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IN THE SUPREME COURT OF FLORIDA

JOAN LESLIE FOX,

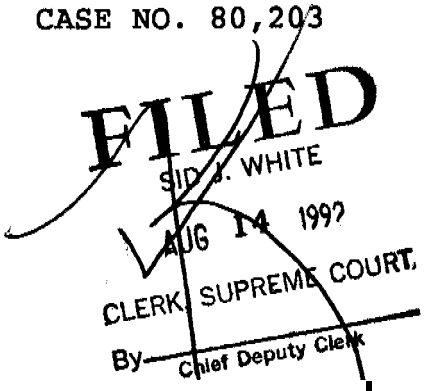
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,203



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PETITIONER'S BRIEF ON THE MERITS

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RELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, and the Appellee in the Fourth District Court of Appeal. Respondent was the State, prosecution and the Appellant below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" -- Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner, JOAN LESLIE FOX, was charged by Information filed in the Fifteenth Judicial Circuit with sale of cocaine at or near a school. See Section 893.13(1)(e), Florida Statutes (1989). A jury trial commenced on May 13, 1991. A verdict of guilty as charged was rendered on May 14, 1991 (R219). At the sentencing hearing testimony was presented to the trial court by a counselor at the Palm Beach County Sheriff's drug program (R5-12). The counselor testified that Petitioner was very motivated to straighten her life out, was trying to improve herself and was an active participant in group therapy at the drug dorm. The counselor also testified about a program, Operation PAR, a residential treatment program in Largo, Florida. Petitioner was accepted into this program and thought there was a good chance of Petitioner successfully completing it. A sentencing proposal was presented to the trial court. This included a history of Petitioner, showing her addiction to drugs as well as transcripts while attending Junior College, where she did very well until she got involved in crack cocaine (R70-90).

Petitioner, Joan Leslie Fox, also testified on her own behalf (R13-19). Ms. Fox testified that she very much wanted to go into the residential treatment center. That she did not want to use drugs anymore and she has realized how they have destroyed her life (R14). Ms. Fox also told the trial court that she would like to complete her college education (R16). Also, at the time of this charge, she did, in fact, have a drug abuse problem (R17).

The trial court sentenced Petitioner to five (5) years probation with the condition that she complete the long term residential Operation PAR pragram. The trial court's written reasons for downward departure sentence were:

> 1. Strong motivation to be rehabilitated.
> 2. Defendant has drug abuse problem.
> 3. There exists a reasonable possibility that drug treatment will be successful. (R92).

The Respondent-State filed a timely notice of appeal to the Fourth D strict Court of Appeal. Petitianer-Defendant also filed a timely notice of appeal to the Fourth District Court of Appeal. On December 27, 1991, the Fourth District Court of Appeal ordered that the motion to consolidate both appeals be granted.

On direct appeal by Respondent-State, the Fourth District Court of Appeal reversed the sentence and order of probation on the authority of State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991). The Fourth DCA also affirmed Petitioner's conviction, however did certify the same question of public importance as was certified in Scates, supra.

The certified question is as follows:

> MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989).

See Scates v. State, 585 So.2d 385 (Fla. 4th DCA 1991).

On July 16, 1992, Petitioner filed a Motion to Stay Petitioner's Sentencing, which was granted by this Honorable Court on July 24, 1992. On July 16, 1992, Petitioner also filed a Notice of Invocation of Discretionary Jurisdiction to this Honorable

Court. On July 23, 1992, this Honorable Court postponed its decision on jurisdiction and ordered briefing by the parties on the merits. This brief on the merits by Petitioner follows.

SUMMARY OF THE ARGUMENT

This Honorable Court in Scates v. State, 17 F.L.W. **$467** (Fla. July 23, 1992); Appendix 2-3, held that a trial court may properly depart from the minimum mandatory provisions of Section **893.13** (1)(e), Fla. Stat. **(1989),** under the authority of the drug rehabilitation provision of Section **397.12, Fla.** Stat. **(1989).**

Thus, Petitioner, Joan Leslie Fox's downward guidelines departure of five years probation must be affirmed. The trial court has full authority **and** was within its discretionary power to **so** sentence Petitioner. Joan Leslie **Fox** meets the criteria for application of Section 392.12, Fla. Stat. Specifically, she falls within the classification as a drug dependent amenable to rehabilitation.

Moreover, there is no language in the statute stating that the mandatory minimum sentence "shall not be suspended, deferred or withheld." In fact, there is no language restricting the trial court's discretion in this regard. Furthermore, the application of the three **(3)** year mandatory minimum to Ms. Fox would be cruel and unusual punishment wholly disproportionate to the offense for which Petitioner stands convicted.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FAILING TO IMPOSE A THREE YEAR MANDATORY MINIMUM SENTENCE WHERE PETITIONER WAS CONVICTED OF SALE OF COCAINE WITHIN 1000 FEET OF A SCHOOL IN VIOLATION OF SECTION 893.13(1)(e), FLORIDA STATUTES.

At sentencing, the trial judge found that Petitioner was a drug dependent amenable to rehabilitation (R92). At Petitioner's sentencing to the charge of sale of cocaine within 1000 feet of a school, Ms. Fox was placed on five (5) years probation instead of the three (3) year mandatory minimum sentence mandated by Section 893.13(1)(e), Fla. Stat. (1989).

The trial judge did not abuse her discretion in doing so for a number of reasons. First, statutory analysis of 893.13(1)(e), Fla. Stat. (1989), demonstrates that imposition of the three (3) year mandatory minimum is not absolute. Second, Ms. Fox meets the statutory criteria under Section 397.12 as a drug dependent, The most recent expression of legislative will, via Chapter 953, shows the efficacy of Ms. Fox's original sentence. Third, recent cases have upheld downward departure from the sentencing guidelines where the defendant was, like Ms. Fox, impaired by substance abuse at the time of the crime and, like Ms. Fox, amenable to rehabilitation. Finally, the application of the three year mandatory minimum sentence in Petitioner's case would be disproportionate to the offense for which she has been convicted. These points will be addressed sequentially.

This Honorable Court in Scates v. State, 17 F.L.W. S467 (Fla. July 23, 1992), expressly held that a trial court may properly depart from the minimum mandatory provisions of Section 893.13

(1)(e), Fla. Stat. (1989) under the authority of Section 397.12, Fla. Stat. (1989). The Court explained:

> In the instant case, Scates was a first-time offender who purchased cocaine for personal use. He is not a dealer or manufacturer. The trial court expressly found that Scates was capable of and amenable to rehabilitation. Chapter 397 was promulgated to give individuals who have a problem with drugs an opportunity to become productive members of society. Scates is the type of defendant contemplated by the rehabilitation alternative of section 397.12. In this case, application of a mandatory minimum sentence would not further the legislative goal of providing alternatives to incarceration for drug addicts with a chance at meaningful rehabilitation.
>
> Accordingly, we hold that trial judges may refer a defendant convicted under section 893.13(1)(e)(1) to a drug abuse program pursuant to section 397.12 rather than impose a minimum three-year sentence.

17 F.L.W. at S467.

At bar, Ms. Fox was found to be addicted to drugs, however, doing very well with counseling at the drug farm. Ms. Fox is not a drug dealer or manufacturer. The trial judge expressly found that Ms. Fox was capable of and amenable to rehabilitation. Ms. Fox is clearly the type of defendant contemplated by the rehabilitation alternative of Section 397.12.

In the instant case, application of a harsh mandatory minimum sentence would not further the legislative goal of providing alternatives to incarceration for drug addicts with a meaningful chance at rehabilitation pursuant to Section 397.12. Therefore, on the authority of Scates, supra, this Honorable Court should reverse the decision of the Fourth District Court of Appeal and

affirm the sentencing order of probation imposed by the trial judge.

In comparing Section 893.13(1)(e), Florida Statutes (1989) with other statutes providing mandatory minimums -- a comparison apparently not considered by the Fourth District Court of Appeal -- shows that the three year minimum for selling, purchasing, etc., cocaine within 1000 feet of a school is not as absolute as other statutoryminimums. Therefore, Section 893.13(1)(e) should not act as an absolute bar to the application of Section 397.12, Florida Statutes (1989), which provides alternatives to incarceration far substance abusers like Ms. Fox.

Section 893.13(1)(e) did not originally provide for a minimum three year sentence. See Section 893.13(1)(3), Florida Statutes (1987). Subsequently, the statute was amended to include subsection (4), which added an additional assessment up to the amount of the statutory fine to be used for drug abuse programs. See Section 893.13(4), Florida Statutes (1989). At the same time, subsection (e)1 was amended to include the three (3) year mandatory minimum. See Section 893.13(1)(e)1, Florida Statutes (1989). The statute now states that the offender "shall be sentenced to a minimum term of 3 calendar years and shall not be eligible for parole or statutory gain-time under s. 944.275 prior to serving such minimum sentence."[1]

The legislature, when enacting penal statutes is presumed to be aware of prior existing laws. State v. Dunman, 427 So.2d 166,

[1] The minimum has been amended again in a way not relevant here. See Section 893.13(1)(e)(1), Florida Statutes (Supp. 1990).

168 (Fla. 1983). Furthermore, the restriction included by the legislature in other mandatory sentence statutes cannot be implied in Section 893.13(1)(e). As stated in St. George Island, Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989):

> Where the legislature uses exact words and different statutory provisions, the court may assume they were intended to mean the same thing.... Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted. [Citations omitted].

Additionally, any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Rewis v. United States, 401 U.S. 808, 812; 91 S.Ct. 1056, 1959; 28 L.Ed.2d 493 (1971). Also, penal statutes must be construed strictly and never extended by implication. State v. Jackson, 526 So.2d 58 (Fla. 1988). Therefore, the omission from Section 893.13(1)(e) of any language forbidding the court to withhold, suspend, or defer sentence can only be viewed as a grant of authority to allow such suspension, withholding, or deferment of sentence. Based upon the foregoing alone Petitioner contends that the trial judge acted within her discretionary power in imposing sentence.

Petitioner also established in the lower tribunal that she was a substance abuser, was under the influence at the time of her offense, and was therefore eligible for a downward departure from her permitted guidelines range under State v. Herrin, 568 So.2d 920 (Fla. 1990). This Court must affirm the trial court's downward departure sentence on this alternative basis. The trial court departed downward on these grounds.

In State v. Herrin, 568 So.2d 920 (Fla. 1990), this Court stated that substance abuse, coupled with amenability to rehabilitation, could be considered by the sentencer in mitigation. Under criteria set forth in this case, Petitioner established to the satisfaction of the trial judge her amenability to rehabilitation and her drug dependency. Thus, on the authority of Herrin, Petitioner's original departure sentence should be affirmed on this alternative basis.

Finally, Petitioner contends that imposition of the three-year mandatory minimum sentence would constitute cruel and unusual punishment wholly disproportionate to the severity of the offense. The sentencing guidelines call for a range of three and one-half ($3\frac{1}{2}$) to four and one-half ($4\frac{1}{2}$) years in state prison for Ms. Fox. The penalty sharply contrasts to the recommended guidelines range for an 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). Thus, the three (3) year mandatory minimum would constitute cruel and unusual punishment in Ms. Fox's case. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Amendment XIII, United States Constitution; Article I, Section 17, Florida Constitution.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court reverse this decision of the Fourth District Court of Appeal and affirm the sentencing order of the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DON M. ROGERS, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 13th day of August, 1992.

Of Counsel

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NOS. **91-2344 and 91-2739.**
	)	
JOAN LESLIE FOX,	)	
	)	
Appellee.	)	

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed July **8, 1992**

Consolidated appeals from the Circuit Court for Palm Beach **County; Mary E. Lupo, Judge.**

Robert A. Butterworth, Attorney General, Tallahassee, and Don **M. Rogers, Assistant Attorney General, West Palm Beach, for Appellant/ Appellee-State of Florida.**

Richard L. Jorandby, Public Defender, and Barbara A. **White, Assistant Public Defender, West** Palm **Beach,** for **Appellee/Appellant-Joan Leslie Fox.**

PER **CURIAM,**

We affirm .appellant's conviction but **reverse the sentence and order of probation on** the **authority of** State v. Scates, **585** So.2d **385 (Fla. 4th** DCA **1991). We also certify the same question of public importance certified in** Scates.

ANSTEAD, HERSEY, **JJ.,** and **OWEN, WILLIAM C., JR., Senior Judge, concur.**

Criminal law—Purchase of cocaine within 1000 feet of school— Sentencing—Trial judge may properly refer defendant to drug abuse program rather than impose mandatory minimum three-year sentence

CARRICK A. SCATES, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 78,533. July 23, 1992. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 90-3174 (Broward County). Norliza Balls of the Law Offices of Norliza Balls, P.A., Forl Lauderdale, Florida, for Petitioner. Robert A. Butterworth, Attorney General; Joan Fowler, Bureau Chief, Assistant Attorney General and Dawn S. Wynn, Assistant Attorney General, West Palm Ekrch, Florida, for Respondent.

(PER CURIAM.) We review *State v. Scates*, 585 So. 2d 385, 386 (Fla. 4th DCA 1991), in which the court certified the following question as being of great public importance:

> MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989)?

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

Scates pled guilty to purchasing one rock of cocaine from an undercover sheriff's deputy within 1000 feet of a school in violation of section 893.13(1)(e)(1), Florida Statutes (1989). The trial court found that Scates had purchased the cocaine for personal use, suffered from substance abuse addictions and was under the influence of alcohol at the time of his arrest. The court found that he was amenable to meaningful rehabilitation and that there was a reasonable possibility that drug treatment would be successful. The court placed Scates on two years' probation and ordered him to undergo drug rehabilitation pursuant to section 397.12, Florida Statutes (1989).[1] The Fourth District Court of Appeal reversed on the premise that section 893.13(1)(e)(1) required the imposition of a minimum mandatory sentence of three years. *Accord State v. Lane*, 582 So. 2d 77 (Fla. 4th DCA 1991); *State v. Baxter*, 581 So. 2d 937 (Fla. 4th DCA 1991), *vacated on other grounds, Baxter v. Letts*, 592 So. 2d 1089 (Fla. 1992); *State v. Liataud*, 587 So. 2d 1155 (Fla. 4th DCA 1991), *review granted*, 593 So. 2d 1052 (Fla. 1992).

Section 893.13(1)(e)(1) provides that individuals convicted of manufacturing, selling, delivering, or purchasing cocaine within 1000 feet of a school "shall be sentenced to a minimum term of imprisonment of 3 calendar years." The statute is intended to create a drug-free zone around Florida's schools, *State v. Burch*, 545 So. 2d 279, 281 (Fla. 4th DCA 1989), approved, 558 So. 2d 1 (Fla. 1990).

On the other hand, in enacting chapter 397, the legislature intended "to provide a meaningful alternative *to* criminal imprisonment for individuals capable of rehabilitation . . . through techniques and programs not generally available in state or federal prison systems" and "to encourage trial judges to use their discretion to refer persons charged with, or convicted of, violation of laws relating to drug abuse . . . to a state-licensed drug rehabilitation program in lieu of, or in addition to, imposition of criminal penalties." § 397.10, Fla. Stat. (1989). Section 397.12 provides:

> When any person, including any juvenile, has been charged with or convicted of a violation of any provision of chapter 893 or of a violation *of any* law committed under the influence of a controlled substance, the court . . may in its discretion require the person charged or convicted to participate in a drug treatment program Licensed by the department [of Health and Rehabilitative Services] . . . . If referred by the court, the referral may be in lieu of or in addition *to* final adjudication, imposition of any penalty or sentence, or any other similar action.

We have the problem of reconciling the requirement of section 893.13(1)(e)(1) to impose a three-year sentence with the mandate of section 397.12 to find alternatives to prison for violations of chapter 893 where such alternatives would be more beneficial.

In construing these statutes, we begin with the principle that, where criminal statutes are susceptible *to* differing constructions, they must be construed in favor of the accused. See 775.021, Fla. Stat. (1989); *Lambert v. State*, 545 So. 2d 838, 841 (Fla. 1989). On its face, section 397.12 applies to chapter 893, and this application is not limited by any other provision of chapter 397. Also, while section 893.13(1)(e) does call for a minimum three-year sentence, when read in conjunction with the other sentencing provisions of chapter 893, it does not absolutely preclude trial judges from exercising their discretion to reduce the sentence.

Two other sections in chapter 893 contain mandatory minimum sentences. Sections 893.135 and 893.20, Florida Statutes (1989), provide that the minimum sentences contained therein shall "not be suspended, deferred, or withheld." Also, sections 893.135 and 893.20 expressly refer to their sentences as "mandatory." There is no similar restriction in section 893.13(1)(e), and the word mandatory is not used. The omission of this language implies that the legislature intended a different construction, allowing trial judges greater discretion in sentencing decisions under section 893.13(1)(e).[2]

Scates was convicted of purchasing a small amount of cocaine for personal use. The *State* argues that section 397.12 cannot apply here because it only relates to possession. See § 397.011(2), Fla. Stat. (1989); § 893.15, Fla. Stat. (1989) (expressly providing that chapter 397 is an alternative *to* sentencing under sections 893.13(1)(f) and (1)(g) (applying to possession of drugs)). We disagree. Section 397.12 does not limit itself to possessory offenses under chapter 893. Section 397.10 manifests the intent to help drug addicts without incarcerating them. For purposes of section 397.12, we fail to see any difference between possessing cocaine for personal use and purchasing a small amount of cocaine for personal use.

The State also cites the rule that when construing two competing statutes, the later promulgated statute should prevail as the last expression of the legislature's intent. Thus, the minimum mandatory sentence in section 893.13(1)(e) should prevail because that statute was enacted after section 397.12. This rule, however, is not applicable here because we do not view these statutes as conflicting. In general, statutes relating to the same subject and having the same purpose should be construed consistently. *Wakulla County v. Davis*, 395 So. 2d 540, 542 (Fla. 1981). The purpose of the statutes *at* bar is to combat drugs. Their punishment provisions are alternatives to be applied by trial judges according to the facts of each case. Section 397.12 was clearly intended to apply to defendants in Scates' position.

In the instant case, Scates was a first-time offender who purchased cocaine for personal use. He is not a dealer or manufacturer. The trial court expressly found that Scates was capable of and amenable to rehabilitation. Chapter 397 was promulgated to give individuals who have a problem with drugs an opportunity to become productive members of society. Scates is the type of defendant contemplated by the rehabilitation alternative of section 397.12. In this *case*, application of a mandatory minimum sentence would not further the legislative goal of providing alternatives to incarceration for drug addicts with a chance at meaningful rehabilitation.

Accordingly, we hold that trial judges may refer a defendant convicted under section 893.13(1)(e)(1) to a drug abuse program pursuant to section 397.12 rather than impose a minimum three-year sentence. We answer the certified question in the affirmative. We disapprove of *State v. Lane*, *State v. Baxter*, and *State v. Liataud* and quash the opinion below.

It is so ordered. (BARKETT, C.J. and OVERTON, SHAW and KOGAN, JJ., concur. GRIMES, J., dissents with an opinion, in which McDONALD and HARDING, JJ., concur.)

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[1] The State does not argue that the court improperly departed from the three-and-a-half- to four-and-a-half-year sentence called for by the sentencing guide-

ines. *See* Herrin v. State, 568 So. 2d 920 (Fla. 1990).

*State v. Ross, 447 So. 2d 1380 (Fla. 4th DCA), *review denied*, 456 So. 2d 1182 (1984), relied on by the court below in its opinion. is distinguishable on he same basis and also because that case did not involve a conviction under chapter 893.

(GRIMES, J., dissenting,) I am generally opposed to mandatory minimum sentences because they deprive trial judges of the discretion to deal more leniently in genuine hardship cases. This may be such a case, However, it is the legislature, rather than the courts, which has the authority to decide whether there shall be a mandatory minimum sentence. In this case, the legislature has spoken.

Section 337.12, Florida Statues (1989), authorizing the referral of those convicted of a violation of chapter 893 to a drug treatment program, was enacted in 1973 at a time when mandatory minimum sentences were unknown except in capital cases. Ch. 73-75, Laws of Fla. In 1987, the legislature first passed section 893.13(1)(e), specifically prohibiting the commission of drug crimes within 1000 feet of a school. Ch. 87-243, Laws of Fla. Two years later, section 893.13(1)(e) was amended to provide that violators, with respect to certain controlled substances (including cocaine) "shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain-time under s. 944.275 prior to serving such minimum sentence." Ch. 89-524, § 1, Laws of Fla. While the statute could have used the word "mandatory" and could have provided that the sentence not be "suspended, deferred or withheld." can there be any doubt what the legislature intended?

The accepted rules of statutory construction all lead to the Same conclusion. Section 397.12 and section 893.13(1)(e)(1) are in facial conflict. Therefore, the later statute, which is section 893.13(1)(e), should prevail as the last expression of legislative will. *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976); *Johnson v.* State, 157 Fla. 685, 697, 27 So. 2d 276, 282 (1946), *cert. denied*, 329 U.S. 799 (1947). Furthermore, when two statutes are inconsistent or in conflict, a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. *Department of Health & Rehabilitative Sews. v. American Healthcorp.*, 471 So. 2d 1312, 1315 (Fla. 1st DCA 1985), *adopted*, 488 So. 2d 824 (Fla. 1986). In such a case, the more narrowly drawn statute operates as an exception to or qualification of the general terms of the more comprehensive statute. Floyd *v. Bentley*, 496 So. 2d 862, 864 (Fla. 2d DCA 1986), *review denied*, 504 So. 2d 767 (Fla. 1987). Thus, the more narrowly drawn section 893.13(1)(e) controls over the more general provisions of section 397.12.

This conclusion is further supported by section 893.15, Florida Statutes (1989), which provides in language paralleling section 397.12 that "[a]ny person who violates s. 893.13(1)(f) or (1)(g) relating to possession may, in the discretion of the trial judge, be required to participate in a drug rehabilitation program." (Footnote omitted.) Why would this statute exist if it were not intended to specify which violators of chapter 893 would be eligible for referral to a drug treatment program? *See Stare v. Edwards*, 456 So. 2d 575 (Fla. 2d DCA 1984) (when violations of section 893 transpire, the trial court's authority to exercise its discretion under section 397.12 is limited to violations of section 893.13 relating to possession). Because Scates bought cocaine within 1000 feet of a school, the statute requires that he be imprisoned for three years.

I respectfully dissent. (McDONALD and HARDING, JJ., concur.)

* * *

Taxation—Insurance—Insurance premium tax scheme under which foreign insurers were liable for premium tax at full or increased rate while domestic insurers were exempt from tax was [illegible] **violation of equal protection and due process clauses—Tax scheme was rationally related to** [illegible] **state purpose of acquiring greater degree of regulatory** [illegible] **over insurance companies—Retaliatory tax which imposes** [illegible] **foreign insurer doing business in state equal to difference between all taxes, licenses, and fees unposed on Florida insurers by the foreign insurer's state or country of domicile and all taxes, including premium taxes, licenses, and fees imposed on the foreign insurer by State of Florida is** not violative of equal protection or privileges and immunities clauses—Assessment of retaliatory tax barred by statute of limitations for taxes which were due more than five years previously

TOM GALLAGHER, etc., et al., Appellants/Cross Appellees, vs. MOTORS INSURANCE CORPORATION, et al., Appellees/Cross Appellants. Supreme Court of Florida. Case No. 79,061. July 23, 1992, Direct Appeal of Judgment of Trial Court, in and for Leon County, F. E. Steinmeyer, III, Judge, Case No. 90-2046 - Certified by the District Court of Appeal, First District, Case No. 91-03704. Robert A. Butterworth, Attorney General and Joseph C. Mellichamp, III, Senior Assistant Attorney General, Tax Section, Tallahassee, Florida; and Daniel C. Brown, Marguerite H. Davis and Brian M. Nugent of Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., Tallahassee, Florida, for Appellants/Cross Appellees. Kenneth R. Hart, Steven P. Seymoe and Robert A. Pierce of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Florida, for Appellees/Cross Appellants.

(KOGAN, J.) We have on appeal a judgment declaring Florida's insurance premium tax scheme, sections 624.509, .512, .514, Florida Statutes, as it existed prior to July 1, 1988,[1] unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of the Florida Constitution. The judgment also upheld Florida's retaliatory tax, section 624.429, Florida Statutes (1983-1987), against various constitutional challenges. We have jurisdiction pursuant to article V, section 3(b)(5) of the Florida Constitution. We reverse that portion of the judgment declaring the premium tax unconstitutional but affirm that portion upholding the retaliatory tax.

Prior to July 1, 1988,[2] section 624.509(1)(a)[3] imposed a two percent tax on gross premiums collected on certain insurance policies written in this state. Section 624.512[4] exempted from this tax insurance companies that were organized under Florida law, maintained their home offices in Florida, and complied with the requirements of sections 628.271 and 628.281 by maintaining their records and assets in Florida. Section 624.514[5] granted a fifty percent reduction in the tax rate imposed by section 624.509 to insurers organized under the laws of other jurisdictions that elected to own and maintain a regional home office in Florida and to keep therein certain records pertaining to their activities within the state. Under this statutory scheme, all foreign insurers were liable for premium tax at either the full or the reduced rate; while domestic insurers who complied with the requirements of section 624.512 were exempt.

The Appellees/Cross Appellants (Taxpayers) are foreign corporations licensed to write insurance in Florida who were subject to Florida's insurance premium tax during the years 1983 through 1988. The Taxpayers sought a declaratory judgment that the premium tax scheme unconstitutionally discriminated against them and demanded a refund of all premium taxes paid for the years 1983 through 1988. The Taxpayers also sought reliefunder 42 U.S.C. section 1983. The Appellants/Cross-Appellees (the State) took the position that Florida's premium tax was constitutional because it advanced legitimate state regulatory goals not set forth in the statute.*

After the complaint was filed, the State sought *to* impose assessments for additional premium tax and retaliatory tax,[7] against several of the Taxpayers for the period 1983 through 1988. The Department also issued pro forma assessments for an increase in retaliatory taxes, for the period 1983 through 1988, which would offset any refund due the Taxpayers should the premium tax be declared unconstitutional.

In response, the Taxpayers amended their complaint to challenge section 624.429, Florida Statutes (1983-1987), as violative of the Equal Protection Clause and the Privileges and Immunities

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DON M. ROGERS, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 18 day of August, 1992.

Barbara A Wolf

Of Counsel