability of drugs to school children at local hangouts." The court also noted "since the sale occurred within 1,000 feet of a school, it increased the risk that drugs would become accessible to school children and thereby subjected appellant to the additional penalties Congress prescribed for such sales." United States v. Jones, 779 F.2d 121, 123. See also United States v. Aqilar, 779 F.2d 123, 125 (2nd Cir. 1985), cert. denied, 475 U.S. 1068 (1986) which the Fourth District quoted as follows in rejecting the instant claim, State v. Burch, 14 F.L.W. 382, 384:

> Agilar contends that the statute... creat[es] an unwarranted irrebuttable presumption that every sale of narcotics within 1,000 feet of a school has the detrimental effects upon school children that Congress sought to avoid by enacting section 845a. The cases condemning irrebuttable presumptions that lack rationality, e.g., Cleveland Board of Education v. La Fleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974); United States Department of Agriculture v. Murray, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1974), do not require that the means chosen by Congress to deal with a problem score a notable success in every application of the statute. Congress wanted to lessen the risk that drugs would be readily available to school children. It is surely rational to achieve that goal by increasing penalties for those who sell drugs near schools.

See United States v. Nieves, 608 F.Supp. 1147 (S.D.N.Y. 1985). Whether or not each sale within the 1,000-foot zone, if not deterred, would have led to acquisition of drugs by school children, the proscription of sales within the environs of schools is a rational means of reducing the risk of easy availability that can lead to such acquisition.

The State would close its discussion of this issue by noting that contrary to petitioners' apparent belief, the problem of prison overcrowding is appropriately of concern to the judiciary only in adjudicating a prison overcrowding lawsuit. See generally Miller v. Carson , 401 F. Supp. 835 (M.D. Fla. 1975), affirmed in part and modified in part and remanded, 563 F.2d 741 (5th Cir. 1977). Otherwise, prison overcrowding is a "matter properly addressed by the legislative and executive branches,'' as the Third District held in rejecting the propriety of such a consideration as a basis for a downward sentencing guideline departure, State v. Caride, 473 So.2d 1362, 1363 (Fla. 3rd DCA 1985). It does not offend the police power to put drug criminals in prison.

IV

§893.13(1)(e) IS NOT FACIALLY VIOLATIVE OF THE DUE PROCESS CLAUSES AS NOT REQUIRING A CRIMINAL INTENT

Petitioners also allege that §893.13(1)(e) facially violates their constitutional rights to due process of law[3] because it does not require that the State prove that a drug-involved defendant knew he or she was within 1,000 feet of a school. The State disagrees.

Petitioners acknowledged below that there are crimes where the State is not required to prove a criminal intent or "mens rea," see e.g. Talley v. State, 36 So.2d 201, 204 (Fla. 1948) (R 35). These are crimes which "malum in se." A crime which is malum in se is one which is "a wrong in itself; an act or case which involves illegality from the very nature of the transaction, upon principles of natural, moral and public law." Black's Law Dictionary (4th ed. 1951, p. 1112).

Generally, statutes which impose a requirement of specific criminal intent contain that requirement within their bodies by the use of words such as "knowingly" or "intentionally." Compare §893.135, Fla. Stat.; State v. Dominquez, 509 So.2d 917, 918 (Fla. 1987). Axiomatically:

> Acts prohibited by statute (statutory as distinguished from common law crimes) need not be accompanied by a criminal intent, unless such intent be specifically required by the statute itself, as the doing of the act furnishes such intent.

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[3] Amendments V & XIV, Constitution of the United States; Article I, Section 9, Constitution of the State of Florida

State v. Medlin, 273 So.2d 394, 396 (Fla. 1973), quoting LaRussa v. State, 196 So. 302, 304 (Fla. 1940). In Medlin, the defendant was convicted of the unlawful delivery of a barbiturate or central nervous system stimulant to a 16 year old girl. This Court held that because the defendant had possession of the drug and admittedly delivered it to the girl, proof of those facts established his guilt of the crime charged. The State was not required to prove a specific criminal intent, only that the defendant committed the prohibited acts.

The purpose behind statutes which require a specific criminal intent is so that people will not be punished for a broad range of innocent or passive conduct. See, e.g., Liparota v. United States, 471 U.S. 419 (1985) and Lambert v. California, 355 U.S. 225 (1957). The handling of controlled substances is not conduct which can be construed as innocent or passive. To handle illegal drugs, a person must actively seek to handle them, as petitioners did.

Although there is no case law on point in Florida dealing with our newly effective statute apart from the decision below the so-called "schoolhouse statute" is modeled after 21 U.S.C. §845(a), as noted. Several federal courts have addressed various challenges to the "schoolhouse statute," including the purported requirement of mens rea, and have held that this statute does not require the government to prove guilty knowledge. United States v. Holland, 810 F.2d 1215 (D.C. Cir. 1987), cert. denied, ___U.S.___, 107 S.Ct. 2197 (1987); United States v. Falu, 776 F.2d 46 (2nd Cir. 1985).

In Falu, the court stated:

> The purpose of the statute is clear from a reading of the legislative history. Congress sought to create a drug-free zone around schools...We find that a requirement that the dealer know that a sale is geographically within the prohibited area would undercut this unambiquous leqislative design.

Id., 776 F.2d 46, 50. Petitioners urged the trial judge to adopt the rule of lenity and resolve what they perceived as an ambiguity in the statute in their favor (R 35). The State urges this Court not to adopt the rule of lenity, as there is no ambiguity in the statute. Our legislature has spoken in a strong, unambiguous voice by establishing §893.13(1)(e). The omission of any express language requiring a specific intent makes clear the legislative intent that the doing of the act itself violates the law and is the only fact that must be proven, as the Fourth District held, State v. Burch, 14 F.L.W. 382, 385. As for petitioners' claim that the statute's omission of a mens rea requirement permits the prosecution of those who deal in drugs oblivious to the fact that a schoolyard is nearby in violation of "established notions of fairness," the State notes that petitioners are, understandably, looking at this issue from the perspective of the criminal community. In the name of "fairness," should not the controlling perspective be that of the civilian community, which realizes that any subjective lack of knowledge on the part of those dealing drugs near schools does not lessen the direct or indirect victimization of the children

attending those schools one iota? See United States v. Falu, 776 F.2d 46, 50.

V

§893.13(1)(e) IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSES AS "VAGUE AND OVERBROAD" EITHER FACIALLY OR AS APPLIED

Petitioners fifthly allege that §893.13(1)(e) violates their constitutional rights to due process of law on its face and as applied because it is "vague and overbroad". The State disagrees.

The State would commence by narrowing the focus of debate. "The overbreadth doctrine applies only if legislation is susceptible of appliction to conduct protected by the First Amendment," Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). Since petitioners did not and could not reasonably contend that their conduct in handling cocaine within 1,000 feet of a school was protected by the First Amendment, petitioners are clearly in error in asserting that §893.13(1)(e) unconstitutionally "overbroad." See State v. Burch, 14 F.L.W. 382,383.

Petitioners are also clearly in error in claiming that the statute is unconstitutionally "vague." "It is well settled that the language of a statute or ordinance must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." Marrs v. State, 413 So.2d 774, 775 (Fla. 1st DCA 1981). "A vague statute is one that fails

to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitiary and discriminatory enforcement." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353-1354. "When people of ordinary intelligence must necessarily guess as its meaning and differ as to its application, the statute or ordinance violates the Due Process Clause[s]." Marrs v. State, 413 So.2d 774, 775. However, "courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353; cf. State v. Ramsey, 475 So.2d 671, 673 (Fla. 1985); Griffis v. State, 356 So.2d 297, 299 (Fla. 1978).

The State quite confidently submits that the legislative declaration contained in §893.13(1)(e) that "it is unlawful for any person to sell [or] purchase [cocaine]...within 1,000 feet of the real property comprising a...school" put these petitioners of presumably average intelligence on adequate notice that the conduct for which they were arrested was prohibited. The statute, far from being "vague," is an absolute paragon of clarity. Indeed, the courts have upheld far less precisely worded statutes against charges that they were unconstitutionally void for vagueness. Compare Powell v. State, 508 So.2d 1307 (Fla. 1st DCA 1987), review denied, 518 So.2d 1277 (Fla. 1987), holding that §950.09, Fla. Stat., which proscribes "malpractice by a jailer" through "willful inhumanity and opppression to any

prisoner," was not unconstitutionally vague; see also State v. Raffield, 515 So.2d 283 (Fla. 1st DCA 1987), review granted, Case No. 71, 677 (Fla. 1988).

Petitioners' particular claim that a person of average intellegence would dispositively not understand whether §893.13(1)(e)'s prohibition against dealing drugs within one thousand feet from a schoolyard meant a thousand feet as a crow flies or as a person walks is patently nonsensical. In United States v. Agilar, 779 F.2d 123, 126 the Second Circuit rejected petitioners' claim this way:

> Appellant's final due process challenge alleges that the 1,000-foot demarcartion line is not sufficiently ascertainable by the average person. Since the statute is violated whether or not the seller knows he is within the prohibited zone...this argument has no force. And since there is no protected right to sell narcotics anywhere, there need be no concern for person who removes his selling activity a considerable distance from a school in order to avoid the risk of being within the 1,000-foot zone.

Again, "courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided." Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353. Cf. State v. Yu, 400 So. 2d 762 (Fla. 1980), holding that the Florida statute criminalizing the possession of certain amounts of a mixture containing any cocaine was not violative of due process.

In any event, to satisfy petitioners' curiosity, the State would note that "words of common usage, when used in a statute, should be construed in their plain and ordinary sense." Pederson v. Green, 105 So. 2d 1, 4 (Fla. 1959). The archtype "reasonable person" studying §893.13(1)(e) would surely understand that "one thousand feet" means "one thousand feet by a straight line" rather than by some jagged calculus, as the Fourth District ruled. State v. Burch, 14 F.L.W. 382, 383. See also United States v. Ofarill, 779 F.2d 791 (2nd Cir. 1985), cert. denied, 475 U.S. 1029 (1986); State ex. rel. Dixie Inn Inc., v. City of Miami, 34 So.2d 705 (Fla. 1946). The State notes that petitioners have never alleged that they were 1,015 feet from a schoolyard by one means of measurement and 985 feet by another when arrested.

VI

§893.13(1)(e) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES AS APPLIED AS HAVING A RACIALLY DISPARATE IMPACT

Petitioners next allege that §893.13(1)(e) violates the equal protection clauses of our federal and state[4] constitution because its application in "big city" areas purportedly disparately impacts against black people. The State disagrees for several reasons.

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[4] Amendment XIV, Constitution of the United States: Article 1, Section 2, Constitution of the State of Florida.

First, this claim is not before this Court since it was not supported by either statistical evidence or stipulation below. Cf. Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1016-1017 (Fla. 4th DCA 1982). Second, this claim must fail on the merits given petitioners' failure to plead or prove a discriminatory intent on the part of the State. United States v. Agilar, 779 F 2d 123, 126; United States v. Nieves, 608 F. Supp. 1147, 1150-1151 (S.D.N.Y. 1985); cf. State v. Leicht, 402 So.2d 1153-1154-1155 (Fla. 1981), cert. denied, 455 U.S. 989 (1982). Third, this claim must also fail on the merits given petitioners' failure to plead or prove that they personally were targeted for arrest and prosecution by the State for racial reasons. McCleskey v. Kemp, 481 U.S. ___, 95 L.Ed 2nd 262, 278-279 (1987). Axiomatically, "a person to whom a statute may constitutionally be applied may not challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before the court," New York v. Freber, 458 U.S. 747, 767 (1982), as the Fourth District noted in rejecting petitioners' claim on the instant score. State v. Burch, 14 F.L.W. 382, 384.

VII

§893.13(1)(e) IS NOT VIOLSTIVE OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES

Petitioner also allege that §893.13(1)(e) violates their constitutional rights against cruel and unusual punishment[5] because its sanctions are unnecessarily severe. The State disagrees.

Axiomatically, "whatever views [the courts] may entertain regarding severity of punishment,...[punishment is] peculiarly [a] question...of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958); quoted with approval, Rummel v. Estelle, 445 U.S. 263, 282 note 27 (1980). "Punishment selected by a democratically elected legislature [is]...presumed valid," Gregg v. Georgia, 428 U.S. 153, 175 (1976). "A heavy burden rests on those who would attack the judgment of the representative of the people." Id. In State v. Benitez, 995 So.2d 514, 518 (Fla. 1981), this Court held that our state's mandatory minimum sentencing scheme for drug traffickers did not constitute cruel and unusual punishment. See also United States v. Holland, 810 F.2d 1215, 1222.

Petitioners argue that the foregoing refutation of their cruel and unusual punishment argument dispositively fails to explain the decision of Solem v. Helm, 463 U.S. 277 (1983). In Solem, the United States Supreme Court struck down a sentence of life imprisonment without the possibility of parole imposed upon a South Dakotan for uttering a forged instrument, his seventh nonviolent felony. In so holding, the Court distinguished Rummel

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[5] Amendments VIII & XIV, Constitution of the United States; Article I, Section 17, Constitution of the State of Florida.

v. Estelle, wherein it had held that a Texas statute mandating a life sentence with the possibility of parole upon one's third adjudication for theft-related offenses did not constitute cruel and unusual punishment. The crucial distinction between the two sentencing schemes was that South Dakota's had foreclosed the possibility that its defendant could be rewarded for rehabilitating himself in prison, while Texas' had not. Solem v. Helm, 463 U.S. 277, 283-284, 297. See also Terrebone v. Butler, 848 F. 2d 500, 503 (5th Cir. 1988). Florida has not foreclosed the possibility that a defendant convicted of violating §893.13(1)(3) may be rewarded for rehabilitating himself while in prison, since one imprisoned for violating this statute may ordinarily expect to be released in about two years upon good behavior. Fla.R.Crim.P. 3.988(g); 8944.275, 944.276, 944.28 and 944.291, Fla. Stat. The Fourth District accepted the State's distinction of Solem and Rummel, State v. Burch, 14 F.L.W. 382, 388.

The State must reiterate that "whatever views [the courts] may...entertain regarding severity of punishment, [punishment is]...peculiarly [a] question...of legislative policy." Gore v. United States, 357 U.S. 386, 393, Rummel v. Estelle, 445 U.S. 263, 282 note 27. Most respectfully, Solem v. Helm represents an anomalous departure from this axiom. Compare Banks v. State, 342 So.2d 469 (Fla. 1976), Harrison v. State 360 So.2d 421 (Fla. 1978), and Rusaw v. State, 451 So.2d 469 (Fla. 1984), upholding the constitutionality of Florida's twenty five year mandatory

minimum sentence for capital rape; Brown v. Wainwright, 576 F.2d 1148 (5th Cir. 1978), upholding the constitutionality of a Florida life sentence for an unprofitable armed robbery; and Francioni v. Wainwright, 650 F.2d 590 (5th Cir. 1981), upholding the constitutional propriety of Florida's three-year mandatory minimum sentence for possession of a firearm during the commission of a felony. As the Fourth District instructively stated in the case at bar:

> We do not think the defendants have shown that a harsh punishment for buying, selling, etc. drugs in a "school zone" violates the eighth amendment of the United States Constitution. It is true that we harbor some reservation as to the propriety of police officers selling drugs within a school zone while operating a reverse-sting. However, the traffic in drugs around schools is what shocks and outrages this court. It must be stopped. If that requires harsh measures, so be it.

State v. Burch, 14 F.L.W. 382, 385.

VIII

THE CONDUCT OF THE POLICE TOWARDS PETITIONER BROWN WAS NOT SO "OUTRAGEOUS" AS TO VIOLATE DUE PROCESS

Commendably conceeding that he could not have been objectively entrapped as a matter of law under Cruz v. State, 465 So.2d 516, 522 (Fla. 1985), cert. denied, 473 U.S. 905 (1985) because 8777.201 Fla. Stat. (1987) had abrogated this defense before he committed his crime, see In Re Standard Jury Instructions in Criminal Cases, 14 F.L.W. 149, 152 (Fla. March

30, 1989), see also Gonzalez v. State, 525 So.2d 1005, 1006 note 1 (Fla. 3rd DCA 1988), petitioner Brown nonetheless seeks to salvage the trial judge's pretrial dismissal of the charge against him on grounds of entrapment (BR 55) by arguing that the apparent police conduct in selling him drugs was so "outrageous" as to violate his somewhat analogous state constitutional right to due process of law under State v. Glosson, 462 So.2d 1082 (Fla. 1985), plus his more limited federal right to same. In truth, Petitioner Brown's Glosson claim is only a remake of both petitioners' claim the statute is being applied in violation of the State's police power, which the State has already refuted. The State will, however, explain why the mere conduct of the police in selling drugs to willing purchasers, without more, does not violate either Glosson or the federal due process clause.

In Glosson, this Court struck down pretrial a scheme whereby the State had agreed to pay an informant a percentage of all civil forfeitures resulting from criminal convictions he helped obtain by selling those defendants drugs, finding that such a contingent fee arrangement violated their state constitutional rights to due process. The Glosson Court relied prominently on the holdings of the state courts in People v. Isaacson, 406 N.Y.S. 2d 714 (N.Y. App. 1978) and State v. Hohensee, 650 S.W. 2d 268 (Mo. App. 1982). By such reliance, this Court underscored the very limited applicability of the state due process defense, insofar as both decisions turned upon illegal acts of violence to either person or property committed by government agents. In

People v. Isaacson, the New York court found that the actions of the police in beating a suspect who was being held on a bogus charge until he agreed to make a drug case against the defendant violated the defendant's state right to due process of law, while in State v. Hohensee the Missouri court found that the actions of the police in unconsentedly breaking into and entering a house while that burglary defendant acted as a lookout violated the defendant's federal right to due process. By contrast, in Talbott v. State, 251 S.E. 2d 126 (Ga. App. 1978), the Georgia court found that the actions of the police in paying an informant a fee contingent upon successfully selling drugs to the defendant did not violate the defendant's right to federal due process of law, while in Tyson v. State, 361 So.2d 1181 (Ala. App. 1978), the Alabama court found that the actions of the police in receiving a 20% kickback of prostitution proceeds while they made their bribery case against the defendant similarly did not violate that defendant's right to due process. Obviously, the challenged police actions in the instant case are more closely akin to, and much less questionable than, those nonviolent practices approved by the courts of our neighboring states in Talbott v. State and Tyson v. State, than they are to those violent practices condemmed by the courts of more distant states in People v. Isaacson and State v. Hohensee.

Indeed, the Florida decisions interpreting Glosson generally distinguish it, see e.g. Owen v. State, 443 So.2d 173 (Fla. 1st DCA 1983), Yolman v. State, 473 So.2d 716 (Fla. 2d DCA 1985),

review denied, 475 So.2d 696 (Fla. 1985), State v.Ruiz, 495 So.2d 256 (Fla. 3rd DCA 1985), and Moore v. State, 498 So.2d 617 (Fla. 5th DCA 1986), thus making it clear that a Florida due process discharge should be ordered only in cases involving clear and pervasive governmental misconduct. In Lusby v. State, 507 So.2d 611 (Fla. 4th DCA 1987), the Fourth District made it plain that mere police facilitation of a narcotics transaction cannot even constitute objective entrapment of a defendant. Since this is so, such facilitation certainly cannot rise to the higher level of "outrageousness" needed to constitute a due process violation. See Yolman v. State, 473 So.2d 716, 717, holding that a "reverse-sting" operation did not violate Glosson as a matter of law; compare Sarno v. State, 424 So.2d 829 (Fla. 3rd DCA 1982), review denied, 434 So.2d 888 (Fla. 1983); State v. Eshuk, 347 So.2d 704 (Fla. 3rd DCA 1977). Of course, police activity which does not even violate the state due process clause cannot violate its federal counterpart. See United States v. Russell, 411 U.S. 423 (1973) and Hampton v. United States, 425 U.S. 484 (1976).

* * *

Axiomatically, courts are obliged to uphold the constitutionality of statutes if possible. State v. Dinsmore, 308 So. 2d 32, 38 (Fla. 1975). Indeed, in State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981), this Court forcefully spoke of this obligation as follows:

> We are aware of the strong presumption in favor of the constitutionality of statutes. It is well established that all doubt will be resolved in favor of the constitutionality of a statute,...and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.

The Fourth District took this language to heart in upholding the constitutionality of §893.13(1)(e):

> Certainly, this statute cannot be declared invalid beyond a reasonable doubt, as it must, to be unconstitutional. State v. Kinner. If the state can prohibit the otherwise legal sale of intoxicating liquors within twenty five hundred feet of a school, State ex. rel. Dixie Inn, Inc. v. City of Miami, 24 So.2d 705 (Fla. 1946), than a fortiori, it should have no difficulty in proscribing the criminal sale of illegal drugs within one thousand feet thereof...
>
> We are confident that the result we reach here is appropriate and will be upheld.

State v. Burch, 14 F.L.W. 382, 387. For the sake of curbing yet another generation's descent into drug abuse, the State respectfully implores this Honorable Court to uphold the constitutionality of §893.13(1)(e) along the lines *so* ably drawn by the Fourth District.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must APPROVE the decision of the Fourth District Court of Appeal reversing the trial judge's order of dismissal and remanding this cause for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by courier to: ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 27th day of April, 1989.

Of Counsel