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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.

_____/

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 appellant below, will be referred to in this brief as the state. Petitioners, FREDERICK BAILEY, MARIO M. GOULD, and MARCUS GORDON, the defendants in the trial court and appellees below, will be referred to in this brief as petitioners. References to the record on appeal will be designated by the symbol "R," and references to the plea and sentencing transcripts will be designated by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

Petitioners listed a number of cases pending before this Court on the same issue in their 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 petitioners's statement of the case and facts as reasonably supported by the record.

SUMMARY OF THE ARGUMENT

The First District properly concluded that section 893.13(1)(i) was not unconstitutionally vague. As is clearly evident under a proper vagueness analysis, petitioners had notice that their behavior was proscribed, and because their conduct fell clearly within the purview of the statute, the statute was not selectively enforced against them. 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.

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, petitioners claim 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 Petitioners 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]

Petitioners devote many pages of their brief to exploring the various meanings of the individual words contained in 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] There, the Second District declared section 893.13(1)(i) "unconstitutionally vague because it is so imprecise as to invite arbitrary or discriminatory enforcement," finding Brown v. State, 610 So.

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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.

2d 1356 (Fla. 1st DCA 1992), "neither helpful nor persuasive":

> 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 petitioners and the Second District in propounding numerous hypothetical definitions of each word is 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 (petitioners "ignore[] 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,

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."); Smith v. State, 237 So. 2d 139, 141 (Fla. 1970) ("To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. . . . 'The law is full of instances

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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).

where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.'") (citations omitted; emphasis supplied).

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 petitioners made no claim that their conduct was not covered by section 893.13(1)(i),[5] their contention that the statute covers too many possibilities should fall on deaf ears.

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[5] Only Leon Houston, against whom the state dropped the enhancement, made such an argument (T 4). In any event, any claim that petitioners did not commit the offense of narcotics possession at a public housing facility, as opposed to private or subsidized, is irrelevant to a facial challenge. Arguing that a statute is inapplicable is completely different from arguing that a statute is unconstitutional. In fact, arguing that a statute is inapplicable precludes a constitutional challenge:

> Not only must a person be adversely affected by a statute in order to challenge its constitutionality but he also must be affected by the portion of the statute which he attacks. Thus, a person cannot raise an objection to part of the statute unless his rights are in some way injuriously affected thereby . . . .
>
> * * * *
>
> One who is not himself denied some constitutional right or privilege may no be heard to raise constitutional questions on behalf of some other person who may at some future time be affected.

State v. Olson, 586 So. 2d 1239, 1242 (Fla. 1st DCA 1991).

Petitioners' brief evidences their confusion of the doctrines of vagueness and overbreadth. Petitioners 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.[6] "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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[6] 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 petitioners' 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, petitioners obviously had notice that their behavior was proscribed, and because their conduct fell clearly within the purview of the statute, the statute was not selectively enforced against them.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm the instant decision of the First District Court of Appeal and its decision in Brown, quash the decision of the Second District in Thomas, and declare **Fla. Stat. §** 893.13(1)(i) (Supp. 1990) constitutional.

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 9th day of August, 1993.

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