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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

REPLY BRIEF OF PETITIONERS ON THE MERITS

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REPLY BRIEF OF PETITIONERS ON THE MERITS

I PRELIMINARY STATEMENT

Petitioners file this reply to the argument of Respondent.

II ARGUMENT

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE STATUTE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO PROVIDE ADEQUATE NOTICE OF WHAT IT FORBIDS AND IT ALLOWS DISCRIMINATORY ENFORCEMENT.

In its brief, the state makes two arguments to support the constitutionality of §893.13(1)(i), Fla. Stat. First, "[p]ublic, as opposed to private, housing in this case connotes 'official' housing, provided by local, state, or federal government, i.e., not private apartment housing." The state also cites a dictionary definition of public housing as "low-rent housing owned, sponsored, or administered by a government."[1] Brief of Respondent at 6. These definitions, the state thinks, provide sufficient notice of what the statute forbids. Second, the state argues that Petitioners do not have standing to attack the vagueness of the statute as applied to hypothetical situations not their own. "Because petitioners made no claim that their conduct was not covered by section 893.13(1)(i), their contention that the statute covered too many possibilities should fall on deaf ears." Id. at 12.

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[1]The state cites the 1983 5th edition of Black's Law Dictionary and Webster's Third New International Dictionary. Undersigned counsel's 1990 6th edition of the former, however, contains no definition of or reference to public housing. Undersigned counsel has no access to the latter, thus demonstrating his belief that an understanding of the meaning of a penal statute cannot be a function of the thickness of one's dictionary.

In response, Petitioners argue first that statutes must prevent discriminatory enforcement as well as provide adequate notice. Second, the state's new definition of the statutory language is not found in the language itself, does not clearly reflect legislative intent, and is, in any event, still vague. Third, Petitioners do have standing to challenge a statute which vaguely allows discriminatory enforcement and which lacks a "hard core".

The due process vagueness doctrine (1) requires notice to citizens and (2) prevents discriminatory enforcement, but the latter purpose is more important.

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. ... Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." ... Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-358 (1983) (citations omitted).

Florida law also emphasizes this necessity for guidelines to prevent selective prosecution.

> Although the goal of the Legislature in promulgation of such legislation to protect the public health, welfare, and safety of children is not only laudable but essential, there must exist some guidelines to instruct those subject thereto as to what will render them liable to its criminal sanctions. No such standards have been provided in Section 827.05. ... Such a statute lends itself to the unacceptable practice of selective prosecution.

State v. Winters, 346 So. 2d 991, 993-994 (Fla. 1977).

Section 893.13(1)(i) as written contains no guidelines on the definition of a public housing facility. Consequently, the statute encompasses everything from military barracks to the downtown headquarters of a public housing agency. This standardless statute gives unbridled discretion to police and prosecutors to choose where and when to enforce it.

The state's proposed restriction of the statute to "official low-rent housing owned, sponsored, or administered by a government," Brief of Respondent at 6, does not sufficiently reduce this discretion, and it still fosters discriminatory enforcement. By its own terms, the state's view of the statute focuses on people who live in or congregate near low-rent housing. These people necessarily are members of the poor lower classes, including minorities, whom the police have traditionally discriminated against. The state's interpretation therefore not only permits but actually invites discriminatory enforcement against the poor.

The police may very well not use this statute against the "official", "low-rent", government-funded housing project for the elderly located behind the old armory in Tallahassee, even

though this project surely qualifies under the state's interpretation of the statute. Instead, the police are likely to target areas populated by persons whom the police and prosecutors instinctively and prejudicially believe are undesirables.

The Supreme Court's comments on a Jacksonville vagrancy ordinance are controlling here. This ordinance was vague in part because, like the statute in the present case, its "imprecise terms" implicated "poor people, nonconformists, dissenters, idlers".

> Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." ... It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk...only at the whim of any police officer."

Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (citations omitted). The instant statute's vagueness encourages this discriminatory enforcement against the poor and therefore cannot stand.

Not only does the statute permit and encourage discriminatory enforcement, but it also fails to provide adequate notice of what it forbids. Due process demands that statutes have a definite and certain meaning, so that citizens are not forced to guess what it proscribes. This is particularly true for penal statutes, which are strictly

construed and require greater certainty than other statutes. State v. Winters, supra; Bertens v. Stewart, 453 So. 2d 92 (Fla. 2d DCA 1984). For this reason, the third district's observation is inapposite that the meaning of the phrase "public housing" is known to all. Williams v. State, 618 So. 2d 323 (Fla. 3d DCA 1993).[2]

In this instance, the "public housing facility" is not defined either in §893.13(1)(i) or in other statutes. Consequently, resort must be had to the ordinary meaning and common understanding of these words. Bertens. The plain and ordinary meanings of the words in "public housing facility" are not clear. On its face, this phrase is vague because it encompasses a whole host of possible places. See Linville v. State, 359 So. 2d 450 (Fla. 1978) ("chemical substance" broadly encompassed unduly large number of materials and objects); Bertens ("medicine" included too many substances).

Respondent's references to 21 USC §860 and to 42 USC §11901 likewise are unavailing. Brief of Respondent at 9. As noted in Petitioners' initial brief at 8, footnote 1, the federal government has no parallel criminal statute concerning drugs in the area of a public housing facility, only a civil

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[2]The Third District has adhered to its view that the phrase is understandable by reference to a dictionary definition, in a case not cited by Respondent. M.H. v. State, 18 Fla. L. Weekly D1664 (Fla. 3rd DCA July 27, 1993). Judge Ferguson, however, would have ruled to the contrary. Id. at 1665.

eviction statute. Thus, there are no similarities between our statute and the federal statutes.

The state argues that persons challenging a statute for vagueness can normally claim only that it is vague as applied to their conduct and cannot assert that it is vague with respect to other persons' conduct. According to the state, because Petitioners' conduct falls within the statute's hard core, they are estopped from arguing that the statute's outer bounds can be vaguely applied to other persons in other situations. This argument is incorrect in several respects.

First, Petitioners have argued that the statute is vague not only because it does not provide notice of what it forbids but also because it does not incorporate adequate guidelines to prevent arbitrary and discriminatory enforcement. If the statute had included proper guidelines, then the police might not have chosen to focus on the housing developments at issue in this case and might not have harshly and discriminatorily focused on the particular person who suffered their displeasure and whom they ultimately arrested. Petitioners have standing to raise this lack of standards and the resulting arbitrary discrimination against them. "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law". Smith v. Goguen, 415 U.S. 566, 575 (1974).

Second, disallowing vagueness challenges makes sense when the number of unusual situations on the statute's outer limits is relatively small, and the number of situations within the statute's core is relatively large. It makes even more sense

in federal courts, after a state supreme court has determined that it knows what the statute means and what the legislature intended. In this instance, however, the statute might arguable be applied to many different and varied situations, and this Court has a basic responsibility either: (1) to say what the legislative intent was; or (2) to say that it cannot be determined.

This Court is not a mini-legislature and may not legislate to answer questions which vague statues leave unanswered. Brown v. State, 358 So. 2d 16 (Fla. 1978). This Court also has a supervisory duty to the lower courts of the State to explain the law so that it may be readily and clearly applied. Because the number of possible, but questionable, applications of §893.13(1)(i) is large, adopting the state's suggested "case-by-case approach", Brief of Respondent at 16, would improperly and unnecessarily create substantial litigation and confusion in the trial courts and district courts and would invite and require these courts to act as legislatures rather than as courts.

Third, the state's argument assumes that the statute has a hard core. If it does not have a hard core, then Petitioners have standing to challenge it for vagueness on its face.

> This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." ... Such a provision simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the

> Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact.

Smith v. Goguen, supra, 415 U.S. at 577-78 (citations omitted; emphasis in original).

A statute is vague on its face when its potential domain is so large and varied that its core cannot be determined. In such cases, courts are not even able to carry out their basic responsibility to devise jury instructions that will tell the jury what the law is. Courts cannot prepare such instructions when the statute's proscription is entirely amorphous. See Warren v. State, 572 So. 2d 1376 (Fla. 1991) (prosecutor could not define "ill fame" sufficiently to be able to prove that element). In the present case, the statute's scope is so large that it has no core and no jury instructions could be devised.

Petitioners have already discussed many of the possible cores of the statutory language in their initial brief at 16-23. The core purpose might be preventing public or flagrant drug-dealing. Alternatively, the core might be preventing drug-dealing on government property. If these are the cores of the statute, the state should criminalize such conduct in all such areas and not only around housing facilities. Another core purpose might be protecting government-subsidized private property. Petitioners' initial brief has already pointed out, however, that this purpose is difficult to define.

The core purpose might be protecting poor persons. Although a government may justifiably provide economic

assistance to poor persons because they are poor, understanding why they have a greater right to crime prevention around their homes than a middle class person has is difficult. In addition, Petitioners do not understand why only those poor person who receive government assistance have this greater right to protection.[3] Finally, this core purpose would make more sense if the statute imposed greater penalties on persons who sell drugs to the indigent anywhere, rather than merely on persons who sell it around the homes of the indigent.

The statute's core purpose might be protecting children. The companion statute which provides greater penalties for narcotics dealing within one thousand feet of a school serves this purpose. Some public housing facilities are for the elderly, however, and most public housing facilities contain as many or more adults as children. In addition, most private housing facilities also contain large numbers of children. Accordingly, it is not clear that the core purpose of the statute is protecting children.

The statute's core purpose might be protecting residences. If this is its purpose, then it should apply to private residences for the wealthy as well as public housing

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[3]One appellate judge has expressed the view that the statute is unconstitutional for the additional reason that it discriminates against African-Americans. Judge Ferguson, concurring in M.H., footnote 2, supra, 18 Fla. L. Weekly at 1665.

facilities. Because it does not, protection of residential housing may not be the goal of the statute.

Finally, the core purpose might be preventing drug-dealing in high-crime area. Many housing facilities, however, are not in high-crime areas. If the purpose is clearing out high-crime areas, then the statute would logically focus directly on high-crime areas, rather than address the problem obliquely by focusing on all public housing facilities, regardless of whether that facility is in fact surrounded by narcotics activity. Moreover, persons should not be subject to greater criminal penalties merely because they happen to live or work in a high-crime area. This Court has held that an area's high-crime character is irrelevant in narcotics prosecutions. Gillion v. State, 573 So. 2d 810 (Fla. 1991). Finally, the other "public" places mentioned in the statute -- universities and parks -- are not obviously high-crime areas. Consequently, supposing that the statute focuses on high-crime areas is difficult to justify.

This wide variety of possible core purposes for the statute means that it effectively does not have a core. A court cannot say that a person's conduct falls within the hard core of a statute when the possibilities for its core purpose are so many and varied. Consequently, because the legislature has not clearly indicated its intent, the statute lacks a hard core, and Petitioners have standing to challenge its vagueness on its face.

Petitioners have argued that the vague statutory language in §893.13(1)(i) does not adequately specify what a public housing facility is, and its vagueness invites arbitrary and discriminatory enforcement. Accordingly, this Court should hold that the statute is unconstitutional.

III CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, on this 10th day of August, 1993.

P. DOUGLAS BRINKMEYER