IN THE SUPREME COURT OF FLORIDA

JAMES BROWN,

Petitioner,

v. Case No.: 81,189

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Petitioner, JAMES BROWN, the defendant in the trial court and appellant below, will be referred to in this brief as petitioner. References to the record on appeal will be designated by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

Petitioner listed a number of cases pending before this Court on the same issue in his preliminary statement. This list is accurate but incomplete, as it does not include State v. Redden, Case No. 81,805.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts as reasonably supported by the record.

SUMMARY OF THE ARGUMENT

As to Issue I:

The First District properly concluded that section 893.13(1)(i) was not unconstitutionally vague. As is clearly evident under a proper vagueness analysis, petitioner had notice that his behavior was proscribed, and because his conduct fell clearly within the purview of the statute, the statute was not selectively enforced against him. This Court should decline to follow the reasoning in Thomas, where the Second District Court of Appeal erred as a matter of law in applying overbreadth principles to a vagueness claim. Such a blending of doctrines is unwarranted by case law and results in bad precedent.

As to Issue II:

This Court should decline to address a point outside the scope of the basis on which jurisdiction was granted. In any event, on the merits, this Court should decline petitioner's request to have the case remanded to have oral pronouncement and written imposition conform. Such action would constitute the type of legal churning censured by this Court in Rucker.

ARGUMENT

Issue

WHETHER **FLA. STAT. §** 893.13(1)(i) (Supp. 1990) IS CONSTITUTIONAL.

This Court is well aware of the strong presumption in favor of the constitutionality of statutes. It is firmly established that all doubt will be resolved in favor of the constitutionality of a statute, and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. State v. Kinner, 398 So. 2d 1360, 1369 (Fla. 1981). Despite this presumption, petitioner claims that section 893.13(1)(i) is unconstitutionally vague because it does not notify the general public as to what activities are prohibited, due to the legislature's failure to define the phrase "public housing facility." Brief of Petitioner at 6. The statute's lack of such a definition does not render it infirm.

A vague statute is one which (1) fails to give adequate notice of what conduct is prohibited, and (2) because of its imprecision, may also invite arbitrary and discriminatory enforcement. Southeastern Fisheries Ass'n v. Dep't of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984). Recently, this Court spoke to the notice requirement of this doctrine:

> A statute which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is vague. Papachristou v. City of Jacksonville, 405 U.S. 156 . . . (1972); State v. Winters, 346 So. 2d 991 (Fla. 1977); Franklin v. State, 257 So. 2d 21 (Fla. 1971). The language of a statute must "provide a definite warning of what conduct" is required or prohibited, "measured by common understanding and practice." State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985). To this end, a statute must be written "in language which is relevant to today's society." Franklin, 257 So. 2d at 23.

Warren v. State, 572 So. 2d 1376, 1377 (Fla. 1991). Here, there can be no serious contention that a person of common intelligence would not clearly understand from the statute[1] an outright prohibition against activities involving illegal drugs near public housing facilities.

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[1] Section 893.13(1)(i), Florida Statutes (Supp. 1990), provides:

> Except as authorized by this chapter, it is unlawful for any person to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, within 200 feet of the real property comprising a public or private college, university, or other postsecondary educational institution, or within 200 feet of any public park.

When a statute does not specifically define a given word or phrase, the words should be afforded their plain ordinary meaning. Southeastern Fisheries, 453 So. 2d at 1353. Public, as opposed to private, housing in this case connotes "official" housing, provided by local, state, or federal government, i.e., not private apartment housing. **Black's Law Dictionary** 624, 642 (5th ed. 1983). See also **Webster's Third New International Dictionary**, Public Housing at 1836 (1981 ed.) ("low-rent housing owned, sponsored, or administered by a government").[2]

Petitioner expended many pages in his brief exploring the various meanings of each word contained within the phrase "public housing facility," quoting at length from State v. Thomas, et al., 18 Fla. L. Weekly D1067 (Fla. 2d DCA Apr. 21, 1993),[3] which declared section 893.13(1)(i) "unconstitutionally vague because it is so imprecise as to invite arbitrary or discriminatory enforcement." There, the Second District found Brown v. State, 610 So. 2d 1356 (Fla.

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[2] "Although the critical words are not statutorily defined, they can be readily understood by reference to commonly accepted dictionary definitions." Powell v. State, 508 So. 2d 1307, 1310 (Fla. 1st DCA 1987). See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 501 & 503 n.20 (1982) (using two dictionaries for definitions).

[3] Pending before this Court in case number 81,724.

1st DCA 1992), "neither helpful nor persuasive," and reasoned:

> While each of the three words of the phrase can be independently and easily defined, when used together in the statute, they present a veritable quagmire for any attempt at uniform enforcement.
>
> We used several approaches as we analyzed the alleged vagueness of this statute. We first considered whether we could articulate a precise jury instruction that would adequately advise a jury how to apply the statute in any particular set of circumstances. We were unable to do so. We also considered whether we could advise law enforcement officers in the field as to a precise standard to apply in enforcing the statute. We were unable to do so. We then considered at great length the myriad circumstances under which the statutory prohibition might be applicable. Although we could provide a long list of such circumstances, we set forth here only a few of the possibility that raised sufficient doubt in our minds to require us to conclude that the statute is unconstitutionally vague.
>
> In regard to the "public" aspect of the "public housing facility" provision, we have no way of definitively ascertaining whether the legislature intended the phrase to apply to publicly-owned housing to the exclusion of privately-owned housing; to housing available for occupancy by the "public" in general or for low income occupants only; to housing that is government financed or built; or to housing that is privately-owned but leased to a government agency for availability to public welfare recipients. We simply have no idea as to the limitations that might be or should be applied to the "public" aspect of a "public housing facility."

> The same problem exists in trying to correctly determine the parameters of the term "housing." Does that term apply to rental units only? Does it refer to multifamily housing only or also to single family units? Does it apply to dormitory and congregate living facilities? Are military housing and facilities included? Are religious or charitable owned and operated facilities available for occupancy or "shelter use" by the public included? The possibilities extend ad infinitum.
>
> Finally, the term "facility" is open to so many possible interpretations as to be bewildering. Are the corporate offices of a "public housing facility" included? Are government offices that operate low income housing included? Are sewage, water and utility facilities included?
>
> In our opinion the possibilities for a misapplication of the term "public housing facility" are too numerous to allow that provision to section 893.13(1)(i) to withstand constitutional scrutiny. Our decision does not affect the validity of other portions of that statute.

Thomas, 18 Fla. L. Weekly D1067-68.

The efforts of petitioner and the Second District in this regard are futile, where the focus is on the meaning of the phrase, not the individual words. See Deal v. United States, 7 Fla. L. Weekly Fed. S283, S284 & S285 (U.S. May 17, 1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"; "petitioner's contention displays once again the

regrettable penchant for construing words in isolation."); Brown, 610 So. 2d at 1358 (petitioner "ignores the fact that the phrase itself has a meaning more narrow than that gleaned from the definitions of its component words."). Moreover, within the "trade" of narcotics sales, "public housing facility" has a special meaning. See Southeastern Fisheries, 453 So. 2d at 1353. See also 42 U.S.C. § 11901 (1991) (Congress made the following findings: "(1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs; (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime; (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants; (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities.").[4]

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[4] Due to the similarities between the federal drug statutes, i.e., 21 U.S.C. § 860, and the one at issue here, this court should view the federal statutes as persuasive authority. State v. Hermann, 164 Wis.2d 269, _____, 474 N.W.2d 906, 909 n.3 (Ct. App. 1991).

In view of the specific aim of section 893.13(1)(i) and the targeted meaning of the phrase "public housing facility,"

> it is obviously unrealistic to require that criminal statutes define offenses with extreme particularity. For one thing, there are inherent limitations in the use of language; few words possess the precision of mathematical symbols. Secondly, legislators cannot foresee all of the variations of fact situations which may arise under a statute. While some ambiguous statutes are the result of poor draftsmanship, it is apparent that in many instances the uncertainty is merely attributable to a desire not to nullify the purpose of the legislation by the use of specific items which would afford loopholes through which many could escape.

W. R. LaFave & A. W. Scott, Substantive Criminal Law, Void-for-Vagueness Doctrine **§** 2.3, at 127-28 (1986). See also Southeastern Fisheries, 453 So. 2d at 1353 ("[C]ourts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided.").

In the present case, the phrase "public housing facility" is intelligible enough to place a person of common intelligence on notice of the proscribed behavior. See Brown, 610 So. 2d at 1358 ("[A] person of ordinary intelligence should know what was intended by the phrase."); Williams v. State, 18 Fla. L. Weekly D1220, D1221 (Fla. 3d

DCA May 11, 1993) ("The term 'public housing,' in common parlance, is understood to encompass affordable, government subsidized housing for individuals or families with varied needs"; "The statute under review in this case provides sufficient guidance to drug dealers to allow them to avoid the enhanced penalty imposed by the legislature."). More qualification of the phrase obviously could have led to preposterous avoidance claims that the statute would not apply because "x" housing did not fit a specific statutory definition. Given the laudable purpose of the statute, i.e., to rid public housing facilities of the scourge of drugs, the statute is sufficiently specific to be constitutional.

Regarding the second requirement of the vagueness doctrine -- non-selective enforcement -- it is well established that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974). Thus, a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) (emphasis supplied). Because petitioner made no claim that his conduct was not covered by section 893.13(1)(i), his contention that the statute covers too many possibilities should fall on deaf ears.

Petitioner's brief evidences his confusion of the doctrines of vagueness and overbreadth. Petitioner discussed at great length all the possible applications of the phrase "public housing facility," a inappropriate tack which the Second District adopted in its Thomas opinion. However, such an attack on the statute is permissible only in an overbreadth claim, which does not lie absent a facial challenge that the provision proscribes constitutionally protected speech or activities.[5] "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). With vagueness challenges, however, "[f]undamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights." Sandstrom v. Leader, 370 So. 2d 3, 4 (Fla. 1979). See also Parker, 417 U.S. at 756 (the vagueness doctrine does not permit the challenger of a statute to confuse vagueness and overbreadth by attacking

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[5] Petitioner understandably made no First Amendment challenge below. See State v. Burch, 545 So. 2d 279, 281 (4th DCA 1989) (the defendants "'did not and could not reasonably contend that [their] conduct in . . . [selling] cocaine within one thousand feet of a school was protected by the first amendment.'") (citation omitted), approved, 558 So. 2d 1 (Fla. 1990).

the enactment as being vague as applied to conduct other than his own).

> Such a personal stake in the outcome of the controversy is necessary in order "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.] If we failed to abide by this limitation our Court would be relegated to being a "roving [commission] assigned to pass judgment on the validity of the [state's] laws."
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> * * * *
>
> [A]ppellees have presented us with an array of acts which, although arguably well intended, might be deemed punishable under [the statute]. We are constrained by fundamental principles of appellate review to decline appellees' invitation to decide whether these hypothetical acts would fall within the proscriptions of [the statute]. The fact that the general conduct to which [the statute] is directed is plainly within its terms is a sufficient basis for our finding that this provision is not unconstitutionally vague. That marginal cases might exist where doubts may arise as to whether there may be prosecution under [the statute] does not render the enactment unconstitutionally vague.

Sandstrom, 370 So. 2d at 4, 6 (citations omitted).

In its Thomas decision, the Second District carried on at length about "the possibility for a misapplication" of the "public housing facility" phrase. In declaring section 893.13(1)(i) void for vagueness, however, that court

utilized a wholly improper analysis. The focus of the void for vagueness doctrine is not whether "it is unclear in some of its applications to the condition of [a given defendant] and of some other hypothetical parties." Hoffman, 455 U.S. at 495 (emphasis in original). Instead, "[t]o succeed [with a vagueness claim], the complainant must demonstrate that the law is impermissibly vague in all of its applications." Id. at 497.

In a similar vein, Justice White observed:

> If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems . . . an untenable exercise of judicial review to invalidate a state conviction because in some other circumstances the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations. It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that it within the State's power to sanction.

Kolender v. Lawson, 461 U.S. 352, 371 (1983) (White, J., dissenting). See also Hoffman, 455 U.S. at 503 n.21 ("The theoretical possibility that the village will enforce its

ordinance against a paper clip placed next to a Rolling Stone magazine . . . is of no due process significance unless the possibility ripens into a prosecution."); Seagram & Sons v. Hostetter, 384 U.S. 35, 52 (1966) ("Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise."). A case-by-case approach for situations not addressed by petitioner's conduct is not only recommended by case law, but preferable in reality. Florida previously has done just that in the context of section 893.13(1)(e). See State v. Burch, 545 So. 2d 279 (4th DCA 1989), approved, 558 So. 2d 1 (Fla. 1990) (subsequent cases, namely State v. Lee, 583 So. 2d 1055 (Fla. 4th DCA 1991), State v. Edwards, 581 So. 2d 232 (Fla. 4th DCA 1991), and State v. Rowland, 577 So. 2d 680 (Fla. 4th DCA 1991), helped define the phrase "public or private elementary school" by holding that it meant first through sixth grades, and did not include a kindergarten, a private home in which tutoring is provided, or an exceptional school for handicapped students).

In Thomas, the Second District erred as a matter of law in applying overbreadth principles to a vagueness claim. Such a blending of doctrines is unwarranted by the law, see Parker, 417 U.S. at 756, and results in bad precedent. See, e.g., State v. Tirohn, 556 So. 2d 447 (Fla. 5th DCA 1990).

Applying a proper vagueness analysis, petitioner obviously had notice that his behavior was proscribed, and because his conduct fell clearly within the purview of the statute, the statute was not selectively enforced against him.

Issue II

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE CONDITION OF PROBATION WHICH PROHIBITED PETITIONER'S PRESENCE IN CERTAIN LOCATIONS.

Petitioner makes clear that he is using this Court's grant of jurisdiction concerning the first issue as a vehicle to receive a second review of this issue because "[t]he lower tribunal did not address this issue." Brief of Petitioner at 3. This type of appellate practice is abominable, particularly in view of this Court's recent refusals to address issues which were outside the scope of conflict or a certified question. See State v. Hodges, 18 Fla. L. Weekly S225 (Fla. Apr. 15, 1993); Burks v. State, 613 So. 2d 441 (Fla. 1993); Gibson v. State, 585 So. 2d 285 (Fla. 1991); Stephens v. State, 572 So. 2d 1387 (Fla. 1991). Because this Court granted jurisdiction based on the first issue only, it should decline to address this point.

In any event, petitioner claims that the trial court erred in orally delegating to the probation officer the power to outline the areas in which petitioner's presence would be prohibited (R 125). Even though the written order specified precisely which areas petitioner was precluded from visiting (R 189), petitioner also claims error based on the failure of the written order to conform to oral pronouncement. Thus, petitioner's claim for relief distills

into the following: Because oral pronouncement and written imposition do not conform, the case must be remanded for the trial court to make the written order conform with oral pronouncement. See Ashe v. State, 582 So. 2d 759 (Fla. 1st DCA 1991). But then, because the condition would be illegal for its delegation of authority to the probation officer, see Henshaw v. State, 564 So. 2d 541 (Fla. 2d DCA 1990), petitioner would appeal once again to have this condition deleted.

This Court should censure petitioner's tactic. The record shows that, between the time it orally pronounced the condition and imposed it in writing, the trial court realized its mistake in delegating the authority to determine the prohibited areas to the probation officer. Thus, in entering its written order, the trial court attempted to alleviate the problem. Perhaps the better approach would have been to set another short hearing and pronounce the more specific condition in petitioner's presence. However, petitioner must not be permitted to claim error in a manner which creates subsequent error for yet another appeal concerning this same condition. This ploy constitutes the type of reprehensible "legal churning" condemned by this Court in State v. Rucker, 613 So. 2d 460, 462 (Fla. 1993).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court: (1) As to Issue I, to affirm the decision of the First District Court of Appeal in Brown, quash the decision of the Second District in Thomas, and declare **Fla. Stat. §** 893.13(1)(i) (Supp. 1990) constitutional; and (2) as to Issue II, to either decline to address the point or refuse to grant the requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to P. DOUGLAS BRINKMEYER, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 8th day of July, 1993.

GYPSY BAILEY
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