IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Appellant, :

vs. : Case No. 81,805

EUGENE REDDEN, JR., :

Appellee. :

_____ :

MANDATORY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF ON THE MERITS OF APPELLEE

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PRELIMINARY STATEMENT

The brief that follows is identical to the brief by Appellees filed in State v. Thomas et al., case number 81,724. This has been done for convenience, both to counsel as well as this Court, so that no one has to read or write what is essentially the same brief more than once. Undersigned counsel has moved to consolidate this case with Thomas, but his court has not yet ruled on this motion.

The records in the consolidated cases in Thomas are each numbered differently, and referring to the records in these cases is difficult. This brief refers to the transcript of the hearing in the Polk County cases by the letter T and will use the court reporter's page numbering rather than the clerk's numbering. Other documents in the Polk County and Hillsborough County records will be referred to by their name and internal page number.

STATEMENT OF THE CASE AND FACTS

Although Appellant has mentioned this fact in its brief, Appellees would nevertheless emphasize that two of the Appellees, Bowles and Porter, were charged with violating narcotics laws near a privately owned housing complex whose tenants received federal rent assistance. According to a letter from the manager of the housing complex (Bowles/Porter appellate record at 64),

> Kenneth Court Apartments is not a Tampa Public Housing property. Kenneth Court is a privately owned complex insured pursuant to Section 221(d)3 of the National Housing Act. HUD has entered into a Section 8 Rental Assistance Contract which provides housing assistance to the low income families who live at Kenneth Court Apartments.

SUMMARY OF THE ARGUMENT

I. The vague statutory language improperly permits and encourages arbitrary and discriminatory enforcement against a sector of the populace that has traditionally been the object of police prejudice. The statute does not provide adequate notice of what it forbids because it could apply to numerous facilities that a person could not reasonably know that it applied to. It has so many possible meanings that it has no hard core. Consequently, Appellees have standing to challenge its vagueness on its face. In any event, Appellees have standing because a privately opened complex is not within the hard core of the statute.

II. The statute violates the equal protection doctrine because, under the State's interpretation, it expressly means and intends to punish poor persons who violate the narcotics laws near or in their homes more harshly than rich persons who commit the same acts near or in their homes.

III. The statute lacks a rational basis because the commission of crime at a public housing facility is not a circumstance which warrants an additional criminal sanction. The seriousness of a crime does not generally depend on the place where it is committed, absent the existence of some other substantial state interest. No rational basis exists for distinguishing between public and private housing facilities. Finally, the means chosen in the statute is not rationally related to the end desired.

ARGUMENT

ISSUE I

THE STATUTE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO PROVIDE ADEQUATE NOTICE OF WHAT IT FORBIDS AND ALLOWS FOR DISCRIMINATORY ENFORCEMENT.

In its initial brief, the State makes two arguments to support the constitutionality of section 893.13(1)(i), Florida Statutes (1991). 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 Appellant at 13. These definitions, the State thinks, provide sufficient notice of what the statute forbids. Second, the State argues that Appellees do not have standing to attack the vagueness of the statute as applied to hypothetical situations not their own. "Because [appellees] made no claim that their conduct was not covered by section 893.13(1)(i), their contention that the statute

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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 1979 5th edition of Black's, however, contains no definition of or reference to public housing. Undersigned counsel's Webster's New Universal Unabridged Dictionary, 2d ed., likewise has no definition of public housing.

covered too many possibilities should not have been considered by either the trial court or Second District." Id. at 16.[2]

In response, Appellees 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, Appellees do have standing to challenge a statute which vaguely allows discriminatory enforcement and which lacks a "hard core," particularly when the State charged two of the Appellees with selling narcotics near a private housing facility.

A. The vague statutory language improperly permits and encourages discriminatory enforcement.

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

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[2] At "the core of the State's argument" in the Second District was a claim that the statutory language did not determine guilt or innocence but rather determined only the level of penalty. The vagueness doctrine therefore was not needed to prevent speculation about the criminality of possibly innocent conduct. Brief of Appellee in the Second District at 16.

In this Court, however, Appellee has apparently abandoned the "core" of its argument, and rightly so. The potential for arbitrariness and the incentive for discrimination become even greater when greater penalties can be imposed pursuant to vague statutory provisions. Criminals as well as innocent persons are entitled to clarity in sentencing so that they understand the consequences of their actions. See United States v. Batchelder, 442 U.S. 114, 123 (1979) ("It is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.' . . . [V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.").

> 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, 357-58 (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, 993-94 (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 Appellant at 13, 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.

Appellees discusses this point further in Issue II. Suffice to say here that the police may very well not use this statute against the "official," "low-rent," government-funded housing project for the elderly located in a middle class neighborhood a few blocks from undersigned counsel's office in Bartow, 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. That the Polk County prosecutor in this case shared this prejudice is obvious from his amended response to the motion to dismiss (p. 5). "It is common knowledge that these housing projects . . . have become a cesspool of drugs and violence and are on the verge of collapse."

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 . . . 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.

B. The statute fails to provide adequate notice of what it forbids.

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, 346 So. 2d 991 (Fla. 1977); Bertens v. Stewart, 453 So. 2d 92 (Fla. 2d DCA 1984). For this reason, the third district's observation is inapposite that the phrase "public housing facility" is found in another statute, § 420.0003(3)(d),

Fla. Stat. (1989), because this statute is a civil statute which does not need the greater certainty required for penal statutes. Hernandez v. State, 18 Fla. L. Weekly D1220, D1221 (Fla. 3d DCA May 11, 1993).

In this instance, the "public housing facility" is not defined either in section 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).

1. The vagueness of "facility."

For example, "facility" might refer only to actual residences, or, alternatively, it might vaguely refer to anything associated with a housing residence. These facilities might or might not include swimming pools, sheds, garages, garbage dumpsters, playgrounds, or parking lots across the street from public housing residences. "Facilities" such as playgrounds and swimming pools can be run by a public housing authority and yet have no obvious connection to a residential building. The second district correctly found that 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?

State v. Thomas, et al., 18 Fla. L. Weekly D1067, D1067 (Fla. 2d DCA April 21, 1993).

The third district has defined the term "facility" as "something that is built or installed to perform some particular function." Hernandez, 18 Fla. L. Weekly at D1221, quoting Black's Law Dictionary 531 (5th ed. 1979). This definition is hopelessly vague on its face. Everything made by humans is "built or installed to perform some particular function."[3] This definition wholly fails to address the second district's reservations about this word and wholly fails to clarify the legislature's intent. Serious questions still exist about the legislative intent with respect to housing authority swimming pools and sewage facilities; even more serious questions remain about how citizens could be expected to know which facilities were included.

As the en banc panel of Polk County judges stated in its "Amended Order on Defendants Motion to Dismiss," a statutory definition of housing project is found in section 421.03(9), Florida Statutes (1991). According to page 2 of the order, this statute

> defines housing projects as any real or personal property set aside or acquired for the

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[3] According to this definition, the computer on which undersigned counsel is presently typing this brief is a "facility." Consequently, if a secretary for a city housing authority took her city-owned portable computer home one night, it would be a portable "public housing facility." Narcotics sellers would have to learn to get out of her way as she drove home. This example is perhaps absurd but it does illustrate the vagueness of the statutory language.

> public purpose of providing low cost housing for low income individuals, parks, recreation, community services such as roads, sewers, dwellings, apartments, site preparation, gardens, administrative, or educational facilities. It is also defined as planning states of any construction project through construction, use, or demolition of the facilities. These projects are funded with state, federal, or municipal monies.

Thus, section 421.03(9)'s definition includes construction projects, parks, schools, roads, sewers, housing authority headquarters, and empty lots soon to be the site of such facilities. Other "facilities" might include the real estate offices of Century 21 (which are open to the public), or mortgage divisions of large banks which administer federally guaranteed mortgage programs, or food preparation kitchens which supply government-owned housing such as military barracks. The en banc court correctly found that section 893.13(1)(i) was vague under this definition, because a person of reasonable intelligence could not readily be aware that schools, parks, roads, and even empty lots were included within the scope of the statute. The statute fails to define "facility" and, as these examples illustrate, therefore forces people to guess what it means.

The State argues that section 893.13(1)(i) ("public housing facility") should not be read in pari materia with section 421.03(9) ("housing project"), because the two statutes use different words and have different purposes. Brief of Appellant at 12-13 n.6. This argument is wrong and misses the point.

Although the wording is slightly different, a plain reading of the two phrases indicates that they do likely have related subject

matters -- "public housing facility" and "housing project" appear to be closely related phrases. The State's reliance on Goldstein v. Acme Concrete Corporation, 103 So. 2d 202 (Fla. 1958), is therefore inapposite. Goldstein said that mechanic's liens and workmen's compensation statutes (which plainly involve substantially different subjects) could be deemed the same subject and read in pari materia, "in a broad sense, . . . to the extent that an understanding of one may aid in the interpretation of the other." Id. at 204. A similar conclusion applies here.

Moreover and more importantly, section 421.03(9) in this context provides one reasonable interpretation of the section 893.13(1)(i) language. As Appellees argue below, other interpretations are certainly possible. The point is not that section 421.03(9) represents the correct interpretation of section 893.13(1)(i) but rather that (1) it is one of many reasonable interpretations and (2) courts cannot confidently determine that it is incorrect. Consequently, because section 893.13(1)(i) is subject to this as well as many other reasonable interpretations, the statute is unconstitutionally vague.

2. The vagueness of "housing."

The word "housing" is likewise vague. The second district correctly found that

> [t]he 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 chari-

> table owned and operated facilities available for occupancy or "shelter use" by the public included? The possibilities extend ad infinitum.

Thomas, 18 Fla. L. Weekly at D1067. Another question the second district might have asked with contemporary relevance is whether "housing" includes tent cities for victims of hurricanes. The statutory language fails to specify what "housing" means and therefore is unconstitutionally vague.

3. "Public" as "publicly available."

The word "public" is even more vague. For example, "public" might refer to housing facilities available to the public. At the hearing in Polk County, Judge Green pointed out that "public" had to have this meaning of "publicly available" and could not mean "publicly provided," because the latter interpretation would include Coast Guard housing and military barracks. (T36-38) In response, however, the prosecutor refused to restrict the statute in any way and said that the statute extended to both publicly provided and publicly available housing. (T38)

Interpreting "public" to mean "publicly available" would be consistent with its meaning in "public park," a phrase also found in section 892.13(1)(i). In common parlance, parks are public not because the government provides, owns, or subsidizes them but because anyone can go there. A developer might create a privately-owned but nevertheless public park near a large office building. Conversely, some government-owned parks are closed to the public. The dictionary definition of public in this sense likewise assumes public availability and makes no reference to government ownership

or financing -- "maintained for or used by the people or community: a public park." The American Heritage Dictionary of the English Language, p. 1056 (1978). Because "public housing facility" and "public park" are in the same statute and deal with the same subject, the words "public" in these phrases are in pari materia and should be read in connection with each other as having the same meaning, i.e., open to the public.

Under this interpretation of "public," the statute's core purpose would be punishing "public" or obvious and flagrant narcotics activity. This interpretation would dovetail well with the statements of those who routinely complain about the conspicuous "drug stores" in certain areas and the obviously crime-infested environment around the children there. Not surprisingly, the State sounded this well-worn theme in its brief to the second district. "Drug peddlers brazenly ply their trade in these areas. . . . Of course the greatest victims are the children who cannot avoid [their] environment. . . ." Brief of Appellant in Second District at 17-18.

If the statute's core goal is preventing "public" or open drug dealing, however, then criminalizing drug dealing in people's housing facilities is a peculiar means of reaching this goal. The statutory proscription presumably includes narcotics activity inside people's apartments, which normally occurs in private and is not brazen and blatant. If the statute's goal is preventing open drug dealing, then the statute would focus on this problem as it occurs in the open -- in streets, playgrounds, or shopping malls --

rather than focus on housing facilities, which by their nature entail the existence of privacy.

Furthermore, interpreting "public" to mean "publicly available" would include within the statute virtually all housing projects of any consequence. Most if not all housing developments, apartment buildings, and condominiums would be included because federal law does not allow such projects to discriminate in any way. They must make their properties available to everyone in the public who qualifies to make the mortgage or lease payment. The middle class suburban development where undersigned counsel lives would certainly be included within the statute's scope, since houses in this development are available to anyone who has the money to buy or can qualify for financing. Yet, no one could be expected to know that this suburban development was included within the statutory prohibition. Consequently, this rational interpretation of the statute as referring to "publicly available" facilities exemplifies its vagueness.

4. <u>"Public" as "publicly owned."</u>

Alternatively, "public" might mean government-owned. This interpretation of "public" would be consistent with its meaning in "public or private college, university, or other postsecondary educational institution," a phrase also found in section 893.13 (1)(i). A public college is owned by the government, while a private college is not, although a private college might be government-subsidized in various ways. This interpretation would

also be somewhat consistent with the meaning of "public park," because most public parks are government-owned.

Under this interpretation of "public," the core purpose of the statute would be protecting government property. If this is the statute's purpose, however, then it seemingly should apply to all government property, such as courthouses, city halls, legislative buildings, defense installations, airports, harbor terminals, border patrol facilities, welfare offices, and highways, as well as public schools and public parks. Defining "public" to mean government-owned would raise severe equal protection difficulties, because little rational basis would exist for protecting only one type of government property. In addition, the two-hundred foot radius around the publicly-owned housing facility would mean that many private houses would be included as well.

Moreover, little rational basis exists for extending greater legal protection to any governmental property merely because it is publicly owned. A crime committed on private property is not less blameworthy than the same crime committed on public property. The idea that a government may always punish violations of its own property rights more harshly than it punishes property violations against others is repugnant and inconsistent with the individual and private property rights on which our constitution is based. If anything, private property rights are more important than governmental property rights in our system of law.

Finally, even if the statute refers only to government-owned housing facilities, it still is vague. As the judges pointed out

below, it still includes a wide variety of facilities, such as college dormitories (T23), homes of state governors or college presidents, military or Coast Guard barracks (T21-22, 37), prisons, juvenile detention centers, illegal alien detention camps, probation and restitution centers, workcamps, migrant housing, sleeping shelters for the homeless, park ranger residences, hospitals, halfway houses for alcoholics, mental institutions, HRS developments for the mentally retarded, nursing or retirement homes, and residential institutions or schools for the deaf, blind, and other handicapped persons. The vagueness and confusion here are compounded by the fact that many of these "public" facilities, such as halfway houses and jails, are now leased from private owners or are run by private agencies for profit under contract to the government and are not government-owned. This wide spectrum of facilities that qualify under an interpretation of "public" as "government-owned" illustrates again the statute's vagueness.

5. "Public" as "publicly subsidized."

Notwithstanding the vagueness of interpreting "public" as "publicly owned," the State for obvious reasons wants to extend the statute even further and include "publicly subsidized" facilities as well. For example, the Polk County prosecutor's "bottom line" was that a housing facility is public if it is "federally subsidized." (T20) The attorney general suggests somewhat obliquely that subsidized facilities are included within the statutory proscription ("low-rent housing owned, sponsored, or administered by a government"). Brief of Appellant at 13. The third district

likewise defined "'public housing' . . . to encompass affordable, government subsidized housing for individuals or families with varied needs." Hernandez, 18 Fla. L. Weekly at D1221.

The State wants to include subsidized facilities within the statute because housing projects are often partly or wholly owned by private for-profit or non-profit organizations which receive government assistance. Appellees Bowles and Porter were in fact charged with violating narcotics laws near a privately owned apartment complex whose tenants received government rental assistance. Many of these projects would be difficult for most citizens to distinguish from projects that are wholly government-owned. Not including such projects within the statute would create obvious vagueness problems because citizens would be forced to guess which projects were covered by the statute. The equal protection problems would be equally severe because little rational basis would exist to protect government-owned developments but not protect similar government-subsidized developments. For these reasons, the State wants to include subsidized facilities within the statute's domain.

If "public" means "publicly subsidized," however, determining the core purpose of the statute is difficult. The government's additional interest in projects it has partially supported is hardly so great that it warrants the provision of greater protection against drugs for these projects than it provides for similar private housing projects. No clear public interest appears to be involved under this interpretation of the statute.

In any event, extending "public" to mean "publicly subsidized" does not cure the vagueness problem and makes it even worse. To illustrate, suppose that four apartment buildings were built at the same time, one mile apart. One was sold to a city housing authority, one was leased to a city housing authority, one had tenants who received government rent subsidies, and one remained privately owned with no government assistance to tenants. None of the buildings had signs outside saying what they were. Each building looked alike. How could anybody know that the first three buildings were "public housing facilities," but the fourth was not? The statute is thus classically vague because it forces citizens to guess which acts will be more penalized. "[A] statute which either forbids or requires the doing of an act in terms so vague that anyone of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Brock v. Hardie, 154 So. 690, 694 (Fla. 1934).

As defense counsel in Polk County persuasively argued, extending "public" to mean "publicly subsidized" makes the vagueness problems insurmountable. For example, the United States Congress has authorized the Coast Guard "to lease housing facilities at or near Coast Guard installations, wherever located, for assignment as public quarters to military personnel." 14 U.S.C. § 475 (1991) (emphasis added). This statute later refers to these privately-owned leased quarters as "public housing facilities" which could be leased on an "individual or multiple-unit basis." Thus, if the

statute's scope includes government-subsidized facilities, then it would include leased single-unit homes for Coast Guard personnel in cities near Coast Guard stations. No person of reasonable intelligence could be expected to know this.

Defense counsel argued that the federal government subsidizes numerous other facilities through different programs and with varying income restrictions. For example, the federal Department of Housing and Urban Development (HUD) administers the "Section 8" program which provides rent assistance to private landlords for tenants living in their developments. (T8) This program subsidizes all of the units in some developments, while other developments have only a few individual units subsidized. (T8) Some tenants can also get a Section 8 certificate, which they can use to help rent any approved private apartment or house. (T9) They might rent one-half of a privately owned duplex in part with public money while the other half might be rented entirely privately. "(T9) HUD has subsidized mortgage programs which allow developers to take a low interest loan for constructing housing projects. (T9-10) These programs typically require that low-income tenants live there. (T10) Farmer's Home programs provide subsidized mortgages or rent payments for low-income housing for farm workers. (T10-11) Numerous other federally-funded mortgage programs -- FHA, Fannie Mae, Ginnie Mae, Freddie Mac -- also help people buy houses. (T11)

In addition to the federally-funded programs, Florida has numerous state-funded housing programs which provide varying levels of public support for private housing facilities. The legislature

has found that first-time home buyers and elderly persons have a special need for government programs that will stimulate private housing activity. § 420.0002, Fla. Stat. (1991). State, regional, and local governments must emphasize partnerships with the private sector to provide affordable and decent housing. § 420.0003(1), Fla. Stat. (1991); § 420.0003(3)(b), Fla. Stat. (1991). State and local governments should provide incentives to encourage the private sector, and state funds should be heavily leveraged to provide a maximum private commitment. § 420.0003(3)(e), Fla. Stat. (1991). Mixed income projects should be encouraged, to avoid a concentration of low-income persons in one project. § 420.0003(3)(e)(8), Fla. Stat. (1991).

In accordance with these goals, the Florida legislature has enacted statutes providing for non-profit housing development corporations, § 420.101, Fla. Stat. (1991), a housing predevelopment trust fund to provide loans and grants to non-profit organizations for farmworker housing, § 420.307, Fla. Stat. (1991), an elderly homeowner rehabilitation program to make loans to low-income elderly homeowners, § 420.34, Fla. Stat. (1991), neighborhood reinvestment corporations to create partnerships between the private sector and government to rehabilitate declining residential neighborhoods, § 420.424, Fla. Stat. (1991), a state housing finance agency to encourage the investment of private capital in residential housing, § 420.502, Fla. Stat. (1991), an affordable housing trust fund to provide loans to low-income persons to build or rehabilitate housing, § 420.604, Fla. Stat. (1991), local coalitions for the home-

less in conjunction with private groups and organizations to provide temporary shelter for the homeless, § 420.623, Fla. Stat. (1991), pockets-of-poverty programs for farmworker housing in Belle Glade and Immokalee, § 420.803, Fla. Stat. (1991); § 420.812, Fla. Stat. (1991), and a program to maintain housing for the elderly by providing financial assistance to non-profit organizations that operate housing communities. § 420.903, Fla. Stat. (1991).

In the face of this huge variety of federal and state housing subsidies and public/private partnerships, determining under a definition of "public" as "publicly subsidized" which facilities should qualify as public housing facilities and which should not is impossible. Even more importantly, no ordinary citizen could be expected to know which facilities would qualify. Accordingly, the vagueness problems become insuperable if the phrase "public housing facilities" includes within its domain any or all "publicly subsidized" residences.

5. "Public" as "low-income."

A final possible definition of "public housing facility" is to restrict it to housing projects for low-income persons. The State proposed this definition in the summary of the argument of its initial brief in the second district, but it may or may not have abandoned this definition in this Court. Appellant's brief in this Court initially suggests that the statute applies to "official" "low-rent" housing, which might or might not be restricted to "low-income" housing. Brief of Appellant at 13. Later, however, Appel-

lant cites several federal findings regarding "public and other federally assisted low-income housing." Id. at 14.

The first district and third district were equally vague on this score. The first district never even said what "public housing facility" meant and held only that everybody knew what it meant. Brown v. State, 610 So. 2d 1356, 1358 (Fla. 1st DCA 1992). Given the obvious problems with the statute, this analysis was decidedly unhelpful.

The third district's opinion was only marginally clearer. It initially referred to the defendant's argument that the statute was vague because "'facility' could include . . . [facilities other than] government subsidized housing for low income residents." Hernandez, 18 Fla. L. Weekly at D1221. This reference to the defendant's argument might or might not have indicated that the third district was restricting the statute's scope to low income housing. Later, however, the court defined "public housing" as "government subsidized housing for individuals or families with varied needs." Id. This definition would include middle income persons such as state governors in their state-provided homes, students in dormitories, military personnel in barracks, or inmates in prisons.

Thus, Appellant in its brief to the second district said that "public housing facility" referred to "low income" housing. Appellant's brief in this Court now seems to have disclaimed that idea, except that it confusingly refers to low income persons later in its brief. The first district did not define the statutory

language at all. The third district's opinion, like the attorney general's opinion, is at odds with itself on this score. Appellees would like to know: Does or does not the phrase "public housing facility" refer only to places with low income residents? The complete inability of the first district, the third district, and the attorney general to answer this question clearly is itself dispositive evidence that the statute is vague. The assistance of the legislature is necessary to clarify its intent in this regard.

If the State is now defining "public" as "low-income," other problems arise. First, section 893.13(1)(i) refers to "housing facility" rather than "housing project." While these two phrases are related and the legislature might even have thought they had the same meaning, "housing facility" does not have the same connotation of indigence that "housing project" might have.

Second, defining "public" to mean "low-income" or "government subsidized" is inconsistent with the meaning of "public" in other parts of section 893.13(1)(i). The users of "public" universities or "public" parks are usually not low-income persons in need of government assistance. If section 893.13(1)(i) is to be interpreted coherently, then the three instances of the word "public" in that section should have approximately the same meaning. The State's definition, however, would give these three instances substantially different meanings.

Third, defining "public" to mean "low-income" would lead to more vagueness because the concept of "low-income" is not susceptible to clear definition. If "low-income" means "subject to income

requirements," undersigned counsel's own house in a middle class suburb would qualify, because it was purchased through a state-funded bond program which has income requirements for first-time home-buyers. Alternatively, "low-income" might be defined consistently with section 421.03(10), which states that "'[p]ersons 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." This definition makes the meaning of the statute depend on what the housing authority thinks. Most people have no way of knowing and could only speculate what a housing authority might think. The vagueness doctrine forbids forcing people to speculate on the meaning of a statute. Adding a "low-income" requirement makes the statute more vague rather than less.

Fourth, interpreting the statute to provide additional penalties for poor people who possess narcotics in their home raises severe equal protection problems which will be discussed in Issue II.

Fifth, by adding the vague concept of "low-income" or "government subsidized" to the statute where it did not previously exist, the State in effect is writing its own statute and asking this Court to act as a legislature by adopting the State's interpretation of the vague language. This Court should not intrude on the legislative domain by rewriting the statute, because this Court can have no confidence that it is acting correctly, absent a clearer indication of the legislative purpose. This Court does not have

the competence or authority to insert and define "low-income" or "government subsidized" in a narcotics statute, without clear direction from the legislature.

> The Florida Constitution requires a certain precision 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 state (sic). The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet undetermined.

Brown v. State, 358 So. 2d 16, 20 (Fla. 1978) (citations omitted).

Sixth, and most importantly, interpreting "public" as "low-income" does not solve the vagueness problems already mentioned. The statute could still mean either "publicly available" or "publicly supported." It could still apply to a large variety of government-owned facilities, such as prisons, alien detention camps, workcamps, migrant housing, sleeping shelters for the homeless, halfway houses for alcoholics, mental institutions, nursing or retirement homes, and residential institutions or schools for the deaf, blind, and other handicapped persons. Extending the definition to publicly-subsidized facilities would still make it impossible to determine which facilities were sufficiently subsidized to qualify for protection under the statute.

In short, restricting the statute's scope to low-income housing does not alleviate any of its vagueness. For these reasons, section 893.13(1)(i) is unconstitutionally vague.

C. Not requiring a mens rea violates substantive due process.

Section 893(1)(i) does not require proof that defendants know they are near a public housing facility. Proof of this mental element is unnecessary for violations of the statute forbidding narcotics violations within one thousand feet of a school. State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989), affirmed and lower court opinion adopted in pertinent part, 558 So. 2d 1 (Fla. 1990). The schoolyard statute is different from the public housing statute, however, because narcotics users near schools can look around to determine whether a school is nearby. The fact that a building is a school is obvious. By contrast, narcotics users near a public housing facility can look around and not know it is there. These places often do not have signs and can look like every other building in the area.

For this reason, Hernandez was decidedly disingenuous when it claimed that, to avoid additional penalty, narcotics users "need only refrain from illegal drug activity in the vicinity of public housing." 18 Fla. L. Weekly at D1221. This claim incorrectly assumed that users can easily determine whether a particular place is a public housing facility. It also overlooked the prevalence of police stings in these cases in which the police determine the location of the narcotics purchase.

Appellant recognizes that this Court has consistently allowed the legislature to dispense with a mens rea element. See, e.g., State v. Medlin, 273 So. 2d 394 (Fla. 1973). These decisions, however, are for crimes like felony murder, in which the intent may fairly be said to transfer from the felony to the homicide, or like capital sexual battery or DUI manslaughter, in which the perpetrator may take steps or precautions to avoid the increased penalty. For example, in Medlin, the defendant could have taken steps to learn that the capsule in his possession that he delivered was a barbiturate. The present cases are different. It is fundamentally unfair and a violation of substantive due process when defendants not only do not know that their conduct is subject to an increased penalty but cannot know it. Accordingly, this Court should determine that the statute is unconstitutional.

D. Appellees have standing to challenge the statute's vagueness.

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. "Because respondents 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 not have been considered by either the trial court or the Second District." Brief of Appellant at 16. According to the State, because Appellees' conduct falls within the statute's hard core, they are disentitled to argue that the statute's outer bounds can be vaguely

applied to other persons in other situations. This argument is incorrect in several respects.

First, contrary to the State's claims, Appellees Bowles and Porter did argue "that their conduct was not covered by section 893.13(1)(i)." They filed a motion to dismiss because the Kenneth Court apartments were a privately owned facility whose tenants received federal rent assistance. They argued logically that a private housing facility could not be a public housing facility. Judge Mitcham denied the motion to dismiss, but he said he "would be at a decided advantage if under this statute public housing had been defined." (pages 26-36 of the Bowles/Porter record) In light of the judge's comments that the legislature had not defined the phrase "public housing," Appellees Bowles and Porter patently have standing to challenge the statute's vagueness and lack of definition.

Because Bowles and Porter have standing, any issue that the other Appellees do not have standing is moot. If this Court rules that the statute is unconstitutional with respect to Bowles and Porter, then it can hardly rule that the statute is constitutional for everybody else. This result would be wholly anomalous, because the other Appellees could then be convicted for an unconstitutional crime.

Second, Appellees 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 persons who bore their displeasure and whom they ultimately arrested. Appellees 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).

Third, 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 arguably be applied to many different and varied situations, and this Supreme Court of Florida 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 statutes leave unanswered. Brown v. State, 358 So. 2d 16, 20 (Fla. 1978). This Court also has a supervisory duty to the lower courts of this State to explain the law so that it may be readily and clearly applied. For these reasons, because the number of possible but questionable applications of section 893.13(1)(i) is large, adopting the State's suggested "case-

by-case approach," Brief of Appellant at 19, rather than say now what the law means, 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 Appellees 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.

Id. at 577-78 (citations omitted).

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).[4] In the present case,

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[4] At oral arguments in the second district, the court directly asked the assistant attorney general what she would tell a jury if it asked for a definition of public housing facility. She was (continued...)

the statute's scope is so large that it has no core and no jury instructions could be devised.

Appellees have already discussed many of the possible cores of the statutory language. 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, however, then it should seemingly criminalize such conduct in all such areas and not only around housing facilities. Another core purpose might be protecting government-subsidized private property. This brief has already pointed out, however, that this purpose is difficult to justify.

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, Appellees do not understand why only those poor persons who receive government assistance have this greater right to protection. 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 is valid for this

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[4](...continued)
unable to provide a definition and was only able to say lamely that it would have to be determined on a case-by-case basis.

purpose, and the attorney general claimed to the second district that the instant statute also protects children. Brief of Appellant in the Second District at 18. 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 seemingly should apply to private residences for the wealthy as well as public housing 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 areas. Many housing projects, however, are not 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 Appellees have standing to challenge its vagueness on its face.

Appellees have argued that the vague statutory language in section 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 affirm the decision of the lower court that the statute is unconstitutional.

ISSUE II

THE STATE'S INTERPRETATION OF THE STATUTE AS FOCUSING ON LOW-INCOME OR GOVERNMENT SUBSIDIZED HOUSING VIOLATES THE EQUAL PROTECTION DOCTRINE BY INVIDIOUSLY DISCRIMINATING AGAINST THE POOR.

Defense counsel did not argue in their written motions to dismiss that section 893.13(1)(i) discriminates against the poor. In addition, the Polk County en banc court below restricted debate to the vagueness issue. (T4) Because this Court has the obligation to affirm the trial court by any means possible, however, the defense did not need to preserve this equal protection argument for appeal.

If the State's interpretation of the statute as applying to government-subsidized or low-income housing is correct, then it incontestably means and intends that poor persons who engage in narcotics activity in or near their low-income housing will be punished more harshly than rich persons who engage in the same activity in or near their homes. Although rich persons will sometimes violate section 893.13(1)(i), it will usually operate against the poor persons living in the area of low-income housing facilities. Poor persons who possess cocaine in their home will be guilty of a first degree felony and will not be eligible for parole or gain-time according to section 893.13(1)(i)(1), while rich persons who commit the same offense in their home will be guilty only of a third degree felony and may be eligible for parole and gain-time. § 893.13(1)(e), Fla. Stat. (1991). The statute might

as well state expressly that poor persons who commit narcotics offenses in their home should be punished more harshly, because this is the statute's clear intent as interpreted by the State and applied by the police.

This invidious discrimination against the poor violates the equal protection doctrine, because it cannot withstand the heightened scrutiny applicable to poverty-based classifications in criminal cases. To be sure, in civil cases, the Supreme Court has "rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny." Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 458 (1988). In civil cases, "poverty, standing alone, is not a suspect classification." Harris v. McRae, 448 U.S. 297, 323 (1980).

The Supreme Court, however, appears to have applied a strict or heightened scrutiny to poverty classifications in the criminal context. Kadrmas, 487 U.S. at 460 n.*, for example, expressly distinguished "the criminal sentencing decision at issue" in Bearden v. Georgia, 461 U.S. 660 (1983). The present case likewise involves a criminal sentencing decision. In Maher v. Roe, 432 U.S. 464, 471 (1977), the Court held that financial need does not generally identify a suspect class, but it distinguished its prior cases which involved "the criminal justice system, a governmental monopoly in which participation is compelled." Id. at 471 n.6.

Similarly, in Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963), the Court required

States to provide free counsel to all indigents on their first appeal of right.

> [A] State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. . . . [T]he issue is whether or not an indigent shall be denied the assistance of counsel on appeal. . . . [T]he evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys "depends on the amount of money he has."

372 U.S. at 355 (citations omitted). In the present case also, the kind of justice that narcotics offenders in low-income housing enjoy depends on the amount of money they have. Finally, in several cases, the Court has disallowed imprisonment when the defendant was too poor to pay fines and disallowed revocation of probation when the defendant was too poor to pay restitution and a fine. Bearden; Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970). Thus, the United States Supreme Court appears to have consistently applied heightened scrutiny to statutes which operate to discriminate against the poor in criminal cases.

Florida cases have also held that imprisoning criminals because they are indigent violates the equal protection doctrine. P.B. v. State, 533 So. 2d 883 (Fla. 3d DCA 1988); V.H. v. State, 498 So. 2d 1011 (Fla. 2d DCA 1986). Whether a Florida statute provides unequal protection depends in part on whether the statute involves a suspect class or impinges on fundamental rights.

> In evaluating claims of statutory discrimination, a statute will be regarded as inherently "suspect" and subject to "heightened" judicial scrutiny if it impinges too greatly on fundamental constitutional rights flowing from

> either the federal or Florida Constitutions, or if it primarily burdens certain groups that have been the traditional targets of irrational, unfair, and unlawful discrimination.

De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So. 2d 204, 206 (Fla. 1989).

In criminal cases, poverty-based classifications satisfy this De Ayala test. The poor have been "traditional targets of irrational, unfair, and unlawful discrimination" from the police in criminal matters. The police have historically been biased against the lower classes and, conversely, have overlooked white collar crime by rich persons. In addition, the Florida Constitution's prohibition against imprisonment for debt in Article I, section 17, emphasizes Florida's special constitutional interest in protecting the poor from discriminatory imprisonment.

This Court has now squarely held that the equal protection doctrine applies with special force to indigents accused of crime.

> The Equal Protection Clause of our state Constitution was framed to address all forms of invidious discrimination under the law, including any persistent disparity in the treatment of rich and poor. We conclude that our clause means just what it says: Each Florida citizen -- regardless of financial means -- stands on equal footing with all others in every court of law throughout our state. Nowhere is the right to equality in treatment more important than in the context of a criminal trial, for only here can a defendant be deprived by the state of life and liberty.

Traylor v. State, 596 So. 2d 957, 969 (Fla. 1992) (footnotes and citations omitted; emphasis added). Consequently, under the De Ayala test, Florida's equal protection clause found in Article I,

section 2 -- like the federal constitutional right to equal protection in amendment 14 -- demands heightened scrutiny of section 893.13(1)(i)'s increased criminal penalties for acts committed in or near low-income housing.

In light of this heightened or strict scrutiny that is properly applied to poverty classifications in the criminal context, section 893.13(1)(i) cannot stand under either Florida or federal law, because it punishes criminal acts committed by poor persons in their homes more harshly than the same acts committed by rich persons in their homes. The State's expected counterclaim that the statute does not discriminate on its face and is intended to protect poor persons rather than punish them is merely an exercise in semantics and ignores the reality of the situation. "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." Williams v. Illinois, 399 U.S. at 242, quoting Griffin v. Illinois, 351 U.S. at 17. The reality is that the police will single out poor persons in poor areas, and the justice system will punish more harshly those persons who live there and violate narcotics laws.

The additional imprisonment for being poor provided by section 893.13(1)(i) is invidious discrimination by any standard. Accordingly, the statute violates the equal protection doctrine, and this Court should rule that it is unconstitutional.

ISSUE III

THE STATUTORY FOCUS ON PUBLIC HOUSING FACILITIES LACKS A RATIONAL BASIS.

All statutes have a basic requirement of rationality. This requirement is sometimes founded on substantive and procedural due process, which requires the State to act fairly in dealing with individuals and not to impose criminal penalties on innocent conduct. The requirement is sometimes founded on equal protection, which prohibits differences in treatment between similarly situated classes of individuals. In Florida, the requirement is sometimes founded on the view that a legislature's use of its police power must be reasonably appropriate to accomplish its purposes. See Horsemen's Benevolent and Protective Association, Florida Division v. Division of Pari-mutuel Wagering Department of Business Regulations, 397 So. 2d 692 (Fla. 1981); State v. Lee, 356 So. 2d 276 (Fla. 1978).

In many cases, these different rationality requirements converge and overlap, as they do in the case at hand. See Bearden v. Georgia, 461 U.S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis of these cases.") Consequently, Appellees have chosen to treat these issues together rather than separately. Appellees argue that the statutory prohibition against drug-dealing at public housing facilities lacks rationality because (1) the commission of crime at a public housing facility is not a circumstance which warrants an additional criminal sanction, (2) the seriousness of a crime does not generally

depend on the place where it is committed, absent the existence of some other substantial state interest, (3) no rational basis exists for distinguishing between public and private housing facilities, and (4) the means chosen in the statute is not rationally related to the end desired.

First, narcotics activity at a public housing facility is not worse than narcotics activity committed elsewhere. They are in effect the same equally reprehensible acts which should be punished by the same penalties. Imposing additional penalties for drug dealing at public housing violates substantive due process because it is unreasonable to impose an additional penalty without a corresponding increase in the criminality of the act punished. State v. Saiez, 489 So. 2d 1125, 1129 (Fla. 1986).

Second, the State may argue that the government may impose greater penalties for offenses committed in certain areas, in order to create crime-free zones. This argument might be valid when other interests are involved. For example, the state's special interest in protecting children at schools reasonably justifies increased penalties for drug dealing near schools. Burch v. State, 558 So. 2d 1 (Fla. 1990). Contrary to the State's claims, however, this special interest does not justify a similar protection for public housing projects, which are often heavily or solely populated by adults.

Moreover, the mere fact that some public housing projects are high-crime areas also does not justify such legislation. Appellees wholly disagree that the legislature could enact a statute which

makes residents of Overtown in Miami or College Hill in Tampa ineligible for parole or gain-time, because these places are high-crime areas. Yet, this hypothetical statute is not substantially different from the statute in the case at hand, because most places in College Hill are likely within two hundred feet of a public housing facility. Similarly, the legislature could not punish crimes committed on Saturday more harshly, on the theory that crimes are frequently committed on weekends. This would be discrimination on the basis of place or of time without a rational basis and therefore a violation of equal protection. Dade County v. Keyes, 141 So. 2d 819 (Fla. 3d DCA 1962) (zoning ordinance restricting the location of some liquor stores was discriminatory); Arundel Corporation v. Sproul, 186 So. 679 (Fla. 1939) (property of persons similarly situated should be taxed equally).

Third, no rational basis exists for distinguishing between private and public housing facilities. Unlike the similar provision in the statute for public and private universities, the statute applies only to public housing facilities. The statute therefore expressly distinguishes between public and private applications of its terms. The legislature in fact rejected a motion on the floor to apply the statute to all residential facilities.

Both public and private housing facilities, however, are equally deserving of statutory protection against narcotics activity. The distinction between public and private residences is irrational because no reason exists to treat persons who deal in

drugs within two hundred feet of a public housing facility any differently than persons who deal in drugs within two hundred feet of a private housing facility. The statutory classification does not rest on some ground of difference which has a fair and substantial relation to the statute's purpose and which treats all persons similarly circumstanced alike. State v. Lee, 356 So. 2d 276, 279 (Fla. 1978) This classification is like the statute condemned in Rollins v. State, 354 So. 2d 61 (Fla. 1978), which irrationally distinguished between playing billiards in a billiard parlor and shooting pool in a bowling alley. See also Mikell v. Henderson, 63 So. 2d 508 (Fla. 1953) (cruelty to animals statute irrationally distinguished between cock fighting on steamboats and cock fighting on land); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (state could not rationally outlaw distribution of contraceptives to unmarried but not married persons).

Finally, the means selected must have a reasonable and appropriate relationship to the statute's purpose. Saiez; Horsemen's Benevolent and Protective Association. In this case, the means selected does not have a reasonable and appropriate relationship to its purpose, because it assigns additional penalties to all narcotics activity near public housing facilities without any regard to the actual character of the facility. A more carefully tailored approach would recognize that each facility is different. If the police believe that an area has become a hotbed for narcotics activity, then they certainly can apply greater enforcement tactics there. Increasing enforcement rather than irra-

tionally increasing penalties is the key to a reasonable and fair approach to the problem perceived.

CONCLUSION

This Court should affirm.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Gypsy Bailey, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, (904) 488-0600, on this 22nd day of June, 1993.

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