IN THE SUPREME COURT OF FLORIDA

ROGER BENNETT,

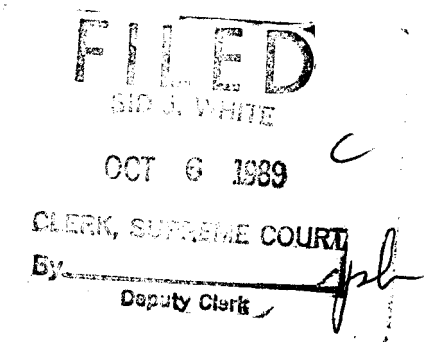
Petitioner,

vs.

Case No. **74,612**

STATE OF FLORIDA,

Respondent.



DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

ANDREA STEFFEN
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL **33830**
(813) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, ROGER BENNETT, was the defendant and Appellant in the appended Bennett v. State, 14 F.L.W. (Fla. 2d DCA August 4, 1989) review granted, number 74,612 (Fla. 1989). Petitioner, Roger Bennett, was the defendant and Appellant in the lower court. Respondent, the State of Florida was the prosecuting authority and Appellee below.

Reference to the record on appeal containing transcripts will be designated. "(R _____)"

All emphasis, unless otherwise indicated, will be supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

On March 15, 1988, the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, filed an information charging Appellant, ROGER BENNETT, with possession of cocaine with intent to purchase, purchase of cocaine within 1,000 feet of a school, possession of cannabis and possession of drug paraphernalia contrary to section 893.13, Florida Statutes (1987). (R3-6)

On March 23, 1988, Petitioner filed a motion to dismiss and memorandum of law arguing the unconstitutionality of section 893.13, Florida Statutes (1987). (R8-28) A second motion to dismiss specifically dealing with the provisions of section 893.13(1)(e), Florida Statutes (1987) was filed with supporting memorandum attacking Count II, the purchase of cocaine within 1,000 feet of a school on June 10, 1988. (R29-45) (The State's response to Appellant's second motion is found in the record on pages 68 to 84.)

Counsel further filed a motion to adopt original argument on the motion to dismiss of March 23, 1988, which was held on February 15, 1988. (R67). Said motion was granted on June 15, 1988. (R122) The record/argument adopted is currently before this court in numerous cases listed in Appendix A.

On June 15, 1988, a hearing was held before Circuit Judges Carolyn Fulmer, E. Randolph Bentley, Joseph Young, and Dale Durrance. (R87-120) The argument presented attacked the constitutionality of section 893.13(1)(e), Florida Statutes (1987)

under the grounds that it was in violation of the due process clause and equal protection clause of the United States and Florida Constitutions and the lack of a scienter or mens rea requirement in the statute. **(R96-120)** The court rejected those arguments and denied the motion to dismiss. **(R123)**

On July **29, 1988,** Petitioner was tried by jury, the Honorable William K. Love, a retired Circuit Judge, presiding. **(R128-394)** An amended information was filed on July **29, 1988,** which deleted Count I of the original information. **(R392-394,258-259).**

The following testimony was presented at trial:

Officer Joe Halman testified he was working undercover as a drug dealer on February **19, 1988,** along **37th** Street Northwest in Winter Haven, Florida. **(R265-266)** The area was picked because it is known for drug traffic and there was a school nearby. **(R266,280)**

Halman stood across the street from the school in a paved lot. **(R267)** The school was visible from his position. **(R267)** Around **7:30** p.m. a truck approached Halman and drove past him at a high rate of speed. The truck then turned around and came back. **(R268)** The driver motioned Halman over. **(R268)** Halman approached and the driver asked for a "dime." **(R249)** Halman stated he did noting until he was summoned to the truck. **(R270).** Halman showed the driver, identified as the Petitioner, Mr. Bennett, a piece of cocaine and Mr. Bennett turned off his truck. **(R279)** Mr. Bennett took out a lighter and asked if it was $10.00. Halman said "yes"

and Mr. Bennett gave Halman $10.00. Mr. Bennett said he would come back later. (R270,273) A video tape of the transaction was played for the jury. (R276)

Officer Halman testified other areas on 27th Street, 36th Street, and 38th Street also had drug activity. (R280-281, 283) Halman observed no other sellers in that area on February 19. (R281) Eleven people were arrested between 3:00 p.m. and 8:00 p.m. (R282)

Steve Hammerburg removed the cocaine rock from Mr. Bennett's car after he was arrested. (R287) Hammerburg removed a bag of marijuana from Mr. Bennett's front pants pocket and a pipe from the ashtray of the truck. (R289-290) Hammerburg testified he had purchased cocaine in this area before. (R294)

Lieutenant James Madden testified he decided to set up a reverse sting across from Westwood Jr. High because it was known to be a high drug sales area in the apartments just north of Avenue J. (R300) Madden stated the initial measurement between the school and sale spot was paced off. At a later date he measured the area and determined the spot of the sale was approximately 400 feet from the property line and 900 feet from the building. (R306, 307-308) The first sale occurred at around 4:45 p.m. (R310) There were no children in the area. (R312) Madden agreed that there was no reason to believe a successful reverse sting couldn't have been set up outside the 1,000 feet protected zone. (R312-313)

Patricia Pattee conducted tests on the cocaine and marijuana and concluded the two substances were, in fact, cocaine

and marijuana. **(R317-319)**

Trial counsel for Petitioner renewed the arguments advanced in the earlier motions during her argument for a judgment of acquittal. **(R323-334)**

Roger Bennett testified he had been drinking heavily on February **19.** He went into that area of Winter Haven to visit his sister. **(R337-338)** Mr. Bennett lived in Orlando. **(R337)**

He drove by Halman, at first not intending to buy anything, but then turned around and went back. **(R339-340)** Mr. Bennett said Halman had come to the edge of the road and said "Yo." **(R341)** He then purchased cocaine. **(R332,348).**

Trial counsel requested that the jury be given an instruction that a finding of scienter must be made. **(R320-325,347-348).** The court denied the request. **(R332,348)**

Mr. Bennett was convicted as charged. **(R261-262,389-391)** The trial court revoked Mr. Bennett's probation. **(R385)** Mr. Bennett was sentenced without objection on August **23, 1988,** by J. Tim Strickland, Circuit Judge. **(R409)** Mr. Bennett was sentenced to **5 1/2** years incarceration on Count I. He was sentenced to one year on Count II and III to run concurrent with the sentence on Count I. **(R416,423-427)** Mr. Bennett was sentenced to one year and one day of incarceration on the violation of probation to be served consecutive to his previous sentence. **(R417)** The recommended guidelines disposition indicated a presumptive sentence of 5 **1/2** to **7** years incarceration. **(R429)**

On September **19, 1988,** Appellant timely filed a notice

of appeal. (R430)

On appeal in the Second District, Petitioner contended that section 893.13(1)(e) was unconstitutional because it was enacted as part of a statute which violated the single subject rule of the Florida Constitution, the enforcement of subsection (1)(e) was not a valid exercise of the police power, due process was violated as a result of outrageous conduct by law enforcement, and the statute was unconstitutionally vague. Petitioner also contended that even if the statute was found to be constitutional, a specific mens rea was an element which required proof by the State and the penalty provisions constituted cruel and unusual punishment. (**See** Brief of Appellant).

The Second District rejected Petitioner's arguments and affirmed Petitioner's conviction. In doing ***so*** the Second District certified the following question to this court:

> Does section 893.13(1)(e), Florida Statute (1987), violate the one subject rule of Article III Section 6 of the Florida Constitution?

Petitioner filed a notice to invoke discretionary jurisdiction on August 16, 1989 and this court issued a briefing schedule on August 25, 1989.

SUMMARY OF THE ARGUMENT

Appellant was convicted of purchase of cocaine, a criminal offense created by the passage of Chapter 87-243, Laws of Florida. Appellant moved to dismiss the charge because Chapter 87-243 violates the "one subject rule" of Article 111, Section 6, of the Constitution of the State of Florida. The 1987 act does violate the "one subject rule" and the trial court erred in denying the motion. The court's error requires reversal of the conviction for purchase of cocaine.

The actions of law enforcement in the instant case are an invalid exercise of the police power in that the selling of drugs by officers near a school is in direct contravention of any legislative intent to keep drugs from schools and because the state interest is not necessarily advanced by the prohibited conduct.

The actions of the police were so outrageous as to constitute a violation of Appellant's due process rights. The court erred in denying Appellant's motion to dismiss.

Section 893.13(1)(e), Florida Statutes (1987) is void for vagueness.

Section 893.13(1)(e), Florida Statutes (1987) should be construed as requiring knowledge on the part of the defendant as to the fact that he was purchasing drugs within a 1,000 feet of a school. The court erred in failing to instruct the jury and erred in failing to grant a judgment of acquittal when the State failed to present any evidence that Appellant knew he was within the protected area.

The penalty provisions of section 893.13(1)(e), Florida Statutes (1987) constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN NOT DISMISSING THE CHARGES OF PURCHASE OF COCAINE WHEN THE ENACTING LEGISLATION FOR THAT CRIME VIOLATES THE "ONE SUBJECT RULE" OF FLORIDA'S CONSTITUTION.

Among its many provisions, an enactment of Florida's **1987** legislative session, Chapter **87-243,** Laws of Florida, created the new criminal offenses of purchase of a controlled substance and possession with intent to purchase a controlled substance. Petitioners were all charged with purchase of a controlled substance and some were also charged with possession of cocaine with intent to purchase. Petitioners challenged the constitutionality of the **1987** act by a motion to dismiss. Chapter **87-243** contravenes the hallowed "one subject rule" of Article 111, Section 6, of the Constitution of the State of Florida. The motion to dismiss should have been granted.

Chapter **87-243,** Laws of Florida, passed the Florida Legislature in the form of a committee substitute for House Bill **1467.** The act was approved by the Governor on June **30, 1987,** and took effect July 1, **1987.** Chapter **87-243** violates Florida's "one subject rule" by encompassing a multitude of separate and disassociated subjects. The subject of creating and amending criminal offenses relating to drug abuse, which encompasses the "purchase" amendments to section **893.13,** Florida Statutes **(1987),** is but one of many different subjects rolled up into the one act

that is Chapter 87-243.

The One Subject Rule

Article III, Section 6, of the Constitution of the State of Florida was part of the 1885 Enabling Act, the state's original constitution. The section states:

> Laws - Every law shall embrace but one subject and matter properly connected therewith and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be it Enacted by the Legislature of the State of Florida."

The first sentence of Article III, Section 6, is often referred to as the "one subject, one title rule" or simply as "the one subject rule." It imposes strict limitation on how the Florida Legislature is to conduct the business of making laws. Florida's founding fathers wanted to ensure that the state's legislative process could not adopt the practices of the United States Congress and many state legislatures where omnibus legislation, rider bills and logrolling are both commonplace and lawful. Such practices allow proposals to become law without majority support, merely because they are combined with legislation that is widely supported. Such practices also abridge the executive veto authority, as an undesirable provision cannot be stricken without "throwing the baby out with the bath water."

The Constitution places in the courts of this state the responsibility to be the watchdog of all legislation, to guarantee that the "one subject rule" is respected. The courts of Florida have performed this role on a number of occasions over time, including several times in recent years. In doing so, the courts have defined the purpose of the "one subject rule."

> The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having no necessary or appropriate connection with the subject matter. State v. Lee, **356** So.2d **276, 282** (Fla. **1978).**
>
> These provisions were designed to prevent various abuses commonly encountered in the way laws were passed by state legislatures. One was logrolling which resulted in hodgepodge or omnibus legislation. Colonial Investments Co. v. Nolan, **100** Fla. **1349, 131 So.178 (1930).** As Justice Brown wrote in Nolan,
>
> > It had become quite common for legislative bodies to embrace in the same bill incongruous matters having no relationship to each other....And frequently such distinct subjects, affecting diverse interests, were combined in order to unite the members who favored either insupport of all.... **131 So.** at **179** (quoting Lewis' Sutherland, Statutory Construction, Section **3).**
>
> The logrolling problem has also been alluded to by our supreme court in its interpretation of Article III, Section **6** of the **1968** constitution. If diverse and dissimilar matters were included within one law, the legislative process could be subverted by passing matters which really have not majority support in the legislative body, but which were passed because legislators were voting to approve other provisions included in the bill. It could also impair the Governor's veto power if he or she were forced to accept an unwanted

> or undesirable provision in order to obtain the enactment of a desirable one. [footnotes omitted] Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984).

This Court has expressed that "wide latitude must be accorded the Legislature in the enactment of laws..." **Lee**, supra at 282. Legislation which has been approved under this standard includes the Florida Uniform Traffic Control Act, Santos v. State, 380 So.2d 1284 (Fla. 1980); the Insurance and Tort Reform Act of 1977, **Lee**, supra; the Medical Malpractice and Medical Liability Insurance Act, Chenoweth v. Kemp, 396 So.2d 396 (Fla. 1981); and the 1986 Tort Reform and Insurance Act, Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

The standard of "wide latitude" cannot shelter all legislation from judicial scrutiny, however, or there soon would no longer be a "one subject rule" in Florida. Examples of multi-subject legislation that have been invalidated include an act criminalizing both the trafficking of liquor and voluntary intoxication, Albritton v. State, 89 So. 360 (Fla. 1921); an act concerning both tax returns and land deed recording, Colonial Investments Co., supra; and an act that both defined a new criminal offense and restructured a criminal justice council. Bunnell v. State, 453 So.2d 808 (Fla. 1984); Williams, supra.

While the State in its brief to the trial court and district court played heavily on case law approving civil-related legislation, Petitioners cite to the more relevant decisions on criminal legislation, and in particular to the recent decisions of

Bunnell and Williams. The act under review in both Bunnell and Williams, Chapter **82-150,** Laws of Florida, created a new criminal offense of obstruction of justice by false information. It also mandated certain restructuring of the Florida Criminal Justice Council. Both the Florida Supreme Court and The District Court of Appeal, Fifth District, found that while these two matters shared the common, general object of improving criminal justice in Florida, they were nevertheless separate, distinct subjects. The concerns and immediate objects of each were distinct and disassociated.

Chapter **87-243**

Chapter **87-243,** Laws of Florida, shares the very same fault as the legislation struck down in Bunnell and Williams. It contains sections that create new criminal offenses. It has other sections that relate to the structure of councils and committees (including some at best marginally related to criminal justice).

Chapter **87-243** repeats the ills of Chapter **82-150,** but it goes much further. Chapter **87-243** encompasses seventy-six **(76)** sections. The title alone contains no less than one thousand, four hundred and ten **(1,410)** words, somewhat stressing the constitutional requirement that the subject of a piece of legislation "shall be briefly expressed in the title." The act's various segments originated from so many separately filed bills and substitutes, it truly merits its popular title as the Omnibus Crime Prevention and Control Act of **1987.**

An outline of the topics of each of the act's seventy-six **(76)** sections can be found in Exhibit A to the Memorandum in Support of Motion to Dismiss. Even affording wide latitude, Petitioners identify sixteen **(16)** separate subjects in Chapter **87-243,** outlined below:

1) Drug abuse crimes: Sections **2-9, 12, 75**

2) Education re: drug abuse: Sections 10-11, **13-19**

3) Conveyances: forfeiture, title and registration Sections **20-23, 28-29**

4) Vessel operation crimes: Sections **51-54**

5) Money Laundering Control Act: Sections **30-38**

6) Planting of a "hoax bomb": Section **39**

7) Pawnbrokers and stolen property: Sections **40-41**

8) Entrapment defense: Sections **42-43**

9) Attempted burglary: Section **44**

10) Witness tampering: Section **45**

11) Appeals by the State: Section **46**

12) Judgment costs at sentencing: Section **47**

13) Bookmaking: Section **48**

14) Operating chop shops: Section **49**

15) Crime prevention studies and training: Sections **50-54**

16) Safe Neighborhood Act: Sections **55-74**

Without elaborating on all of the many distinctions among these sixteen **(16)** subjects, as done in more detail in Petitioners Memorandum in Support of Motion to Dismiss, a few examples are in order. The new crime of purchase of controlled substances **(s.4)**

is unrelated to the procedural appellate rights of the State of Florida **(s.46).** The changes and additions to vessel operation crimes **(s.51-54)** are unrelated to the changes the Legislature would make to the entrapment defense **(s.42-43).** All of the criminal offense sections are as unrelated to the crime prevention studies of Sections **50-54** as were the two subjects addressed in Chapter **82-150** by Bunnell and Williams. Costs imposed at sentencing **(s.47)** are unrelated to substantive matters such as the "Money Laundering and Control Act" (s.30-38) or witness tampering **(s.45).** As coup de arace, the "Safe Neighborhood Act" **(s.55-74)** does not belong under even the largest umbrella with the various substantive and procedural criminal matters of the act.

Applying the Rule to the Act

In its Orders Denying Motions to Dismiss, the trial courts accepted the State's argument that all provisions of Chapter **87-243** relate to a single subject, to wit: crime prevention and control. This holding is contrary to Florida Supreme Court authority.

At the district court level of Bunnell, the District Court of Appeal, Second District, used the same reasoning applied here by the trial court, i.e., that criminal justice is a suitable umbrella to shroud different topics as a single subject. State v. Bunnell, **447** So.2d **228** (Fla. 2d DCA **1983).** The Florida Supreme Court rejected that reasoning and overturned the Second District decision. Bunnell, supra at **809.** In Williams, the District Court

of Appeal, Fifth District, highlighted the flaw in the Second District's holding:

> The Bunnell court [referring to the Second District decision] 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 provisions of article III, section 6. [footnote omitted] Williams at **321.**

In its opinion affirming the trial courts in these cases, the District Court of Appeal, Second District, simply stated agreement with the decision of the District Court of Appeal, Fourth District, in State v. Burch, **14** FLW **382** (Fla. 4th DCA Feb. **8, 1989).** pending rev. on certified question (No. **73,826) (1989).** In Burch, the State conceded that Chapter **87-243** does not pass constitutional muster under the Bunnell standard. The Fourth District Court at **14** FLW **385** accepted the State's argument that Bunnell was inconsistent with Smith v. Dept. of Insurance, supra, and that the dicta of the **1987** Smith opinion supercedes Bunnell. The flaw in this reasoning is that Bunnell and Smith are **not** inconsistent and Bunnell is good law.

In Smith at **1087** the Court rejected the argument that tort law, contract law and insurance regulation must be considered separate subjects. Very similar complaints against combined tort and insurance reform legislation had been rejected previously in

Lee, supra, and Chenoweth, supra. The court reasoned that to achieve its goals in each instance the Legislature was reasonable in passing comprehensive legislation that covered tort, insurance, and contractual law as related to claims for personal injury and property damage. The Court noted in Smith at 1087 that many such claims are brought under both a contract and a tort theory and that liability insurance concerns both. The areas of law were so interconnected that the Legislative object--to assure the general availability of affordable insurance--could not be met without legislation that involved all three aspects.

A reading of the bills at issue in **Lee** (Ch. 77-467), Chenoweth (Ch. 76-260) and Smith (Ch. 86-160) demonstrates that these are truly "comprehensive" acts that systematically cover a number of interrelated facets in order to achieve a specific objective.

The same is true for Chapter 87-6, Laws of Florida, which necessarily encompassed a number of different areas of law, budget and operation in order to attempt to create a tax on services in Florida. Such a new tax could not be reasonably and responsibly created without comprehensive consideration of the various, necessarily affected areas. The Court found in In re: Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987), that this act was not a "cloak" for dissimilar legislation, nor was it hodgepodge or logrolling legislation, because all of its sections were necessarily interrelated.

The difference between these bills and Chapter 87-243,

is that each of them truly were comprehensive, whereas Chapter **87-243** is not. Chapter **87-243,** rather, is a grab bag collections of various pieces of proposed legislation whose only commonality is that they arguably relate to "crime prevention and control." Even if they do each somehow serve "crime prevention and control," the sixteen (16) or subjects of this bill are **not** interrelated or interconnected to each other. They each have no bearing on the expected effectiveness of the others. For example, the effectiveness of the "Money Laundering Control Act" is in no way affected by changes to jurisdiction for state appeals, or vice versa. The effectiveness of the "Safe Neighborhoods Act" is in no way dependent on alteration of the entrapment defense, or vice versa. The advantage to "crime prevention and control" to be occasioned by each segment is not dependent on passage of the others. Each of the sixteen (16) areas are quite independent.

"Comprehensive" must mean more than "large" in order to excuse expensive legislation from the "one subject rule." Petitioners submit that legislation that includes a great number of matters titled under one broad topic is comprehensive if its various components bear an interrelatedness to each other that make it reasonable to have to include all in one bill in order to achieve the specified objective. Legislation that combines separate matters that are not interrelated with each other is hodgepodge rather than comprehensive if the only commonality they hold is a relationship to one broad topic title.

Bunnell is distinguished from Lee, Chenoweth, Smith and

In re: Advisory Opinion because the act in question in Bunnell was not comprehensive. Even if the separate provisions each related to a common topic such as "criminal justice," they were not interrelated with each other such as to justify their being combined in one legislation. Bunnell has not been overruled and is controlling law for legislation such as Chapter **87-243** where the single thread of commonality is to a general topic such as "crime prevention and control." As held in Bunnell and Williams, a general topic heading does not make separate subjects of a bill interrelated with each other and does not make an assortment bill comprehensive.

The Florida Supreme Court has said that the subject of a bill "may be as broad as the Legislature chooses provided the matters included in the law have a natural and logical connection." Lee at **282.** This does not provide carte blanche to the Legislature, however, to place disassociate subjects under one general heading in one bill. For example, all provisions of a bill entitled, "For the common good of the citizens of Florida," would surely be related to this very general topic title, but they would not necessarily be interconnected or interdependent to each other.

Petitioners agree that it is a common sense test that must be applied to determine if a piece of legislation meets the single subject requirement, as stated in Smith at **1087. A** common sense reading of some expansive bills can demonstrate that there was reason to tie together so many aspects of concern into one bill in order to effectively achieve one purpose. With other bills,

common sense can demonstrate that separate pieces of proposed legislation, each with no bearing on the effectiveness of the other, have been lumped together in one bill--linked together only by their individual tethers to a general title. Common sense tell the reader of Chapter **87-243** that this **is** hodgepodge legislation--various proposals merged together by the use under one omnibus label, "crime prevention and control." It is common sense that exposes Chapter **87-243** as a myriad of unrelated pieces of legislation collected together under one omnibus umbrella. Bunnell has specifically prohibited using "criminal justice" as an umbrella to bring unrelated pieces of criminal legislation together in one bill.

The dangers to the Constitution are great. Consider the ramifications if all bills related to crime are each year tied into one act. What legislator dare vote "nay" to such an act? For example, is there any measure whether a majority of the Florida Legislature truly wished to abolish the time-honored, common law definition of the entrapment defense, honed by the United States and Florida Supreme Courts, and wished to put in its place a definition of its own? Or were legislators precluded from voting their conscience on the entrapment subject because forced to vote on the entire package, which included neighborhood improvement and drug education provisions?

In Chapter **82-150** the Florida Legislature tested the water of the "one subject rule" and its application to criminal legislation. Despite the fact that Chapter **82-150** was struck down,

the Legislature has now dived in those same waters headfirst with the omnibus Chapter 87-243.

Section 893.13, Florida Statutes, to the extent amended Chapter 87-243 is plagued with this violation of the "one subject rule." To the extent amended by this 1987 legislation, section 893.13 should be declared unconstitutional. The Motions to Dismiss charges brought under these amendments to section 893.13 should have been granted.

Only declaring Chapter 87-243 constitutionally invalid will adhere to the Florida Supreme Court's holding in Bunnell. Even more importantly, only in doing ***so*** can the "one subject rule" of Article 111, Section 6, of the Constitution of the State of Florida survive and maintain a meaningful function in our state's law making process. Approval of Chapter 87-243 would effectively ring the death knell for Florida's esteemed "one subject rule."

The Second District did not certify to this court any other issues unique to subsection 893.13(1)(e) as relating to the specific act of a drug transaction within 1,000 feet of a school. The Fourth District in Burch v. State, 14 FLW 382 (Fla. 4th DCA Feb. 8, 1989), did not seek limit this court's review to only the single subject violation, but certified the following question "Is section 893.13(1)(e) constitutional?". The remainder of Petitioner's brief will address other avenues of attack which are outside the narrow confines of the certified question in this case in recognition of the principle that jurisdiction exists for every issue raised in a case properly before this court on some other

ground should this court choose to exercise it. Freund v. State, 520 So.2d 556 (Fla. 1988).

ISSUE II

THE ENFORCEMENT OF SECTION 893.13(1)(e), FLORIDA STATUTES (1987) IS NOT A VALID EXERCISE OF THE POLICE POWER ON ITS FACE AND AS APPLIED.

All criminal law 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. State, **65** So.2d **752** (Fla. **1953).** The exercise of the police power to the detriment of an individual or class must serve a desirable purpose that actually serves the public in general. L. Maxcy, Inc. v. Mayo, **103** Fla. **552, 139 So. 121 (1932).**

The United State Supreme Court in Goldbalt v. Town of Hempstead, New York, **369 U.S. 590, 82** S.Ct. **987 (1962)** defined the limits upon the police power as follows:

> "To justify the State in...interposing its authority in behalf of the public, it must appear - first, that, the interest of the public...require such inference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Id. at **594, 81** S.Ct. at **990.**

This Court in Horsemen's Benev. Ass. 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 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).

This Court in Horsemen's Benev., supra, found a state statute to be in invalid exercise of the police power. The state required licensed horse racetracks holding permits for thoroughbred horse racing to deduct one percent from the total purse pool paid and to pay this amount to the horsemen's association representing a majority of the owners and trainers of thoroughbred stabled in Florida. The Court found the objective of the statute was valid, i.e., improving the quality of racing which would enhance tourist revenues. However, the means selected to achieve that goal were found to be an invalid exercise of police power:

> "Section 550.2615, Florida Statutes (1980), however, does not effect the intended legislative purpose. There is no reasonable relationship between the stated objective of the statute and the form of the statute chosen by the legislature to advance this purpose. Section 550.2615 contains no provision for how the funds paid to the horsemen's association must be spent or that they must be spent in furtherance of the legitimate State objective." Id. at 695.

Section 893.13(1)(e), Florida Statutes (1987) is not a valid exercise of the police power. It does not rationally follow that the mere purchase of drugs within 1,000 feet of a school (prohibited conduct) will have an adverse effect on school chi1dren.

The enforcement of section 893.13(1)(e), Florida Statutes (1987) is not a valid exercise of the police power because:

1. The legislative intent is not readily ascertainable from the statutory language.

2. The purported state interest is not necessarily advanced by the prohibited conduct.

The statute calls for an enhanced penalty if the accused purchases drugs within the 1,000 feet radius of a school without regard for the circumstances. For example, the statue 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 home within the protected area.

Even if the purported state interest is ascertainable, the actions taken by the police agency here do not meet or advance the purported legislative intent. In fact, the disputed law enforcement technique utilized here results in and invalid exercise of the police power as applied in violation of the due process clause of both Federal and Florida Constitutions.

As noted in Griffin, 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.

Petitioner suggests that the intent of this legislation is to create a "drug free zone." Petitioner further argues that "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." To the contrary, 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.

Aside from an examination of the statutory language to discern legislative intent, this Court should review existing documentation to ascertain its intent. It is clear that the legislature did **not** envision law enforcement officers setting up reverse sting operations to enforce the law. This is cognizable based on the projected fiscal impact of the statute. It was projected that the passage of section 893.13(1)(e), Florida Statutes (1987) would have no sisnificant fiscal impact on the State budget. **See**, Senate Staff Analysis and Economic Impact Statement of Senate Bill (R42-45). The House of Representative, Committee on Criminal Justice, Staff Analysis, specifically states that "[t]he Department of Corrections estimates that this could result in approximately 40 new prison admissions annually'' (R42-45).

This fiscal analysis is crucial to determine the legislative intent. This offense is a first degree felony which

would be scored under Category 7: Drugs. For a first time offender charged with purchasing cocaine without any prior convictions, a total guidelines score of 137 points results. This automatically places the offender in the 3 1/2 - 4 1/2 years in prison range. Each person arrested for purchase of cocaine faces at least three and one half (3 1/2) to four and one half (4 1/2) years in prison. If each police agency in the State embarks on the disputed conduct of the Polk County agencies, the arrest and prison admissions figures would geometrically skyrocketed into the thousands. This is in sharp variance from the Department of Corrections own estimates to the Legislature. Clearly the Legislature did not intend for the actions instituted here by the Polk County police agencies.

Here the reverse sting technique utilized by the law enforcement agencies fosters 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 1,000 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 for violating section 893.13(1)(E), Florida Statutes (1987) 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 uphold the dismissal of the charge and declare section 893.13(1)(e), Florida Statutes (1987) unconstitutional as applied to Appellant, a purchaser of

cocaine.

The Fourth District in State v. Burch, 14 FLW 382 (Case number 88-0930) (Fla. 4th DCA opinion filed February 8, 1989) pending on cert. question (No. 73,826) (Fla. 1989) has found section 893.13(1)(e), Florida Statutes (1987) to be constitutional. The court, however certified the following question to the Florida Supreme Court as one of great public importance: "Is section 893.13(1)(e), Florida Statutes (1987) constitutional?", which is currently before this court.

ISSUE III

THE POLICE ACTION IN INTENTIONALLY SETTING UP THE REVERSE STING OPERATION TO CATCH PURCHASERS WITHIN 1,000 FEET OF A SCHOOL CONSTITUTES GOVERNMENT MISCONDUCT OF SUCH AN OUTRAGEOUS DEGREE THAT THE TENETS OF THE DUE PROCESS CLAUSE WERE VIOLATED.

Assuming, arguendo, this Honorable Court declines to hold section 893.(1)(e), Florida Statutes (1987) unconstitutional, Appellant argues that the trial court erred in failing to use an alternative basis for dismissing the information.

This Court in State v. Glossen, 462 So.2d 1982, 1984 (Fla. 1985) recognized the principal that certain conduct on the part of government agents could be so "outrageous that due process principals would absolutely bar the government from invoking judicial process to obtain a conviction." Such governmental misconduct is an objective question of law for the court to determine. Analysis is focused strictly upon the actions of the government; hence, predisposition of the defendant is not an issue.

In the instant case law enforcement specifically targeted an area which was within the magic 1,000 feet mark. They further acknowledged that they could have set up a reverse sting within the same targeted area outside the 1,000 feet parameter (R156-161). By intentionally setting up within the protected zone to lure potential buyers into that protected zone, as opposed to a few feet away, the action of the police violated notions of fundamental fairness - the essence of due process.

Analogous to the instant case is that of People v.

Isaacson, 378 N.E. 2d 78 (N.Y. Ct. App. 1978). In Isaacson a confidential informant persuaded a Pennsylvania drug dealer to conduct a drug sale in New York where the drug laws were stiffer. The confidential informant managed this by conducting the sale from a bar located near the state border of New York State and Pennsylvania where the only notice that the bar was in New York State was a crumbled stone marker obscured by vegetation. The court held that in addition to other misconduct, the luring of the defendant into new York was a violation of due process sufficient to support a dismissal of the indictment. But for the intentional conduct of law enforcement in the instant case, Appellant would be faced with a conviction for a second degree felony as opposed to a first degree felony. The actions of law enforcement in luring purchasers into the protected zone is in violation of Glossen, supra. The charges are subject to dismissal.

The Fourth District in Burch, supra, failed to consider due process consideration under Glossen as applied to a purchaser of cocaine. The court did reject an entrapment argument based upon entrapment under Cruz v. State, 465 So.2d 516 (Fla. 1985). The court did not find Burch, a seller of cocaine was entrapped under Cruz. The court further relied on United States v. Agilar, 779 F.2d 125 (2d Cir. 1985), cert. denied, 475 U.S. 1068 (1986), a case based upon the federal statute which, as previously argued, does not contain the word "purchaser".

The position of a purchaser is different from that of a seller. The seller is at liberty to choose where to distribute and

has the ability to set up shop wherever he pleases--forcing the buyer to meet him in his market. The buyer, while making a choice to purchase a drug, does not choose the location, but must rather go to the area chosen by the seller. Thus, the proposition that a buyer's due process rights are violated by police conduct is much stronger than for that of the seller.

ISSUE IV

SECTION 893.13(1)(e), FLORIDA STATUTES (1987) IS SO VAGUE AND INDEFINITE AS TO BE UNCONSTITUTIONAL ON ITS FACE AS APPLIED.

Section 893.13(1)(e), Florida Statutes (1987) is unconstitutionally vague on its face and as applied to Petitioner.

The doctrine of vagueness originates in the due process clause of the Fourteenth Amendment. It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618 (1939). As generally stated, the void-for-vagueness doctrine requires that a penal statute defines 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. Kolendar v. Lawson, 461 U.S. 352, 357, 103, S.Ct. 1855 (1982); Gravned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972).

A vague statute does not give adequate "notice of the required conduct to one who would avoid its penalties," Bovce Motor Lines v. United States, 342 U.S. 377, 340, 72 S.Ct. 329, 330 (1951), is not "sufficiently focused to forewarn of both its reach and coverage," United State v. National Dairy Products Corporation, 372 U.S. 29, 33, 83, S.Ct. 594, 595 (1963) and "may trap the innocent by not providing fair warning," Gravned v. City of

Rockford, 408 at 108, 92 S.Ct. at 2298 (1972). "In determining the sufficiency of the notice a statue must of necessity be examined in the light of the conduct with which a defendant is charged." National Dairy Products Corporation, at 33.

It is clear under Florida law that a statute, especially a penal statute, must be definite to be valid. Locklin v. Pridueon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute.

Section 893.13(1)(e), Florida Statutes (1987) suffers from the same deficiency as other vague statutes. Petitioner 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." In fact, Officer Bennett took two different measurements and found the sale was conducted 318 feet and 6 inches from the property line, but near 700 feet from the school building.

Section 893.13(1)(e), Florida Statutes (1987) therefore violates the constitutional requirement of definiteness. Hence, section 893.13(1)(e), Florida Statutes (1987) is unconstitutional, vague and overbroad as written and applied to Petitioner. This Court should affirm the trial court's order declaring the statute unconstitutional.

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 State 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.

ISSUE V

A FINDING OF OF MENS REA OR "SCIENTER" IS AN ELEMENT OF SECTION 893.13(1)(e).

It is generally recognized that an essential element of all criminal offenses is guilty knowledge and criminal intent, or mens rea, of the accused. Simmons v. State, 151 Fla. 778, 10 So.2d 936 (1942); **see** 14 Fla. Jur. 2d 106 Criminal Law 41. The exception to this general rule is strict liability or mala in se crimes. **See** Tallev v. State, 160 Fla. 593, 36 So.2d 201 (1948). Strict liability or mala in se crimes have a "generally disfavored status." Liuarota v. United States, 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434, 440 (1985).

Thus it can be presumed that the legislature intended to follow the general rule by requiring knowledge to be an essential element of section 893.13(1)(e), Florida Statutes (1987). This presumption is in keeping with the similar presumption found by the United State's Supreme Court in Liuarota when it stated "the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law." (The background assumption being that criminal offenses requiring no mens rea are disfavored) Liuarota, supra at 426.

This presumption that knowledge is an essential element of section 893.13(1)(e), Florida Statutes (1987), is not shaken bv the fact that the language of the statute makes no reference to suiltv knowledse. Petitioner concedes that section 893.13(1)(e),

Florida Statutes (1987), contains no specific language requiring scienter or knowledge. However, that fact, standing alone, is insufficient to establish that knowledge is not an element of the offense.

In United States v. United States Gypsum Co., 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978) the Supreme Court noted that "certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify disposing with an intent requirement." Id. at 438. See also Liparota, supra at 426. If Florida's legislature had intended to dispense with the general assumption of our criminal law that guilty knowledge is an essential element of criminal statutes it certainly could have done far more than simply omit the appropriate language from the statute.

It is significant to note that in Chapter 87-243, Laws of Florida, the committee bill which, among many other things, created section 893.13(1)(e), Florida Statutes (1987), the legislature did specifically state its legislative intent in exacting several provisions. If the legislature had intended to breach the general rule requiring guilty knowledge it certainly could have explicitly stated its intent as was done in several other sections of the bill.

Yet another general rule of statutory interpretation leads inescapably to the conclusion that guilty knowledge is an essential element of section 893.13(1)(e), Florida Statutes (1987). In Liparota, the Supreme Court stated:

> In addition; requiring mens rea is in keeping with our longstanding recognition of the principle that "ambiguity concerninu ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812, 28 L.Ed.2d 493, 92 S.Ct. 1056 (1971). See also United State Gypsum Co., supra, at 437, 57 L.Ed.2d 854, 985 S.Ct. 2864; United, States v. Bass, 404 U.S. 336, 347-348, 30 L.Ed. 488, 92 S.Ct. 595 (1971); Bell v. United States, 349 U.S. 81, 83, 99 L.Ed. 905, 75 S.Ct. 620 (1955); United States v. Universal C.I.T. Credit Corp., 334 U.S. 218, 221-222, 97 L.Ed. 260, 73 S.Ct. 227 (1952). Supra, at 427.

Unfortunately, it is not unusual for the Florida legislature to have left out the specific language making knowledge an element of a criminal offense. In such instances the courts have not hesitated in construing the statute as requiring scienter. In State v. Slaton, 68 So.2d 894 (Fla. 1953) this Court inferred a knowledge requirement in a statute prohibiting illegal transmission of racing information. In Brent v. State, 173 So.2d 675 (Fla. 1937), a knowledge requirement was inferred into the then existing larceny statute. In State v. Diaz, 97 So.2d 105 (Fla. 1957), a knowledge requirement was inferred onto a statute requiring the taking of a non-communism oath. In Cohen v. State, 125 So.2d 560 (Fla. 1961) and Tracey v. State, 130 So.2d 605 (Fla. 1961), a knowledge requirement was inferred onto the possession of obscenity statute.

More recently, this court probably recalls when the larceny statute was amended in 1977 and the resulting theft statute failed to expressly require that knowledge was an essential element of the crime of theft. This perceived problem was cured by the

legislature in **1978** amending the theft statute to include the work "knowingly" but only after this Court held in Griffis v. State, **356** So.2d **297** (Fla. **1978)** that:

> In construing a statute, this court is committed to the proposition that a statute should be construed and applied so as to give effect to the evident legislative intent, regardless of whether such construction varies from the statute's literal meaning. (Citations omitted.)

Id. at **299.**

Finally, another basic rule of statutory construction compels a finding that guilty knowledge is an essential element of section **893.13(1)(e),** Florida Statutes **(1987).** In Griffis, supra, the general rule was affirmed that if a controversy can be resolved by statutory construction rather than by passing on the constitutionality of a statute, the statute will not be declared unconstitutional.

> It is axiomatic that the Court will not pass upon the constitutionality of a statute if the case may be effectively disposed of on any other grounds. Sinaletarv v. State, **322 So.2d 551** (Fla. **1975).** Williston Hiahlands Development Corp. V. Hogue, **277 So.2d 260** (Fla. **1973).** Thus, if a particular matter in litigation can be determined by statutory construction, this Court will avoid considering the constitutional questions raised. Green v. State ex rel. Phipps, **166 So.2d 585** (Fla. **1964).**

Griffis, supra at **298.**

A literal reading of all the provisions of section **893.13,** Florida Statutes (1987), as amended by Chapter **87-243,** Laws of Florida, clearly establishes the section **893.13,** Florida

Statutes (1987), would have to be declared unconstitutional unless the criminal offenses prescribed by section 893.13, Florida Statutes (1987) are construed to contain an element of scienter or knowledge.

None of the prohibited acts enumerated in section 893.13, Florida Statutes (1987) contain specific language requiring guilty knowledge. If guilty knowledge was not construed or presumed to be an element of these prohibited acts an entire array of seemingly innocent conduct would be made illegal.

Section 893.13(1)(a), Florida Statutes (1987) purports to make it unlawful for any person to sell, purchase, manufacture, or deliver, or possess with intent to sell, purchase, manufacture, or deliver a controlled substance. If guilty knowledge is not an element of this offense then it would be a crime for a store clerk to sell a bag of sugar which had been laced with a controlled substance at the processing plant. Additionally, the buyer would also be guilty of a crime even though neither he nor the clerk knew that the controlled substance was in the bag.

Similar results would occur in relation to subsections (1)(b) and (1)(c) if the amount of controlled substance present is in excess of 10 grams and if the buyer was under the age of 18.

Subsection (1)(d) makes it unlawful for any person to bring a controlled substance into the State unless the person is authorized to do ***so.*** If guilty knowledge if not an essential element of this offense, an airline stewardess who had a controlled substance hidden in her baggage without her knowledge and then flew

into Florida would be guilty of a criminal offense. Likewise, the pilot would also be subject to prosecution if passengers or crew concealed contraband on the plane he brings into the state.

Subsection (1)(f) makes it unlawful for any person to be in actual or constructive possession of a controlled substance. If guilty knowledge were not an essential element of this offense any person in a car which also contains controlled substances would be guilty regardless of whether they knew of the presence of the substance.

Similar ludicrous examples can be applied to the provisions of subsections (2)(a) and (3)(a).

Clearly this is not the law. Scienter has been recognized as an essential element of each of these offenses despite the fact that the language of the statute makes no reference to guilty knowledge. See, Florida Standard Jury Instructions in Criminal cases. If subsection (1)(e) is read in pari materia with all other sections of Chapter 893.13 a requirement of scienter must also be imposed upon this subsection.

Petitioner feels compelled to discuss 21 U.S.C.A. 845a, the so-called federal school yard statute. Petitioner acknowledges that the federal statute has been construed not to require knowledge of the presence of a school within 1,000 feet of the criminal act. However, three significant distinctions can be drawn between the federal statute and section 893.13(1)(e), Florida Statutes (1987).

First, the federal statute makes it a crime only to

distribute or manufacture a controlled substance within 1,000 feet of a school. It does not make purchase of a controlled substance within 1,000 feet of a school illegal. Innumerable reasons can be present for holding drug pushers and manufacturers to a higher standard of culpability than drug users.

Second, while, as has been previously pointed out, section 893.13(1)(e), Florida Statutes (1987) has absolutely no mens rea requirement in its literal language, the federal statute does. Section 845a enhances the punishment for an individual who violates sections 841(a)(1) or section 856 of Title 21 while that person is within 1,000 feet of a school. Section 841(a)(1) and 856 of Title 21 contains the specific mens re
a language "knowingly or intentionally." The deletion of the specific mens rea language from 945a while it is contained in section 841(a)(1) would logically lead one to believe that the Congress intentionally deleted the mens rea requirement. In the Florida statute where no mens rea language is contained within any of the provisions of section 893.13, Florida Statutes (1987) the lack of such language in subsection (1)(e) has no similar significance.

Third, in United States v. Halland, 810 F.2d 1215, 1224 (D.C.Cir. 1987), the court found knowledge was not required because it was "reasonable for Congress to have expected drug traffickers to ascertain their proximity to schools and remove their operations from these areas or assume the risk for their failure to do so." In United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985) the court

found Congress' rationality that a drug dealer's knowledge may be presumed by his actions provided them with "more" that Liparota required. The inclusion of "purchase" in section 893.13(1)(e), Florida Statutes (1987) defeats this rationality and renders the lack of knowledge a violation of due process. It is simply irrational that purchasers of drugs, especially unknowing first-time buyer, have knowledge that they are within 1,000 feet of a school.

Finally, specific legislative intent to require no proof of knowledge can be found for the federal statute. The Congressional Record contains references to the intent of the sponsors of section 845a to "send a signal to drug dealers that we will not tolerate their presence near our schools." Such statements of legislative intent cannot be found for section 893.13(1)(e), Florida Statutes (1987).

In analyzing section 845a the United States Court of Appeals, Second Circuit, found:

> While far more than simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement Id. at 2088 (citation omitted), we find that Congress has provided us with more.

Falu, supra at 50. The Florida legislature has provided us with no more than the single omission.

To require proof of knowledge as an essential element of section 893.13(1)(e), Florida Statutes (1987) would not emasculate the statute. Proof of this knowledge can come from circumstantial

evidence, just as proof of "every operation of the human mind" must come from circumstantial evidence. ***See***, Florida Standard Jury Instructions in Criminal Cases.

The defense position can best be summarized by the words of Justice Brennan speaking for the **6** Justice majority in Liparotg:

> Our point once again is not that Congress could not have chosen to enact a statute along these lines, for there are no doubt policy arguments on both sides of the question as to whether such a statute would have been advisable. Rather, we conclude that the policy underlying such a construction [absence of mens rea] is neither ***so*** obvious nor compelling that we must assume, in the absence of any discussion of this issue in the legislative history, that Congress did enact such a statute.

Liparota, supra at **430.**

Petitioner is aware that the preceding argument was rejected by the Fourth District in Burch, supra. However, the Fourth District based its ruling upon those Federal cases which Appellant submits are distinguishable and not persuasive due to the inclusion of the word "purchasers" in the Florida statute and thus, the ruling by the Fourth District is incorrect.

Thus, the trial court erred in failing to instruct the jury that knowledge was an essential element of the crime of purchase of cocaine within 1,000 feet of a school.

ISSUE VI

THE PENALTY PROVISIONS OF 893.13 (1)(e) CONSTITUTES CRUEL ANDUNUSUAL PUNISHMENT.

The harsh penalties called for, upon conviction under section 893.13(1)(e), Florida Statutes (1987) constitute 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 for purchase of cocaine, Petitioner is 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, (section 812.13(b), Florida Statutes (1987)); manslaughter with a firearm (section 782.07, Florida Statutes (1987) and section 775.087, Florida Statutes (1987)); aggravated battery with a firearm (section 784.045, Florida Statutes (1987) and section 775.087 Florida Statutes (1987)); arson of an occupied structure (section 806.01(c), Florida Statutes (1987)); and attempted first degree murder (section 782.04, Florida Statutes (1987) and section 777.04(4)(a), Florida Statutes (1987)).

Furthermore, the state calls for a maximum sentence which is <u>twice</u> the exposure for such crimes as manslaughter (section 782.07, Florida Statutes (1987)); sexual battery (section 794.011(5), Florida Statutes (1987)); robbery (section 812.12(c),

Florida Statutes (1987)); burglary (section 810.02(3), Florida Statutes (1987)); or lewd and lascivious assault upon as child (section 800.04(3), Florida Statutes (1987)). A person would have to commit six (6) counts of aggravated assault with a deadly weapon (section 784.021, Florida Statutes (1987)) or six (6) batteries on law enforcement officers (section 784.07(2)(b), Florida Statutes (1987)) before this exposure would reach thirty (30) years. The sentencing guidelines call for a range of three and one-half (3 1/2) to four and one-half (4 1/2) years in state prison upon conviction of section 893.13(1)(e), Florida Statutes (1987) 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, 103 S.Ct. at 3010-3011.

Petitioner asserts that section 893.13(1)(e), Florida Statutes (1987) 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 identical act 1,001 feet from a school constitutes a third degree felony with a lesser guidelines sentence of "any non-state prison sanction."

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 undercover police officer shocks the conscience. It is the essence of cruel and unusual punishment. Therefore, the penalty provision of section 893.13(1)(e), Florida Statutes (1987) should be declared unconstitutional.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.