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KENTUCKY SUPREME COURT
File No. 2008-SC-899

ORLANDO SAXTON — APPELLANT

ON REVIEW FROM THE KENTUCKY
COURT OF APPEALS

V.

Appeal from Graves Circuit Court
Hon. Timothy Stark, Judge
Indictment No. 06-CR-00195

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT ORLANDO SAXTON

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Certificate required by CR 76.12(b)

The undersigned certifies that this brief was served by U.S. mail, postage prepaid, on the Hon. Timothy Stark, Judge, Graves Circuit Court, Courthouse, Box 5, 100 E. Broadway, Mayfield, Kentucky 42066; the Hon. David Hargrove, P.O. Box 315, Mayfield, Kentucky 42066-0315; the Hon. Josh W. Nacey, 503 North 16th Street, Murray, Kentucky 42071; and by messenger mail to: the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 on June 26, 2009. The record on appeal has been returned to the Kentucky Supreme Court.

JAMESA J. DRAKE

INTRODUCTION

This case concerns defendant's conviction for trafficking in a controlled substance (marijuana) within 1,000 yards of Graves County High School, KRS 218A.1411. That conviction is constitutionally invalid for two reasons. *First*, the Commonwealth was required to prove that defendant knew of his physical proximity to the school at the time he trafficked in marijuana, and it failed in that regard. *Second*, the Commonwealth offered no evidence to rebut the legal conclusion that the police entrapped defendant into trafficking within 1,000 yards of a school when they specifically arranged for a controlled buy at a location within 1,000 yards of a school.

The Court of Appeals concluded that KRS 218A.1411 was a strict liability offense and that defendant was not entrapped because the police "merely afforded [him] the opportunity to commit the offense at issue." Slip op. at 3-4, 5-6. The Court of Appeals was wrong in both regards. Defendant respectfully requests that this Court vacate his conviction for trafficking within 1,000 yards of a school and remand his case with instructions to enter a conviction for trafficking in marijuana.

STATEMENT CONCERNING ORAL ARGUMENT

This case presents two questions of first impression for this Court. Defendant respectfully requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Defendant sold marijuana to two informants at the Days Inn motel, which is located within 1,000 yards of Graves County High School. The informants, who were acting in conjunction with the Pennyrile Narcotics Task Force, specifically instructed defendant to meet them at the motel. A jury found defendant guilty of trafficking in a controlled substance in or near a school, and the trial court ordered him to serve an aggregate sentence of 16 years in prison.

ARGUMENT

I.

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT ON THE CHARGE OF TRAFFICKING IN OR NEAR A SCHOOL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS.

The Commonwealth was required to prove that defendant knew of his location vis-à-vis the school at the time he sold marijuana to the confidential informants. Because it failed to do so, defendant's conviction for trafficking within 1,000 feet of a school is unsound. *See Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (the Fourteenth Amendment guarantees that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."); *Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (Section 2 of the Kentucky Constitution embraces traditional concepts of due process).

PRESERVATION

Defendant moved for a directed verdict at the close of the Commonwealth's case and again at the close of all the evidence. The trial court denied defendant's motions. (VR: 5/31/07; 3:21:20, 3:56:00). On appeal, the Commonwealth claimed that defendant's argument – which he renews here – was unpreserved. The Court of Appeals disagreed. It addressed defendant's sufficiency argument as if it were preserved. Having granted discretionary review, this Court should likewise conclude that defendant's argument was preserved, and it should decide the case on the merits. However, to the extent that this Court is inclined to agree with the Commonwealth, its failure to prove an essential element of an offense constitutes palpable error, which this Court may correct. *See* CR 10.26 (so stating).

Moreover, the Court of Appeals has held, both in the instant case and in another case, that trafficking in or near a school constitutes a strict liability offense. *See Kirk v. Commonwealth*, 2009 WL 414482 (defendant did not seek discretionary review). If the Court of Appeals opinion stands, then many potential defendants may be wrongfully convicted. That fact alone militates in favor of palpable error review.

ARGUMENT SUMMARY

The analysis proceeds as follows. In part A, defendant sets out the culpable mental state statutory scheme. In part B, defendant demonstrates that the Court of Appeals erroneously applied that scheme. In part C, defendant discusses the cases in which this Court has correctly applied that scheme. In part D, defendant applies the

scheme to the trafficking in or near a school statute and concludes that the statute does not codify a strict liability offense. In part E, defendant demonstrates that the culpable mental state of "knowingly" applies to the offense. In part F, defendant demonstrates that the culpable mental state of "knowingly" applies to the physical proximity element. In part G, defendant argues that the Commonwealth failed to present any evidence from which a rational factfinder could conclude that defendant knew of his physical proximity to Graves County High School at the time he trafficked in marijuana.

A.

THE STATUTORY SCHEME

KRS 501.020 through 501.050 define the four culpable mental states and provide rules of statutory construction. The Legislature enacted the culpable mental state statutory scheme in 1974 as part of the Penal Code revision, and it has not amended them since. The full text of each statute is appended.

KRS 501.020

KRS 501.020 defines "intentionally", "knowingly", "wantonly" and "recklessly." KRS 501.020(2) provides that the culpable mental state of "knowingly" applies to the conduct and circumstances elements of a statute: "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists."

KRS 501.030

KRS 501.030 (1) provides, *inter alia,* that a person is not guilty of a criminal offense unless he acts voluntarily. Subsection (2) provides that a person is not guilty of a criminal offense "unless he has engaged in conduct intentionally, knowingly, wantonly or recklessly as the law may require, **with respect to each element of the offense**, except that this requirement does not apply to any offense which imposes absolute liability, as defined in KRS 501.050." (Emphasis added).

The Model Penal Code and a majority of American jurisdictions also require courts to apply a culpable mental state **to each element of the offense**. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 683 (1983) (collecting statutes). And, the U.S. Supreme Court has repeatedly instructed that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *Unites States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (collecting cases).

KRS 501.040

KRS 501.040 provides that: "**Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof**, if the proscribed conduct necessarily involves such culpable mental state." (Emphasis added).

KRS 501.040 is a "rule of statutory construction." Final Draft, Commentary to § 215 at 19. KRS 501.040 and its Model Penal Code counterpart direct that, "[t]he absence of a specified culpability requirement does *not* mean that culpability is not required." Robinson, *supra,* at 701.

KRS 501.050

KRS 501.050 provides that a person may be guilty of an offense without having one of the culpable mental states defined in KRS 501.020 only when the offense "is a violation or a misdemeanor" or when the "**offense is defined by statute other than this Penal Code and the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described.**" (Emphasis added).

KRS 501.050 is also a rule of statutory construction. KRS 501.050 imposes "tight restrictions upon the imposition of criminal sanctions for conduct unaccompanied by a culpable mental state." Final Draft, Commentary to § 220 at 19.

KRS 218A.015

KRS Chapter 218A, the chapter relating to controlled substances, incorporates KRS 500.010 et seq. KRS 218A.015 provides that the terms "'intentionally,' 'knowingly,' 'wantonly,' and 'recklessly,' including but not limited to equivalent terms such as 'with intent,' shall have the same definition **and the same principles shall apply to their use** as those terms are defined and used in KRS Chapter 501." (Emphasis added).

B.

THE COURT OF APPEALS OPINION

The Court of Appeals opinion illustrates how the culpable mental state statutory scheme does **not** work. *First*, the Court assumed that KRS 218A.1411 was a strict liability offense because it did not expressly prescribe a culpable mental state: "KRS 218A.1411 is silent as to *mens rea*. It merely requires proof of the unlawful transaction of a controlled substance or controlled substance analogue (i.e. fake drugs) within 1,000 yards of a school." Slip. op. at 3-4.

Plainly, that logic is wrong. The absence of an expressly designated mental state does not, *ipso facto*, mean that a statute codifies a strict liability offense. The Court of Appeals ignored KRS 501.040 and 501.050(2). Together, those statutes instruct that "[a]lthough no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state nevertheless may be required" and that a person may be guilty of an offense codified outside the Penal Code without having a culpable mental state only if "the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described."

Second, the Court of Appeals assumed that KRS 218A.1411's codification outside the Penal Code settled the matter: "We are further persuaded that a requirement of *mens rea* is not imparted to KRS 218A.1411 by the application of any provisions of the Kentucky Penal Code. As the Commonwealth properly notes, KRS 501.050(1) requires proof of a mental state (intentionally, knowingly, wantonly or recklessly) for felonies set out in the Kentucky Penal Code, KRS Chapter 500, et seq.

The offense of trafficking within 1,000 yards of a school is not a provision of the Kentucky Penal Code, and KRS 501.050(1) is not applicable. Since the clear language of KRS 218A.1411 does not set out the mental state of 'knowingly' as an element of the offense, and because we find that no other statutory provision imparts to KRS 218A.1411 the requirement of proof of a mental state, we find no error on this issue." Slip op. at 4.

Again, the Court of Appeals ignored KRS 501.050(2), which provides that for offenses "defined by a statute other than this Penal Code" a person may be guilty without having a culpable mental state only if "the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described." Inexplicably, the Court of Appeals failed to consider the Legislature's intent. *Compare Malone v. Commonwealth*, 636 S.W.2d 647, 648 (Ky. 1982) (finding a clear legislative intent to dispense with the requirement of a culpable mental state for the crimes of forcible rape and sodomy), *with Blanton v. Commonwealth*, 562 S.W.2d 90, 94 (Ky. App. 1978) ("We find nothing...which indicates a clear legislative purpose to impose absolute criminal liability. ... Consequently, we construe the statutes to require a culpable mental state....")

More importantly, the Court of Appeals failed to recognize the significance of its own conclusion. The notion that trafficking within 1,000 yards of a school is a strict liability offense is repugnant.

First, as a general principle, strict liability "is reserved for the least serious offenses, such as traffic violations." Robinson, *supra*, 35 Stan. L. Rev. at 701; *see*

generally Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) (suggesting that strict liability is appropriate only for so-called "public welfare offenses"); Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 2-1(b)(1) (1998) ("Strict liability crimes are...largely limited to offenses with minor penalties – traffic crimes, building, fire, health code violations, etc. ... [I]mposition of punishment in the absence of fault (i.e. 'mens rea'...) is generally regarded as the exception rather than the rule in our jurisprudence, especially for crimes with substantial penalties.")

Second, the justification for absolute immunity under "limited circumstances" is "justified because of the difficulty of proving culpability for certain classes of offenses." Final Draft, Commentary to § 220 at 19. The Commonwealth has no difficulty proving that a person "knowingly" trafficked in controlled substances, KRS 218A.1412, or "knowingly" trafficked in controlled substances within 1,000 yards of a school, KRS 218A.1411.

Third, "[t]he scholarly comment opposing imposition of criminal sanctions for strict liability offenses is overwhelming." Robinson, *supra,* at 701 n. 88 (collecting commentary). And, the Kentucky Legislature has quite clearly expressed an aversion to strict liability offenses. *See* Final Draft, Commentary to § 220 at 19-20.

It is exceedingly difficult to understand why the Court of Appeals equated the Legislature's silence with a "clear" indication of a "legislative purpose to impose absolute liability" for **a felony offense**. *See Staples v. United States*, 511 U.S. 600, 618, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (noting that "[h]istorically, the penalty

imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*" and acknowledging the view that, "absent a clear statement from Congress that *mens rea* is not required, [courts] should not...interpret any statute defining a felony offense as dispensing with *mens rea.*"); *Morissette*, 342 U.S. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-37, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") The Court of Appeals opinion cannot stand.

C.

THIS COURT'S CASE LAW

By comparison, opinions from this Court illustrate how the culpable mental state statutory scheme was intended to work. For example, in *Walker v. Commonwealth*, 127 S.W.3d 596 (Ky. 2004), this Court construed the so-called bondsman detaining without a warrant statute, KRS 440.270, to require the culpable mental state of "recklessly." *First,* this Court cited KRS 501.030(2), and observed that "KRS 440.270(2) does not recite a culpable mental state as required for the conviction of a criminal offense." *Id.* at 607. *Second,* this Court acknowledged KRS 501.050's limitation on construing statutes to impose absolute liability, and remarked

that "[a]s Professors Lawson and Fortune note, strict liability crimes are commonplace but 'largely limited to offenses with minor penalties – traffic crimes, building fire, health code violations, etc.'" *Id.* at 607 (quoting Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 2-1(b)(1) (1998)). *Third*, this Court noted that a violation of the bondsman detaining without a warrant statute carried a penalty of up to five years in prison, and concluded that "[t]hese are not minor penalties and we are unable to conclude that the statute clearly indicates a legislative purpose to impose absolute liability." *Id.* at 607. *Fourth*, this Court turned to KRS 501.040 and concluded that "a violation [of the bondsman detaining without a warrant statute] would require at a minimum that the accused recklessly 'arrested, detained, imprisoned or removed' the victim with knowledge that a warrant had not been issued by a Kentucky judicial officer." *Id.* a 608.

In *Love v. Commonwealth*, 55 S.W.3d 816 (Ky. 2001), this Court considered whether the defendant was required to know, in a third-degree assault prosecution, that the victims were police officers. *First*, this Court noted that KRS 501.030(2) requires a culpable mental state with respect to each element of the offense. *Id.* at 824. *Second*, this Court observed that because third degree assault was codified in the Penal Code, and was not a violation or a misdemeanor, the third-degree assault statute "cannot be interpreted as imposing absolute liability with respect to any element of the defined offense." *Id.* at 824. *Third*, this Court noted that the third-degree assault statute did not "recite a culpable mental state with respect to either the defendant's conduct or the status of the victim." *Id.* at 824. *Fourth*, this Court reasoned: "The

issue then becomes what degree of knowledge is required?" *Id.* at 825. *Fifth*, this Court noted that that the definition of "knowingly" under KRS 501.020(2) applied to the "circumstance described by the statute." *Id.* at 825. *Lastly*, this Court concluded that because the "status" of the victim as a police officer was the circumstance described by the statute that distinguished the crime of third degree assault from fourth degree assault, a "jury shall be instructed as an element of the offense that [the defendant] can be convicted of third-degree assault only if he knew at the time of the assault that [the victim] was a peace officer." *Id.* at 826.

Walker and *Love* illustrate how to methodically traverse the culpable mental state statutory scheme. Defendant now applies the rules of construction set out in that scheme to the trafficking within 1,000 yards of a school statute.

D.

KRS 218A.1411 DOES NOT CODIFY A STRICT LIABILTIY OFFENSE

Applying KRS 501.020 et seq. and the foregoing principles, the trafficking in or near a school statute, KRS 218A.1411, provides:

> Any person who unlawfully traffics in a controlled substance classified in Schedules I, II, III, IV or V, or a controlled substance analogue in any building used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) yards of any school building used primarily for classroom instruction shall be guilty of a Class D felony, unless a more severe penalty is set forth in this chapter, in which case the higher penalty shall apply. The measurement shall be taken in a straight line from the nearest wall of the school to the place of violation.

KRS 218A.1411 does not contain an expressly designated culpable mental state. However, "a culpable mental state may nevertheless be required for the commission of [the] offense." KRS 501.040.

KRS 218A.1411 is codified outside the Penal Code. However, a person may not be guilty of an offense without having a culpable mental state unless, *inter alia*, the offense falls outside the Penal Code "**and** the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described." KRS 501.050(2) (emphasis added).

Read together, KRS 501.040 and 501.050(2) direct that KRS 218A.1411 requires a culpable mental state unless "the statute clearly indicates a legislative purpose to impose absolute liability...." The **text** of KRS 218A.1411 does **not** clearly indicate a legislative purpose to impose absolute liability.

The **context** of KRS 218A.1411 does **not** clearly indicate a legislative purpose to impose absolute liability. *See generally Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) (statutes must be read as a whole and "in context with other parts of the law."); *Hamilton v. International Union of Operating Engineers*, 262 S.W.2d 694, 699 (Ky. 1953) (the context of a statute is relevant to the question of Legislative intent). Nearly every other statute codified in Chapter 218A contains an expressly designated mental state. *See e.g.* KRS 218A.1412 through 218A.1414 ("knowingly" trafficking in controlled substances); KRS 218A.1415 through 218A.1417 ("knowingly" possessing controlled substances"); KRS 218A.1421 ("knowingly" trafficking in marijuana); KRS 218A.1422 ("knowingly" possessing

marijuana); KRS 218A.1423 ("knowingly" cultivating marijuana); KRS 218A.1432 ("knowingly" manufacturing methamphetamine); KRS 218A.1437 ("knowingly" possessing a methamphetamine precursor); KRS 218A.1438 ("knowingly" distributing a methamphetamine precursor); KRS 218A.1441 through 218A.1444 ("knowingly" committing controlled substance endangerment to a child); KRS 218A.284 ("knowing" possession of a forged prescription); KRS 218A.2486 ("knowing" possession of a prescription blank); KRS 218A.324 ("knowingly" falsifying a medical record); KRS 218A.500 ("knowingly" delivery, possess with intent to deliver, or manufacture drug paraphernalia).

The **legislative history** of KRS 218A.1411 does **not** clearly indicate a legislative purpose to impose absolute liability. On the whole, the legislative history of the trafficking within 1,000 yards of a school statute is silent with regard to what the legislature intended for the *mens rea* requirement. The trafficking near a school statute originated as part of House Bill 132 (1992), a massive legislative undertaking, which significantly augmented Chapter 218A. Because the trafficking near a school statute was only a small part of the bill, commentary on that particular provision is lacking. Moreover, because the bill passed in the House and Senate unanimously, members did not debate each provision.

The only clue as to what the Legislature intended is a statement made by Representative Michael Bowling during the House Judiciary Committee meeting on January 28, 1992. By way of explaining his vote to pass the bill with favorable

expression out of committee, Representative Bowling commented: "Drug dealers are getting the knowledge that they can't be within 1,000 yards of schools."

The trafficking within 1,000 yards of a school statute and the unlawful possession of a weapon on school property statute, KRS 527.070, are obviously similar in purpose. KRS 572.070 expressly designates the culpable mental state of "knowingly." It is difficult to imagine that the Legislature intended different *mens rea* requirements for the trafficking near a school statute and the possession of a weapon on school property statute.

Lastly, **maxims of statutory construction** do **not** imply that the Legislature intended the trafficking within 1,000 yards of a school statute to be a strict liability offense. To the contrary, the rule of lenity suggests that KRS 218A.1411 does not call for absolute liability. *See Gilbert v. Commonwealth*, 838 S.W.2d 376, 382 (Ky. 1991) (the rule of lenity directs courts to interpret an ambiguous penal statute "in favor of the accused."); *Liparota v. United States*, 471 U.S. 419, 427-28, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (the rule of lenity "directly supports petitioner's contention that the Government must prove knowledge of the illegality to convict him").

The text, context, legislative history, and maxims of statutory construction do **not** evidence **clear intent to impose absolute liability**. KRS 501.050(2). KRS 218A.1411 is **not** a strict liability offense. KRS 501.040; KRS 501.050(2).

E.

THE CULPABLE MENTAL STATE OF "KNOWINGLY" APPLIES TO THE TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL STATUTE.

The Criminal Law Revision Advisory Committee provided guidance on how to construe a statute that does not have an expressly designated culpable mental state. The Committee explained, by way of an example, that the crime of criminal conspiracy "requires an *agreement* between the defendant and at least one other person to engage in conduct that constitutes a crime. [However,] [n]one of the culpable mental states defined in [KRS 501.020] is expressly designated for this offense. Nevertheless, it should be obvious that the mental state required is that of 'intention.' It is not possible to agree with another for any purpose without doing so 'intentionally.'" Final Draft, Commentary to § 215 at 19 (emphasis in original).

In other words, common sense dictates. Obviously, a person cannot wantonly or recklessly traffic within 1,000 yards of a school. And, as between "intentionally" and "knowingly," the culpable mental state of "knowingly" fits best. In fact, the indictment in the instant case alleges that defendant "**knowingly** and unlawfully sold marijuana to a confidential informant within 1,000 yards of Graves County High School." (Emphasis added). A copy of the indictment is appended.

First, the only expressly designated mental state in Chapter 218A is "knowingly." Moreover, the trafficking within 1,000 yards of a school statute is, obviously, closely related to the generic trafficking in controlled substances statutes,

KRS 218A.1412 through 218A.1414. A person is guilty of the generic crime of trafficking in controlled substances only if he "knowingly" and unlawfully traffics.

Second, again, the trafficking near a school statute and the unlawful possession of a weapon on school property statute, KRS 527.070, are similar in purpose. The possession of a weapon on school property statute expressly designates the culpable mental state of "knowingly."

Third, in the hierarchy of mental states, "intentionally" is slightly more difficult to prove than "knowingly." *See United States v. Bailey*, 444 U.S. 394, 403-4, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) (recognizing the hierarchy). Nothing suggests that the Legislature desired to saddle the Commonwealth with a higher burden of proving trafficking within 1,000 yards of a school, a Class D felony, than that required for all of the other trafficking, manufacturing, distributing, etc., statutes.

Thus, "knowingly," is the only plausible contender. A person is guilty of trafficking within 1,000 yards of a school under KRS 218A.1411 only if he "**knowingly** and unlawfully traffics in a controlled substance...or a controlled substance analogue in any building used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) yards of any school building used primarily for classroom instruction...."

Defendant pauses here to address the Commonwealth's anticipated argument that a court is "not at liberty to add or subtract from the legislative enactment" or to "discovery meaning not reasonably ascertainable from the language used." *Beckham*

v. Board of Educ. Of Jefferson County, 873 S.W.2d 575, 577 (Ky. 1994); *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002).

The drafters of the Model Penal Code, like the members of Kentucky's Criminal Law Revision Advisory Committee, anticipated that a Legislature may – or may not – articulate a culpable mental state either for an offense or for an element within an offense. At the same time, the drafters expressed "a general policy adverse to the use of the strict liability doctrine." Final Draft, Commentary to § 220 at 19-20.

Therefore, both the drafters of the Model Penal Code and the members of Kentucky's Criminal Law Revision Advisory Committee proposed specific rules of construction, which the Legislature later enacted. In accordance with the rules of construction – *i.e.* KRS 501.020 ("knowingly" applies to the conduct or circumstance elements); KRS 501.030(b) (a culpable mental state applies to each element of the offense); KRS 501.040 (in the absence of an expressly designated culpable mental state, a mental state may nevertheless be required); and KRS 501.050(2) (for an offense codified outside the Penal Code, a culpable mental state is required unless the statute clearly indicates otherwise) – courts are expressly directed to add a *mens rea* requirement except in very "limited circumstances." Final Draft, Commentary to § 220 at 19. The rules of construction expressly authorize a court to infer a culpable mental state unless the circumstances provided in KRS 501.050(2) dictate otherwise. *See* Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 2-1(b)(2) (1998) ("It is not unusual for defining statutes to be silent or ambiguous as to elements of scienter nor for defendants to argue for mens rea in statutes that seem to

prove for liability without fault. The notion of intent by implication is deeply embedded in the law and is recognized at the highest levels of authority.")

The U.S. Supreme Court has repeatedly "read-in" a culpable mental state both to offenses and elements within offenses. *See e.g. Flores-Figueroa v. United States*, __ U.S. __, 129 S.Ct. 1886, __ L.Ed.2d __ (2009) ("knowingly" applies to the elements of "means of identification" and to "another person"); *Arthur Anderson LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) ("knowingly" applies to the element of "corrupt persuasion"); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) ("knowingly" applies to element of "the use of a minor); *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 372 (1994) ("knowingly" applies to the element of "in any manner not authorized by law").

Kentucky courts have done the same, *see Walker* and *Love, supra*. *See also Covington v. Commonwealth*, 849 S.W.2d 560, 562 (Ky. App. 1992) ("In effect, the culpable mental state required for assault in the third degree is written into KRS 508.025(1)(b) by KRS 501.040) (opinion by Schroder, J.).

Thus, it is no answer to say that a court is not at liberty to add or subtract from a legislative enactment. Although that rule may apply in other contexts, it does not apply here. The entire culpable mental state statutory scheme expressly directs courts to add a *mens rea* requirement to every element of the offense except in very limited circumstances. The absence of an expressly designated culpable mental state does

not, *ipso facto*, mean that a defendant is strictly liable of an offense or an element within an offense.

As discussed *supra*, a person is guilty of trafficking within 1,000 yards of a school only if he does so "knowingly." The culpable mental state of "knowingly" applies **both** to the trafficking element **and** to the physical proximity to a school element.

F.

A PERSON IS GUILTY OF TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL ONLY IF HE IS AWARE OF HIS PHYSICAL PROXIMITY TO THE SCHOOL AT THE TIME HE TRAFFICS.

There are two different ways to arrive at the conclusion that a person is guilty of trafficking within 1,000 yards of a school only if he is aware of his physical proximity to the school at the time he traffics. The first way relies on KRS 501.020(2) and KRS 501.030(2). The second way relies on KRS 501.030(2) and, by analogy, U.S. Supreme Court case law. Both approaches are straightforward.

KRS 501.020(2) AND KRS 501.030(2)

KRS 501.030(2) provides that a person is not guilty of a criminal offense unless he acts with a culpable mental state "with respect to each element of the offense." KRS 501.020(2) is more specific. It provides that the mental state of "knowingly" applies to the "conduct" and "circumstance" elements of an offense. *See* KRS 501.020(2) ("A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his

conduct is of that nature of that the circumstance exists."); *see also* Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 2-2(a)(2) ("The culpable mental states...are used in statutes the define crimes that have three kinds of physical elements – *results* of conduct, *conduct* itself, and *circumstances* surrounding conduct. The definitions contained in KRS 501.020 are designed to be used in conjunction with all three types of physical elements.... It is essential for the mental state of a given crime to be determined in relationship to the type of physical element required for commission of that crime.") (emphasis in original).

The "circumstance" described by KRS 218A.1411 is the gravamen of the offense – it distinguishes the trafficking within 1,000 yards of a school from the generic trafficking statutes, KRS 218A.1412 through 218A.1414. The "circumstance" is the defendant's physical proximity to a school.

Read together and applied to KRS 218A.1411: A person is not guilty of trafficking within 1,000 yards of a school unless he is aware that the "circumstance described by [the] statute...exists," and the circumstance described by KRS 218A.1411 is the defendant's physical proximity to a school. A person is not guilty of trafficking within 1,000 yards of a school unless he is aware of his physical proximity to a school.

Moreover, as a general principle, an element that distinguishes one offense from another and gives rise to **increased** punishment must have a corresponding culpable mental state. *See e.g. Love*, 55 S.W.3d at 824-26 (a defendant must "know" that the victim is a police officer; an assault on a police officer distinguishes third-

degree and fourth-degree assault); KRS 510.030 *and* KRS 531.330(2) (it is a defense that the defendant did not "know" the age status of the victim for those crimes defining sexual offenses against children in which the age status of the child is an enhancing element of the offense, *e.g.* KRS 510.040(2) and KRS 510.070(2)); Final Draft, Commentary to §1405 through 1407 at 159-60 (a defendant must "know" that a building is occupied; an occupied building, *inter alia*, distinguishes first-degree and second-degree arson).

The same is true here. The proximity to a school element distinguishes the misdemeanor offense of trafficking in marijuana, KRS 218A.1421, from the felony offense of trafficking in a controlled substance in or near a school, KRS 218A.1411. Accordingly, the proximity to a school element – *i.e.* the "circumstance" described by the statute, which gives rise to increased punishment – must correspond to a culpable mental state.

KRS 501.030(2) AND U.S. SUPREME COURT CASE LAW

Again, KRS 501.030(2) provides that a person is not guilty of a criminal offense unless he "has engaged in...conduct intentionally, knowingly, wantonly or recklessly as the law may require, **with respect to each element of the offense**, except that this requirement does not apply to any offense which imposes absolute liability." (Emphasis added).

The Criminal Law Revision Advisory Committee explained the meaning of KRS 501.030(2) through this example: "Suppose that a statute in defining an offense requires that a defendant *knowingly possesses stolen property*. Does this mean that an

offender must 'know' that he has possession of the property in question? Or does it mean that he must 'know' that the property in his possession is stolen? ... [I]t is clear that a defendant, to be guilty of this offense, must 'know' that he has possession of the property and also must 'know' that it is stolen." Kentucky Penal Code, Final Draft, § 215, Commentary, 18-19 (1971) (emphasis in original).

KRS 501.030(2) is based in part on the Model Penal Code. *See* Final Draft, Commentary to § 205 at 15 (so stating). Model Penal Code Commentary also employs an example to illustrate what it means for a culpable mental state to apply to each element of the offense: "False imprisonment is defined by...the Model Code to include one who 'knowingly restrains another unlawfully so as to interfere substantially with his liberty.' Plainly, the word 'knowingly,' is intended to modify the restraint, so that the actor must, in order to be convicted under this section, know that he is restraining his victim. The question whether 'knowingly' also qualifies the unlawful character of the restraint is not clearly answered by the definition of the offense, but is answered in the affirmative by" the requirement that a culpable mental state applies with respect to each element of the offense. Model Penal Code and Commentaries (Official Draft and Revised Comments), § 2.02, p. 246 (1985).

The United States Supreme Court has repeatedly construed federal statutes accordingly. *See Flores-Figueroa v. United States*, __ U.S. __, 129 S.Ct. 1886, __ L.Ed.2d __ (May 4, 2009) ("As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime. The Government cannot easily claim that the word

'knowingly' applies only to the statute's first four words, or even its first seven."); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) (the statue the "provides the *mens rea* – 'knowingly' – and then a list of acts – 'uses intimidation or physical force, threatens, or corruptly persuades.' We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to other elements down the statutory chain."); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (holding that the mental state of "knowingly" modified not only the surrounding verbs, but also elements set forth in independent clauses separated by interruptive punctuation).

Applying the reasoning of the Supreme Court and KRS 501.030(2)'s directive that a person is not guilty of a criminal offense unless he has engaged in the proscribed conduct with a culpable mental state "with respect to each element of the offense," to the trafficking within 1,000 yards of a school statute, the mental state of "knowingly," plainly – and in accordance with nearly every other statute in KRS Chapter 218A – precedes the word "unlawfully." It then modifies not only the surrounding verbs, but also the other elements, including the proximity to a school element, down the statute chain.

In sum, and harkening back to the examples provided by Kentucky's Criminal Law Revision Advisory Committee, *first*, none of the culpable mental states defined in KRS 501.020 is expressly designated for the element of a defendant's physical proximity to a school in the definition of the offense. Nevertheless it should be

obvious that the mental state required is that of 'knowingly.' It is not possible to traffic in controlled substances without doing so 'knowingly.' *See* Final Draft, Commentary to § 215 at 19 (The statute defining the offense of criminal conspiracy "requires an *agreement* between the defendant and at least one other person to engage in conduct that constitutes a crime. None of the culpable mental states defined in [KRS 501.020] is expressly designated for this element of the offense. Nevertheless, it should be obvious that the mental state required is that of 'intention.' It is not possible to agree with another for any purpose without doing so 'intentionally.'") (emphasis in original).

Second, as discussed, *supra*, the trafficking within 1,000 yards of a school statute requires that a defendant *knowingly* traffic in a controlled substance...in any building used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) yards of any school building.... Does this mean that an offender must "know" that he traffics in a controlled substance? Or does it mean that he must "know" that he traffics in a controlled substance in or near a school? It is clear that a defendant, to be guilty of this offense, must "know" that he traffics and also must "know" that he is located in or near a school. *See* Final Draft, Commentary to § 215 at 18-19 ("Suppose that a statute in defining an offense requires that a defendant *knowingly possesses stolen property.* Does this mean that an offender must 'know' that he has possession of the property in question? Or does it mean that he must 'know' that the property in his possession is stolen? ...[I]t is clear

that a defendant, to be guilty of this offense, must 'know' that he has possession of the property and also must 'know' that it is stolen.") (emphasis in original).

G.

THE COMMONWEALTH FAILED TO PROVE THAT DEFENDANT KNEW OF HIS PROXIMITY TO A SCHOOL AT THE TIME HE TRAFFICKED IN MARIJUANA.

The Commonwealth may establish proof of a criminal defendant's actual knowledge through circumstantial evidence. *See Love*, 55 S.W.3d at 825 (so stating). Nonetheless, the record here is devoid of any evidence to suggest that defendant was aware that the Days Inn motel was located within 1,000 yards of Graves County High School – and the Commonwealth does not argue otherwise. The motel and the high school are not within sight of each other; the jurors were not told whether "drug free zone" signs or the like were posted in the area; and defendant's familiarity with the motel, or the high school, or that particular area of town, was never explored. Absent that evidence, or something similar, defendant's conviction for trafficking in or near a school is constitutionally infirm and cannot stand.

Again, the Fourteenth Amendment and Section 2 of the Kentucky Constitution guarantee that "no person shall be made to suffer the onus of a criminal conviction exception upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 U.S. at 316. The Commonwealth failed to prove "the existence of every element of the offense" because it failed to prove that defendant knew of his proximity to Graves County High School when he trafficked in marijuana. The

proper remedy is to vacate defendant's conviction for trafficking within 1,000 yards of a school and remand the case to the trial court for the entry of a conviction for the lesser-included offense of trafficking in marijuana, KRS 218A.1421.

II.

THE COMMONWEALTH OFFERED NO EVIDENCE TO REBUT THE LEGAL CONCLUSION THAT THE POLICE ENTRAPPED DEFENDANT INTO TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL WHEN THEY SPECIFICALLY ARRANGED FOR A CONTROLLED BUY AT A LOCATION WITHIN 1,000 YARDS OF A SCHOOL.

The police entrapped defendant into trafficking **within 1,000 yards of a school** when two confidential informants, acting at the direction of the police, specifically instructed him to meet them at a location within 1,000 yards of a school. (VR: 5/31/07; 11:07:30, 2:47:20). The record is devoid of any evidence to suggest that defendant had in the past, would have on that occasion, or would in the future, traffic marijuana at the Days Inn or at any other location within 1,000 yards of a school. Defendant's conviction is impermissibly tainted by police entrapment; it cannot stand.

PRESERVATION

As discussed *supra*, defendant made a motion for directed verdict at the close of the Commonwealth's case and at the close of all the evidence. Again, the argument that follows is different than the argument presented to the trial court. Nonetheless, as discussed *infra,* a directed verdict of acquittal is the appropriate remedy where, as here, the Commonwealth has failed to disprove entrapment beyond a reasonable doubt.

In the event that this Court concludes that this issue is not preserved, defendant respectfully requests palpable error review pursuant to CR 10.26. A criminal conviction tainted by police entrapment is infirm. Moreover, anecdotal evidence suggests that the facts of this case are not unique. Similar issues are likely to arise in other cases. Those fact militate in favor of palpable error review.

PERTINENT FACTS

Defendant's aunt and her fiancé agreed to act as informants and participate in "controlled" purchases of narcotics. They specifically instructed defendant to come to the Days Inn motel so that they could purchase drugs. Pennyrile Narcotics Task Force police officers were stationed in the adjoining motel room. The Days Inn motel is located within 1,000 yards of Graves County High School.

ENTRAPMENT

KRS 501.030(1) provides that a person is not guilty of a criminal offense unless, *inter alia*, he has engaged in conduct "which includes a voluntary act." The defense of entrapment echoes that rule. KRS 505.010 codifies the defense of entrapment. KRS 500.070 describes how the burdens of proof and production are allocated with regard to defenses. Defendant addresses each statute in turn, and then harmonizes them.

KRS 505.010

KRS 505.010 codifies the defense of entrapment:

> (1) A person is not guilty of an offense arising out of proscribed conduct when:

(a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and

(b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.

(2) The relief afforded by subsection (1) is unavailable when:

(a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense.

In *Commonwealth v. Day*, 983 S.W.2d 505 (Ky. 1999), this Court instructed that the "defense of entrapment is available when there is evidence that the defendant was induced by police authorities, or someone acting in cooperation with them, to commit a criminal act which he was not otherwise disposed to commit." *Id.* at 508. This Court reiterated that "[e]ven though the defendant admittedly committed the offense, if the criminal design was conceived in the mind of a government agent, who then induced or lured the defendant into its commission, strong public policy estops the government from convicting him for it." *Id.* at 508 (citing *Sorrells v. United States*, 287 U.S. 435, 445, 53 S.Ct. 210, 77 L.Ed.413 (1932)).

KRS 500.070

KRS 500.070(1) describes how the burdens of production and persuasion are allocated among the parties with regard to defenses. It provides:

(1) The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt.... This provision, however, does not require disproof of any element that is entitled to a 'defense,' as that term is used in this code, unless the evidence tending to support the defense is of such probative

force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal.

KRS 505.010 AND 500.070 READ TOGETHER

To raise the defense of entrapment, a defendant must point to evidence in the record from which a rational jury could find that he was induced to commit the crime but was not otherwise predisposed to do so. *See* KRS 505.010(1)(a), (b) (so stating). A defendant "need not testify in order to avail himself of the defense of entrapment. If the evidence presented is sufficient to support...entrapment...it is of no consequence that such evidence is introduced during the Commonwealth's case-in-chief, through direct or cross examination." *Wyatt v. Commonwealth*, 219 S.W.3d 751, 756 (Ky. 2007).

After the defendant has demonstrated that the record contains evidence from which a rational jury could infer that he was induced to commit the crime but was not otherwise predisposed to do so, the burden then shifts to the Commonwealth to prove beyond a reasonable doubt that the defendant was *not* entrapped. *Id.* at 757.

The burdens allocation can be restated as follows: "Where the Government has induced an individual to break the law and the defense of entrapment is at issue...the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson v. United States*, 503 U.S. 540, 548-49, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). Or, stated another way: "[Defendant] argues that he was entrapped as a matter of law. To succeed, he must persuade us that, viewing the evidence in the light

most favorable to the government, no reasonable jury could have found in favor of the government as to inducement or lack of predisposition." *United States v. Poehlman*, 217 F.3d 692, 697 (9th Cir. 2000).

THE REMEDY OF A DIRECTED VERDICT OF ACQUITTAL

It logically follows that when the Commonwealth fails to produce **any** evidence from which a rational factfinder could conclude that "the defendant was disposed to commit the criminal act prior to first being approached by Government agents," a directed verdict of acquittal is in order.

KRS 500.070 suggests the remedy of a directed verdict. KRS 500.070(1) provides that the Commonwealth is not required to disprove a defense "unless the evidence tending to support the defense is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal." Restated, if the Commonwealth fails to satisfy its burden of disproving a defense, "the defendant would be entitled to a directed verdict of acquittal."

Case law also suggests the remedy of a directed verdict. *See Wyatt*, 219 S.W.3d at 756 ("If the public servant first conceived the criminal design and lured the defendant into its commission, the state is effectively estopped from convicting the defendant."); *Sorrells*, 287 U.S. at 445 ("When...the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefore."); *Sherman v. United States*, 356 U.S. 369, 373, 78 S.Ct. 891, 2 L.Ed.2d 848 (1958) ("We conclude from the evidence that entrapment was established as a matter of law.

In so holding, we are not choosing between conflicting witnesses, nor judgment credibility. ... We reach our conclusion from the undisputed testimony of the prosecution's witnesses. It is patently clear that petitioner was induced by [a government informer].")

The historical underpinnings of the entrapment defense suggest the remedy of a directed verdict of acquittal, as well. The defense of entrapment is a uniquely American doctrine, rooted in equitable notions of justice. The defense of entrapment has no constitutional underpinnings; it did not exist under English Common Law. The defense of entrapment was created by courts in response to the use of undercover "sting" operations by police and other agencies. Eventually, state legislatures expressed concern about the use of undercover tactics and the necessity of an entrapment defense. Today, many states – including Kentucky – have enacted statutes that codify the defense of entrapment.

A conviction tainted by police entrapment violates both KRS 505.010 (the statute proscribing entrapment) and basic notions of equity. Accordingly, it would appear that both statutory remedies, *i.e.* the assertion of the defense of entrapment through a request for jury instructions (which defendant does not pursue), and equitable remedies, *i.e.* estoppel of the prosecution (which defendant does request), are available. For a full exposition on the development of judicial notions of police entrapment, *see e.g.* Erich Weyand, *Entrapment: From Sorrells to Jacobson – The Development Continues*, 20 Ohio N. U. L. Rev. 293 (1993).

THE POLICE ENTRAPPED DEFENDANT TO TRAFFIC MARIJUANA WITHIN 1,000 YARDS OF A SCHOOL.

The Pennyrile Narcotics Task Force ("Task Force") could have arranged for the controlled buy to occur anywhere in Graves County; they specifically picked a location within 1,000 yards of a school. As a preliminary matter, defendant notes that in its brief to the Court of Appeals, the Commonwealth passionately explained the dangers associated with trafficking in narcotics in or near a school: "The drug trade is a violent trade. ... Drug deals gone bad often lead to gunfire and death. When those bad deals occur within 1,000 yards of a school, the students are in real danger. They are in real danger of being struck by stray bullets. It seems that the media reports, almost daily, of a child killed by stray bullets from drug-related gang violence. KRS 218.1411 is a legislative attempt to prevent these events. The legislature has taken a zero tolerance policy when it comes to schools and their surrounding neighborhoods." Commonwealth's Brief at 4.

Thus, it boggles the mind that the police would purposefully arrange for multiple purchases of narcotics at a location within 1,000 yards of a school. The practice is abhorrent. This Court should condemn it.

Nothing in this record suggests that the Task Force's so-called sting operation was undertaken in response to a high volume drug trade near Graves County High School, or as part of a good faith effort to curb some specific drug activity that presented a risk for school children. The sting operation "was not aimed at facilitating discovery or suppression of ongoing illicit dealings," but rather was aimed

at enhancing the penalty for trafficking in marijuana from a misdemeanor to a felony offense "for the sake of bringing criminal charges." *United States v. Lard*, 734 F.2d 1290, 1297 (8th Cir. 1984) (a case concerning entrapment as a matter of law). The Commonwealth makes no argument otherwise.

As the Commonwealth acknowledges, the Legislature obviously intended to keep drug trafficking **away** from schools. Absent any evidence to suggest that the police were attempting to address an ongoing problem of drug trafficking near a specific school, the practice of specifically instructing drug traffickers to come within 1,000 yards of that school is unconscionable. It directly undermines the Legislature's intent **and needlessly puts schoolchildren at risk** for the sole purpose of securing a felony, rather than a misdemeanor conviction.

Defendant is guilty of trafficking in marijuana, KRS 218A.1421. Defendant's ill-fated decision to sell drugs was his own. But, defendant was entrapped into trafficking in marijuana within 1,000 yards of a school, KRS 218A.1411. As discussed *supra*, the gravamen of that offense is not simply trafficking, but trafficking within close proximity to a school. In the instant case, the location specifically selected by the police for a series of controlled buys – the location where defendant's aunt and her fiancé, in their capacity as informants for the Task Force, specially instructed defendant to meet them – was the Days Inn motel. It defies credulity that members of the Task Force fortuitously chose that location, unaware that it was located within 1,000 yards of Graves County High School. Again, the Commonwealth makes no argument otherwise.

Defendant satisfied his burden of proving entrapment by a preponderance of the evidence. The Commonwealth's evidence established that defendant "was induced or encouraged to engage in [the conduct that distinguishes the crime of trafficking in marijuana from trafficking in controlled substances within 1,000 yards of a school] by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution" and that "[a]t the time of the inducement or encouragement he was not otherwise disposed to engage in such conduct." KRS 505.010(1)(a), (b).

The burden then shifted to the Commonwealth to prove "beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." *Wyatt*, 219 S.W.3d at 757. The Commonwealth failed to satisfy its burden.

The record does not contain a scrap of evidence to suggest that defendant had in the past, would have on that occasion, or would in the future, traffic marijuana at the Days Inn or at any other location near a school. The record is devoid of any evidence from which a rational factfinder could conclude that defendant was disposed to traffic marijuana **within 1,000 yards of Graves County High School** before the confidential informants instructed him to do so.

Defendant was entitled to a directed verdict of acquittal on the charge of trafficking in marijuana within 1,000 yards of a school. The trial court erred by denying his motion for a directed verdict at the close of all the evidence.

THE ACCUSED'S PHYSICAL PROXIMITY TO A SCHOOL IS A SUBSTANTIVE ELEMENT OF THE OFFENSE OF TRAFFICKING IN CONTROLLED SUBSTANCES WITHIN 1,000 YARDS OF A SCHOOL.

In an abundance of caution, defendant concludes by addressing the Commonwealth's argument to the Court of Appeals. The Commonwealth re-cast defendant's entrapment argument as follows: "[A]ppellant argues he was entrapped by the situs of the *actus reus*. Appellant cites no authority holding that entrapment applies to the situs of the *actus reus*. Appellant's argument is dangerous. Situs is **always** an element of a criminal offense, *i.e.* venue. If appellant's argument is taken to its logical end, defendants will argue that every controlled purchase made by the Kentucky State Police is entrapment. Defendants will argue that the Kentucky State Police commit entrapment when they arrange a purchase in 'County X'.... The Court can see where appellant's argument would lead. ... If appellant were to prevail in his argument, local police agencies would always be subjected to claims of entrapment because they set up the controlled buys within their own jurisdiction rather than another jurisdiction. Appellant's argument, taken to its local end, would lead to an absurd result." Commonwealth's Brief at 6-7 (emphasis in the original). The Court of Appeals did not address that argument, and defendant seriously doubts that the Commonwealth will renew it before this Court.

At any rate, the Commonwealth's argument blurs the distinction between the substantive elements of an offense and the jurisdiction where the crime occurred. This Court should not be fooled; the Commonwealth's argument is a red herring.

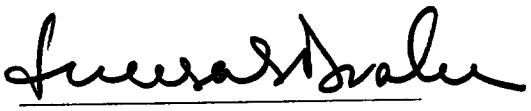
As a general matter, if the police "induce or encourage" a person to enter the jurisdiction in question, then a defendant may raise an entrapment defense and argue that the court lacks jurisdiction. *See e.g. Poehlman*, 217 F.3d at 704 (accepting defendant's argument that he was entrapped as a matter of law because, *inter alia*, federal agents induced him to cross state lines). That did not happen in this case. Defendant's person was, at all time, located within Graves County, and within the jurisdiction of the Graves Circuit Court.

However, the Commonwealth alleged that defendant committed a crime that proscribed – as a substantive element of the offense – the precise location **within** the jurisdiction where the offensive behavior took place. As with any other substantive element of an offense, a criminal defendant may argue that he was induced or encouraged to engage in the prohibited behavior. To use the Commonwealth's parlance, when the situs of the offense is a substantive element, a criminal may argue that, as a matter of law, he was induced or encouraged to come to the situs. There is nothing "dangerous" about that obvious and unremarkable proposition.

CONCLUSION

Defendant respectfully requests that this Court vacate his conviction for trafficking within 1,000 yards of a school, and remand his case to the trial court for entry of a conviction of the lesser-included offense of trafficking in marijuana.

Respectfully submitted,



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