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IN THE SUPREME COURT OF FLORIDA

FREDERICK BAILEY,
MARIO M. GOULD, and
MARCUS GORDON,

Petitioners,

v. CASE NO. 81,621

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ON THE MERITS

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BRIEF OF PETITIONERS ON THE MERITS

I PRELIMINARY STATEMENT

Petitioners were the defendants in the trial court and the appellees in the lower tribunal. Separate one volume records on appeal were prepared for each petitioner. They will be cited by the petitioner's name, "R," and followed by the appropriate page number in parentheses. A one volume transcript for all three petitioners will be referred to as "T," Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as State v. Bailey, et al., 614 So. 2d 1224 (Fla. 1st DCA 1993). The issue presented in this case is also pending review before this Court in Brown v. State, case no. 81,189, oral argument set for November 1, 1993; Turner v. State, case no. 81,519; State v. Thomas, et al., case no. 81,724; and State v. Kirkland, case no. 81,725.

II STATEMENT OF THE CASE AND FACTS

By amended information filed January 22, 1991, petitioner Bailey was charged with sale of cannabis within 200 feet of a public housing facility and possession of cannabis (Bailey R 7-8). By information filed December 2, 1991, petitioner Gould was charged with sale of cocaine within 200 feet of a public housing facility and possession of cocaine (Gould R 9-10). By information filed July 12, 1991, petitioner Gordon was charged with sale of cannabis within 200 feet of a public housing facility, possession of cannabis, delivery of paraphernalia, and possession of paraphernalia (Gordon R 6-7).

Petitioners filed nearly identical motions to dismiss the counts which charged sale within 200 feet of a public housing facility (Bailey R 16-17; Gould R 16-17; Gordon R 13-14). Their motions were heard at a consolidated hearing on January 13, 1992, by Circuit Judge Robert P. Cates, in addition to a motion filed by a defendant named Leon Houston. The prosecutor amended the information as to Houston to drop the public housing facility accusation (T 2-4), saying:

> quite candidly, because there apparently is a difference between a public housing facility and what is referred to on the street as subsidized housing. (T 11).

Petitioners' counsel argued the term "public housing facility" was vague (T 5-7).

The state presented the testimony of Gail Monahan, Executive Director of the Alachua County Housing Authority. She defined "public housing facility" as:

> any unit that was owned by a public housing authority and rented to low income people. (T 12).

She further testified, upon questioning by the court, that there was another type of housing for low income people known as "subsidized housing," which she defined as:

> any housing that gets federal help, but it's often in the form of an interest subsidy in the loans. So, I can give you examples of those: Gardenia Homes, homes that are given money by the Farmers Home Administration. They're given huge interest cuts. So they have a tie to the federal government, but they're not considered public housing. (T 13).

The rent in subsidized housing may be $120.00, whereas in public housing it would be nothing or $3.00 (T 14). She named the following as public housing facilities in Alachua County: Thistle Hills East and West, Meadowbrook, Merrillwood, the HItchcock subdivision, Pine Tree Terrace, and Pleasant Gardens (T 14-15).

A member of the public would differentiate between public and subsidized housing by how much rent they could pay (T 15). Upon further questioning by the court, the following occurred:

> THE COURT: Is there anything on the sign or the logo or the -- however you identify your projects that differentiates between your project, a public housing facility, and subsidized housing?
>
> THE WITNESS: Not to my knowledge. (T 16).
>
> * * *
>
> THE COURT: Is the term public housing facility defined in your policy manual?

THE WITNESS: I'm not going to swear to that because I didn't look it up. (T 18).

She further testified that public housing facilities are owned by the Housing Authority, along with the government. Subsidized housing is owned by private companies or church groups or the Volunteers of America (T 19). Subsidized housing is totally distinct from public housing (T 23).

Again, upon questioning by the court:

THE COURT: Is there anything that would differentiate a public housing facility for non -- someone not connected with your agency, just a renter or a member of the public, is there anything that would differentiate a public housing facility from any other apartment building?

THE WITNESS: Well, we used to say green doors because all public housing had green doors, but we've sort of tried to stop that. You know, I certainly think, and maybe just because I've done it so long, they look like public housing. I think if you drove by you would wonder if it was just a regular housing area. They don't -- and that may just -- I don't know.

THE COURT: I would wonder if it is --

THE WITNESS: You would think, "Is that an apartment complex or what is that?" They just don't look the same.

THE COURT: Can you pinpoint how they are different? Is it --

THE WITNESS: Not to our benefit. Oftentimes, they don't look as kempt [sic] as a private place would look.

THE COURT: Not as well kept?

THE WITNESS: Right.

THE COURT: Not as architecturally --

THE WITNESS: They're very plain, not a lot of your fences and nice things like that that you see --

THE COURT: But other than those things, which may be a subjective matter of individual taste, is there anything about your facility that says public housing facility?

THE WITNESS: Is there a sign that says that?

THE COURT: Sign or newspaper ads or TV ads or however you get the word out to people that you have units available, your brochures, however you do it.

THE WITNESS: I have a waiting list that's so long I can't fill it. So, actually, I do no publicity. So, in terms of specifically driving in and saying, "Here's a public housing facility," it doesn't.

THE COURT: It says Thistle Hills and its supposed to look like Thistle Hills Apartments?

THE WITNESS: Right. (T 24-25).

Gardenia Gardens is subsidized as opposed to public housing (T 27). Counsel argued that because Leon Houston was charged with sale of cocaine within 200 feet of a public housing facility at Gardenia Gardens, which was subsidized housing, not even the state attorney could tell the difference (T 27).

Counsel further argued the issue was not whether Ms. Monahan or the court could tell the difference, but rather whether the average person could (T 29).

The trial judge entered written orders, finding the term "public housing facility" to be unconstitutionally vague, and

dismissing those counts of the informations (Bailey R 18-20; Gould R 20-23; Gordon R 15-18).

On March 25, 1992, timely notices of appeal were filed by the state (Bailey R 21; Gould R 23; Gordon R 18). The Public Defender of the Second Judicial Circuit was designated to represent petitioners in the consolidated appeal below.

On appeal, the First District disagreed with the trial judge and held the statute to be constitutional on authority of its prior opinions in Brown v. State, 610 So. 2d 1356 (Fla. 1st DCA 1992), review pending, case no. 81,189, oral argument set for November 1, 1993, and Turner v. State, 615 So. 2d 819 (Fla. 1st DCA 1992), review pending, case no. 81,519:

> Subsequent to the trial court's decisions in these cases, this Court has addressed the precise issue here, concluding that the statute is not unconstitutionally vague. Appendix at 1.

On April 19, 1993, a timely notice of discretionary review was filed, pursuant to Art. V, §3(b)(3), Fla. Const., and Rule 9.030(a)(2)(A)(i), Fla.R.App.P. On July 30, 1993, this Court accepted review.

III SUMMARY OF THE ARGUMENT

The First District's opinion in this case expressly declares valid the state statute creating the crime of sale of a controlled substance within 200 feet of a public housing facility, making the crime a first degree felony, and prohibiting release through control release or the accumulation of gain time.

An opinion from this Court will notify citizens of this state what conduct is prohibited. The First District's opinion in Brown assumes the general public knows what a "public housing facility" is, although that term was never defined by the legislature and cannot be found in the dictionary. In fact, the dictionary definitions of these words would lead a person of common intelligence to believe that any place where people live is a protected area.

The due process vagueness doctrine requires a statute to both give notice to its citizens what conduct is prohibited and prevent discriminatory enforcement.

The Second District has criticized the lower tribunal's Brown opinion and declared the statute to be unconstitutionally vague. The Third District has agreed with the First. This Court should adopt the position of the Second District, quash the First and Third Districts, and declare the statute unconstitutionally vague on its face.

IV ARGUMENT
SECTION 893.13(1)(i), FLORIDA STATUTES, IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

The First District's construction of §893.13(1)(i), Fla. Stat. (Supp. 1990), is incorrect because it expressly declares valid an unconstitutionally vague statute. Section 893.13(1)(i) states, in pertinent part:

> it is unlawful for any person to sell, ... a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, ... (emphasis added).

The statute makes the crime a first degree felony, and exempts the offender from consideration for control release and gain time.[1]

Petitioners contended below and argue here that this statute violates State and Federal due process guarantees, because it does not give notice of what is prohibited, in that "public housing facility" is not defined. The due process vagueness doctrine requires a statute to both give notice to its citizens what conduct is prohibited and prevent discriminatory enforcement.

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[1]The undersigned could not locate a parallel federal criminal statute on point. 21 U.S.C. §860 doubles the penalties for distribution of controlled substances within 1000 feet of a school, much like §893.13(1)(e), Fla. Stat., but does not speak to public housing facilities. The federal government encourages the eviction of residents of housing facilities owned by HUD, who are involved in drugs, 42 U.S.C. §1437d(1), but that policy has come under some criticism. Comment, 36 Loyola L. Rev. 137 (1990).

In Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the court ruled the California loitering statute unconstitutionally vague. The court set forth this test:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with such sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

In Bertens v. Stewart, 453 So. 2d 92, 93 (Fla. 2d DCA 1984), the court said, citing State v. Wershow, 343 So. 2d 605 (Fla. 1977):

> It is constitutionally impermissible for a statute to contain such vague language that a person of common intelligence must speculate about its meaning and subject himself to punishment if his guess is wrong.

A statute is unconstitutionally vague if it:

> fails to give adequate notice of the conduct it prohibits and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement.

Id., citing Southeastern Fisheries Assoc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984).

In Bertens, the court held a rule, which prohibited personal possession of "medicine" at school, was unconstitutional because it failed to give adequate notice what is required under due process.

In reaching its decision that the rule was impermissibly vague, the court noted that the school board's failure to

define medicine did not, in and of itself, render the rule unconstitutional. Rather, the court looked to the "ordinary" meaning of the term "medicine." The court concluded that the dictionary definition did not cure the infirmity and that the term "medicine" was impermissibly vague.

See also Linville v. State, 359 So. 2d 450 (Fla. 1978), in which this Court declared unconstitutional a statute which outlawed the sniffing of a "chemical substance," because it too broadly encompassed an unduly large number of materials and objects.

Penal statutes must be strictly construed, §775.021(1), Fla. Stat., and they require greater certainty than other statutes. State v. Winters, 346 So. 2d 991 (Fla. 1977).

The First District held in Brown that:

> Although the definition of "public housing facility" might not be included in a dictionary, a person of ordinary intelligence should know what was intended by the phrase. 610 So. 2d at 1358; emphasis added.

But this is not the test; it is not whether a person should know; rather, it is whether a person of common intelligence does know what the term means by reading the statute.

The Third District made the same mistake in Williams v. State, 618 So. 2d 323 (Fla. 3rd DCA 1993), when it ruled the same statute constitutional because its judges knew what the term meant:

> The term "public housing," in common parlance, is understood to to encompass affordable, government subsidized housing

> for individuals or families with varied needs.

Id. at 324.

The Second District reached the proper result in State v. Thomas, et al., 616 So. 2d 1198 (Fla. 2nd DCA 1993), review pending, case no. 81,724, when it ruled the statute unconstitutionally vague. First, it criticized the lower tribunal for its cursory examination of the statute:

> We find Brown, however, to be neither helpful nor persuasive as the discussion therein regarding the vagueness of the statute is limited to one paragraph ... .
>
> While the Brown court concludes that "a person of ordinary intelligence should know what was intended by the phrase public housing facility, we have not been able to decipher the intended meaning of the phrase with any degree of precision. The phrase is not defined in any dictionary, case law or sufficiently related statute that we can discover. 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.

Id at 1199; emphasis in original.

Next, the Second District struggled to find a way to place a judicial gloss on the statute which would make it constitutional.

> 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 possibilities that raised sufficient doubt in our minds to require us to conclude the statute is unconstitutionally vague.

Id. The Second District next looked at each individual term, beginning with the term "public:"

> 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; to housing that is privately owned but 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."

Id. The Second District then looked at the term "housing:"

> 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 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.

Id. The Second District finally examined the term "facility:"

> 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?

Id. at 1199-1200. The Second District then declared the statute to be unconstitutionally vague:

> 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.

Id. at 1200.

The soundness of the Second District's opinion is demonstrated by the prosecutor's action in the instant motion hearing, which also involved a defendant named Leon Houston. The prosecutor amended the information as to Houston to drop the public housing facility accusation (T 2-4), saying:

> quite candidly, because there apparently is a difference between a public housing facility and what is referred to on the street as subsidized housing. (T 11).

Gardenia Gardens, where Houston allegedly sold drugs, is subsidized as opposed to public housing (T 27). Not even the state attorney could tell the difference.

The soundness of the Second District's opinion is demonstrated by the testimony in the instant motion hearing, of Gail Monahan, Executive Director of the Alachua County Housing Authority. She defined "public housing facility" as:

> any unit that was owned by a public housing authority and rented to low income people. (T 12).

She further testified, upon questioning by the court, that there was another type of housing for low income people known as "subsidized housing," which she defined as:

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THE COURT: It says Thistle Hills and its supposed to look like Thistle Hills Apartments?

THE WITNESS: Right. (T 24-25).

Counsel below correctly argued the issue was not whether Ms. Monahan or the court could tell the difference, but rather whether the average person could. The trial court correctly found that the term "public housing facility" is not defined anywhere in the statutes, and is not capable of being understood by an ordinary person.

The term "public housing facility" is not defined in the drug abuse statute. A search of the Florida Statutes related to housing does not reveal a definition for the term "public housing facility." The only passage of the statutes where the term "public housing" is used is in connection with the State Housing Incentive Partnership (SHIP) Act of 1988. Chap. 420, Fla. Stat., Part I. "Public housing" is mentioned in

§420.00003(3)(d), Fla. Stat., but this is a legislative intent section and not a definitional section:

> Public Housing. -- The important contribution of public housing to the well-being of low-income citizens shall be acknowledged through state and local government efforts to provide services and assistance through existing programs to public housing facilities and tenants.

The definitional portion of the act, §420.00004, Fla. Stat., does not define the term. "Facility" is not defined anywhere in Chapter 420.

Chap. 421, Fla. Stat., governs public housing. The term "public housing facility" does not appear therein, but the term "housing project" does. Section 421.03(9), Fla. Stat., defines "housing project" as:

> "Housing project" shall mean any work or undertaking:
> (a) To demolish, clear, or remove buildings from any slum area; such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreational or community purposes; or
> (b) To provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities or other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes; or
> (c) To accomplish a combination of the foregoing. The term "housing project" also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, restoration,

> alteration and repair of the improvements and all other work in connection therewith.

These definitions are not particularly helpful to understand what a "public housing facility" is. Even if the legislature intended for the traditional low-income "housing project" to be targeted in §893.13(1)(i), the legislature did not use this statutory term; rather, it used "housing facility," a term with no definition. And even if the state uses this definition to attempt to save the statute, the statute is still vague.

A vacant lot could be a "housing project" within subsection (a) of the statutory definition, if it is some day envisioned as a dwelling place. A vegetable garden could be a "housing project" within subsection (b) of the statutory definition, if it is in some way connected to a dwelling place. An abandoned building could be a "housing project" within subsection (c) of the statutory definition, if it is some day remodeled into a dwelling place. People of common intelligence must still guess as to the statute's meaning.

This Court has no power to rewrite the statute to make it constitutional. That is a job for the legislature. State v. Wershow, supra. In Brown v. State, 358 So. 2d 16 (Fla. 1978), this Court declared the open profanity statute unconstitutionally overbroad, and impossible to save by a limiting judicial construction:

> The Florida Constitution requires a certain provision defined by the legislature, not legislation articulated by the judiciary. ... This constitutional mandate obtains for two reasons. First, if legislative intent is not apparent from the statutory

> language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a [statute].

Id. at 20; citations omitted.

Even if "low income" is judicially engrafted onto "housing facility," in an attempt to save the statute, the statute remains vague. Section 421.03(10), Fla. Stat., defines "low income" as:

> "Persons of low income" shall mean persons or families who lack the amount of income which is necessary, as determined by the authority undertaking the housing project, to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Equating "low income" with "public" is internally inconsistent with other portions of the statute. The statute also enhances the penalties for drug transactions close to public schools and public parks. One does not have to be a low income person to attend public school or play basketball in a public park. Even rich people are allowed to use these places too.

Moreover, the concept of "low income" is not susceptible to quantification, but the statute leaves that determination to the local housing authority. A person of common intelligence must necessarily guess whether the housing authority will classify someone as "low income."

Moreover, some single parents employed as secretaries by the state, with several dependants, may believe they meet the definition, even if the housing authority does not. In short, restricting the statute's scope to low income housing does not alleviate any of its vagueness.

Because there is no statutory definition for "public housing facility," the words must be construed according to their plain meaning. State v. Hagen, 387 So. 2d 943 (Fla. 1980). In the absence of a statutory definition, case law, or related statutory provisions which define a statutory term, the next step is to consult a dictionary to determine the meaning of the term. Bertens v. Stewart, supra, 453 So. 2d at 94.

Webster's New World Dictionary (2d college ed.) defines the adjective "public" as:

> 1. of, belonging to, or concerning the people as a whole; of or by the community at large
> 2. for the use or benefit of all; esp. supported by government funds
> 3. as regards community, rather than private, affairs
> 4. acting in an official capacity on behalf of the people as a whole
> 5. known by, or open to the knowledge of, all or most people

Id. at 1149.

The term "public" could be construed as "available to the public." This construction does little to save the statute. Such an interpretation would include within the statute virtually all housing developments, since in this country, those with sufficient funds may buy or rent any housing which they can afford.

The term "public" could be construed as "owned by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place owned by the local, state, or federal governments. It would include college dormitories, military barracks, the Governor's mansion, juvenile detention homes, illegal alien detention camps, probation and restitution centers, migrant housing, homeless shelters, park ranger residences, prisons, jails, halfway houses, nursing or retirement homes, and residential schools for the deaf, blind, or physically handicapped.

The confusion increases when one considers that many places traditionally owned by the public are now leased by the government from private owners, such as jails and prisons.

The term "public" could be construed as "financed by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place where the resident receives government funds to assist in housing expenses. Such a construction would necessarily include private homes purchased with Farmer's Home, FHA or VA funds. It would include first-time home buyers who receive local bond money to assist in their payments. It would include apartments close to the FAMU campus, which the developer proposes to build with government funds. It would include off-base housing for military personnel.

The term "public" could be construed as "subsidized by the public." This construction does little to save the statute.

Such an interpretation would include within the statute any place where the developer receives government funds to construct or maintain the project. It would include private not-for-profit groups, such as Habitat for Humanity, which depend on some government assistance in building affordable housing.

Scattered throughout Chap. 420, Fla. Stat., are programs for the state to subsidize private housing: the State Housing Trust Fund, §420.0005, Fla. Stat.; the Housing Development Corporation of Florida, §420.101, Fla. Stat.; the Housing Predevelopment Trust Fund, §420.307, Fla. Stat.; the Elderly Homeowner Rehabilitation Program, §420.34, Fla. Stat.; the Florida Elderly Housing Trust Fund, §420.35, Fla. Stat.; the Neighborhood Housing Services Grant Fund, §420.4255, Fla. Stat.; the Florida Housing Finance Agency, §420.504, Fla. Stat.; the State Apartment Incentive Loan Program, §420.5087, Fla. Stat.; the Florida Homeownership Assistance Program, §420.5088, Fla. Stat., the Florida Affordable Housing Trust Fund, §420.603, Fla. Stat.; the Pocket of Poverty Trust Fund, §420.805, Fla. Stat.; and the Maintenance of Housing for the Elderly Trust Fund, §420.905, Fla. Stat.

Petitioners ask: which of these "public housing facilities" did the legislature intend to be included within the proscription of §893.13(1)(i)? All of these laudable programs are surely "public," but they are not included within the chapter dealing with "public housing."

Chap. 421, Fla. Stat., is entitled "Public Housing." It creates local housing authorities in §421.04, Fla. Stat., and regional housing authorities in §421.28, Fla. Stat., but it never defines "public housing facility."

The noun "housing" is defined as:

> 1. the act of providing shelter or lodging
> 2. shelter or lodging; accommodation in houses, apartments, etc. ...
> 3. houses collectively
> 4. a shelter; covering

Webster's New World Dictionary (2d college ed.) at 681. This definition is fairly straightforward, so petitioners will not quarrel with it, except to note that it applies to all of the lodging mentioned above in connection with the term "public." Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for lodging the public, is a "public housing facility" within the dictionary definition.

The noun "facility" is defined as:

> 1. ease of doing or making; absence of difficulty
> 2. a ready ability; skill; dexterity; fluency
> 3. the means by which something can be done
> 4. a building, special room, etc. that facilitates or makes possible some activity

Id. at 501.

"Facility" may refer only to actual residences, or it could refer to anything associated with a dwelling place. These facilities may or may not include swimming pools, sheds, garages, garbage dumpsters, playgrounds, or parking lots across the street.

This definition is fairly straightforward, so petitioners will not quarrel with it, except to note that it applies to all of the lodgings mentioned above in connection with the term "public." Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for lodging the public, is a "public housing facility" within the dictionary definition.

Thus, the dictionary definition of each individual word does not provide a satisfactory definition. The dictionary meaning of the words together would lead a reasonable person to conclude that any type of housing available to the public would be a public housing facility. The dictionary definition of the words together would cause a reasonable person to guess at the meaning of a "public housing facility." Surely, the legislature did not intend to elevate the penalty for drug offenses within 200 feet of any place where the public may reside.

Consequently, because the term "public housing facility" does not have a statutory definition, and there is no dictionary or plain and ordinary definition that provides a clear meaning, the statute is unconstitutionally vague in that it fails to provide adequate notice of the prohibited conduct.

The undersigned, in limited research of the law of other states, located only four other states with statutes similar to ours. Code of Ala. §13A-12-270, provides for an additional five year prison term for a drug sale with three miles of a

"public housing project owned by a housing authority." This language makes this statute a little less vague than ours.[2]

Illinois has a statutory scheme which reclassifies drug crimes which occurred within 1000 feet of "residential property owned, operated and managed by a public housing agency." Ill. Rev. Stat. ch. 56 1/2, para. 1407(b). Again, this language makes this statute a little less vague than ours.[3]

Minnesota penalizes the sale of controlled substances in a "public housing zone." Minn. Stat. Ann. §152.022(1)(6). That term is defined as:

> any public housing project or development administered by a local housing agency, plus the area within 300 feet of the property's boundary, or one city block, whichever is greater.

Minn. Stat. Ann. §152.01(19).

Georgia has the most explicit language. It penalizes drug crimes:

> in, on, or within 1,000 feet of any real property of any publicly owned or publicly operated housing project ... . For the purposes of this Code section, the term "housing project" means any facilities under the jurisdiction of a housing authority which constitute single or multifamily dwelling units occupied by low and moderate-income families ... .

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[2]The statute has been upheld against a constitutional attack on separation of powers grounds, but no vagueness argument was made in Burks v. State, 611 So. 2d 487 (Ala. Ct. Crim. App. 1992).

[3]The statute has been upheld against an equal protection attack, but no vagueness argument was made in People v. Shephard, 605 N. E. 2d 518 (Ill. 1992).

Ga. Code §16-13-32.5(b). The statute further provides:

> The governing authority of a municipality or county may adopt regulations requiring the posting of signs ... designating the areas within 1,000 feet of the real property of any publicly owned or publicly operated housing project as "Drug-free Residential Zones."

Ga. Code §16-13-32.5(f).

The Uniform Controlled Substances Act §409(b) (Supp. 1990) adds a section for sale within 1000 feet of a school, but does not mention public housing facilities.

The First District's conclusion that the statute was constitutional because a person of ordinary intelligence "should know what was intended by the phrase" is patently erroneous. A vague statute cannot be saved by what a person "should know;" it can only be saved by the terms the legislature used in the statute. A person cannot be required to guess what the words mean. This Court must quash the First and Third Districts, and adopt the position of the Second.

V CONCLUSION

Based upon the arguments presented here, the petitioners respectfully ask this Court to declare the statute unconstitutional, because it significantly affects the rights of citizens of the state to know what criminal conduct is prohibited.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief has been furnished to Gypsy Bailey and Marilyn McFadden, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to each petitioner, on this 31st day of August, 1993.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

of condition '6' by a positive urinalysis for marijuana.

Affirmed; remanded.

ALTENBERND, J., and STOUTAMIRE, R. GRABLE, Associate Judge, concur.

1

Donnie Demont PHILLIPS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1576.

District Court of Appeal of Florida, First District.

March 30, 1993.

An Appeal from the Circuit Court for Walton County; G. Robert Barron, Judge.

John C. Harrison, of John C. Harrison, P.A., Shalimar, for appellant.

Robert A. Butterworth, Atty. Gen., Suzanne G. Printy, Asst. Atty. Gen., Tallahassee, for appellee.

OPINION ON MANDATE

WIGGINTON, Judge.

Pursuant to a mandate of the Supreme Court of Florida, the judgment and opinion of this court, filed August 30, 1991, 585 So.2d 412, wherein appellant's convictions of first-degree murder, kidnapping, robbery with a firearm and possession of a firearm during the commission of a felony were affirmed, is hereby set aside. The opinion and judgment of the Supreme Court of Florida, *Phillips v. State*, 612 So.2d 557 (Fla.1992), reversing appellant's convictions and vacating his sentences based on a determination that his motion to suppress statements had improperly been denied, is hereby adopted as this court's opinion and judgment. Consequently, appellant's convictions are reversed due to the trial court's error in denying the motion to suppress, his sentences are vacated and this cause is remanded for a new trial. We find no error in the remaining points raised by appellant.

Reversed and remanded for further proceedings.

WOLF and KAHN, JJ., concur.

2

STATE of Florida, Appellant,

v.

Frederick BAILEY, Mario M. Gould and Marcus Gordon, Appellees.

Nos. 92–1064, 92–1076 and 92–1243.

District Court of Appeal of Florida, First District.

March 30, 1993.

An appeal from the Circuit Court for Alachua County; Robert P. Cates, Judge.

Robert A. Butterworth, Atty. Gen., Marilyn McFadden, Asst. Atty. Gen., for appellant.

Nancy A. Daniels, Public Defender, P. Douglas Brinkmeyer, Asst. Public Defender, for appellees.

PER CURIAM.

The state appeals orders which granted motions to dismiss in three criminal cases. The appeals have been consolidated because all involve the same issue. In each case, the trial court dismissed the information based upon its conclusion that section 893.13(1)(i), Florida Statutes (Supp.1990), is unconstitutionally vague because the term "public housing facility" is undefined.

Subsequent to the trial court's decisions in these cases, this court has addressed the precise issue raised here, concluding that the statute is not unconstitutionally vague.

Cite a

Brown v. State, 610 So.2d 13 DCA 1992); *Turner v.* Fla.L.Weekly D773, — So.2d – DCA Mar. 16, 1993). Accordi three cases, we reverse and r directions that the trial court r information.

REVERSED and REMANDI rections.

SMITH, KAHN and WEBST concur.

1

L.V. JENKINS, Appel

v.

STATE of Florida, Ap

No. 92–3151.

District Court of Appeal o First District.

March 30, 1993.

An Appeal from the Circu Escambia County; T. Michael J

Nancy A. Daniels, Public D John R. Dixon, Asst. Public D lahassee, for appellant.

Robert A. Butterworth, Att Carolyn J. Mosley, Asst. Atty. hassee, for appellee.

PER CURIAM.

AFFIRMED. *See State v.* So.2d 460 (Fla.1993).

JOANOS, C.J., and SMITH JJ., concur.

art's error in denying the motion
, his sentences are vacated and
s remanded for a new trial. We
or in the remaining points raised
nt.

and remanded for further pro-

nd KAHN, JJ., concur.

2

TE of Florida, Appellant,

v.

k BAILEY, Mario M. Gould
Ma Gordon, Appellees.

-1084, 92-1076 and 92-1243.

Court of Appeal of Florida,
First District.

March 30, 1993.

eal from the Circuit Court for
ounty; Robert P. Cates, Judge.

A. Butterworth, Atty. Gen., Mari-
lden, Asst. Atty. Gen., for appel-

A. Daniels, Public Defender, P.
Brinkmeyer, Asst. Public Defend-
pellees.

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using facility" is undefined.

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ases, this court has addressed the
sue raised here, concluding that
e is not unconstitutionally vague.

Brown v. State, 610 So.2d 1356 (Fla. 1st DCA 1992); *Turner v. State*, 18 Fla.L.Weekly D773, — So.2d — (Fla. 1st DCA Mar. 16, 1993). Accordingly, in all three cases, we reverse and remand with directions that the trial court reinstate the information.

REVERSED and REMANDED, with directions.

SMITH, KAHN and WEBSTER, JJ., concur.

1

L.V. JENKINS, Appellant,

v.

STATE of Florida, Appellee.

No. 92-3151.

District Court of Appeal of Florida,
First District.

March 30, 1993.

An Appeal from the Circuit Court for Escambia County; T. Michael Jones, Judge.

Nancy A. Daniels, Public Defender, and John R. Dixon, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Carolyn J. Mosley, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

AFFIRMED. *See State v. Rucker*, 613 So.2d 460 (Fla.1993).

JOANOS, C.J., and SMITH and WOLF, JJ., concur.

2

M.D.K., a child, Appellant,

v.

STATE of Florida, Appellee.

No. 92-03456.

District Court of Appeal of Florida,
First District.

March 30, 1993.

An Appeal from the Circuit Court for Leon County; John Crusoe, Judge.

Nancy A. Daniels, Public Defender, and Chris W. Hoeg, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Gypsy Bailey and Michelle Konig, Asst. Attys. Gen., Dept. of Legal Affairs, Tallahassee, for appellee.

PER CURIAM.

REVERSED AND REMANDED. *See R.A.H. v. State*, 614 So.2d 1189 (Fla. 1st DCA 1993).

BOOTH, KAHN and MICKLE, JJ., concur.

3

E.P., a child, Appellant,

v.

STATE of Florida, Appellee.

No. 92-3530.

District Court of Appeal of Florida,
First District.

March 30, 1993.

An Appeal from the Circuit Court for Leon County; John Crusoe, Judge.