BERDON, J., concurring in part and dissenting in part. I agree with part III of the majority opinion with respect to the conviction and sentence of the defendant, Kenneth Myers, as a repeat offender, in that to charge a person as a repeat offender, the procedure set forth in the rules of practice must be followed.

I disagree with parts I and II of the majority opinion with respect to the conviction of the defendant pursuant to General Statutes § 21a-278a (b). Under the circumstances of this case, there was insufficient evidence to establish that the defendant possessed narcotics with the intent to sell or dispense them within the prohibited zone, that is, within 1500 feet of the Henry Abbott Technical School in Danbury.

The arresting police officer, Isaiah Pitts of the Danbury police department, had cause to stop the defendant's vehicle in a shopping plaza, which was outside of the school zone. Instead, he chose to follow the defendant's vehicle until it got within 1500 feet of the school, which was the basis for the charge that the defendant possessed drugs with the intent to sell or dispense within 1500 feet of a school in violation of § 21a-278a (b).[1] Upon being stopped, the defendant gave a package of drugs to his passenger, Susan Curtis, and instructed her to hide them.

A reading of the entire statute leads to the conclusion that it does not cover one who merely passes through the prohibited zone as the defendant did but rather that the defendant specifically must have intended to sell or dispense the drugs at a location that happens to be within the prohibited zone. *State* v. *Denby*, 235 Conn. 477, 483, 668 A.2d 682 (1995). The plain language of the statute provides for that intent as follows: "To constitute a violation of this subsection, an act of transporting or possessing a controlled substance *shall be with intent to sell or dispense in or on, or within one thousand five hundred feet of, the real property comprising a public or private elementary or secondary school* . . . ." (Emphasis added.) General Statutes § 21a-278a (b); see *State* v. *Denby*, supra, 482.

On the basis of the plain language of § 21a-278a (b), our Supreme Court has concluded that "the state is required to prove that the defendant intended to sell or dispense those drugs in his or her possession at a specific location, which location happens to be within [1500][2] feet of an elementary or secondary school." *State* v. *Denby*, supra, 235 Conn. 483. Although the defendant is not required to know that such location is within a school zone, he or she actually must intend to sell or dispense at a location that is within the zone. Id.

In the present case, there was no such intent. The

defendant was merely passing through the prohibited zone. This intent is a required element; otherwise it "would encourage the police to chase drug suspects through school zones, or to delay arrests of suspected drug suspects until a school zone violation has occurred." *United States* v. *Alston*, 832 F. Sup. 1, 7 (D.D.C. 1993), aff'd without opinion, 72 F.3d 920 (D.C. 1995); see also *United States* v. *Liranzo*, 729 F. Sup. 1012, 1014 (S.D.N.Y. 1990). Such delay by the police officer is precisely what occurred in this case.

The majority opinion recounts, at length, evidence of the defendant's intent to sell narcotics. This includes evidence that the packaging and quantity of the narcotics found was consistent with an intent to sell and evidence of the defendant's prior conviction for selling narcotics. This evidence, though indicative of the defendant's intent to sell narcotics at some time or place, is not relevant to the defendant's intent to sell within the school zone. Intent to sell, without evidence of intent to sell at a location within a school zone, is not sufficient to find the defendant guilty under § 21a-278a (b). See *State* v. *Denby*, supra, 235 Conn. 483. The majority opinion's reliance on this evidence obfuscates the key issue in this case, which is whether the defendant's acts evidenced intent to sell or dispense narcotics within the school zone.

Although intent can be inferred from conduct; see *State* v. *Downey*, 45 Conn. App. 148, 154, 694 A.2d 1367, cert. denied, 242 Conn. 909, 697 A.2d 367 (1997); here, the defendant's words and conduct do not provide sufficient grounds for the inference that he intended to "sell" narcotics at that location, despite his act of handing the narcotics to Curtis.

Even under the very broad definition of sale,[3] the defendant's act here, handing a package of narcotics to his passenger with instructions that she "hold it," was not a sufficient act from which the jury could infer that he intended to "sell" or "dispense" at that moment. There is no evidence that the defendant would have stopped his vehicle within the school zone without orders from the police to do so. Once the defendant was stopped, the only reasonable inference that could be drawn from his act of handing the narcotics to Curtis was that he was attempting to conceal them from the police. Furthermore, the only reason this act occurred at this location was that the police officer followed the defendant into the zone and deliberately stopped him there.

Moreover, the United States Court of Appeals for the Second Circuit has held that the transfer of narcotics between two simultaneous purchasers is not "delivery" because such transfers are not links in the chain of distribution. *United States* v. *Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977). Similarly, here, though the defendant and his passenger were not simultaneous purchasers,

the defendant did not "deliver" the narcotics to Curtis because there is no indication that the transfer was furthering the distribution of the narcotics within the school zone.

This case, therefore, implicates the concerns expressed by other courts that police may, on a whim, use the pervasive and unavoidable presence of drug free school zones within our cities to significantly increase the mandatory penalty. See *United States* v. *Alston*, supra, 832 F. Sup. 7. Indeed, the scope of the prohibited zones is even broader in Connecticut. They also include "a public housing project or a licensed child day care center, as defined in section 19a-77, that is defined as a child day care center by a sign posted in a conspicuous place. . . . For the purposes of this subsection, 'public housing project' means dwelling accommodations operated as a state or federally subsidized multifamily housing project by a housing authority, nonprofit corporation or municipal developer, as defined in section 8-39, pursuant to chapter 128 or by the Connecticut Housing Authority pursuant to chapter 129." General Statutes § 21a-278a (b). These zones can, and do, encompass entire cities. See *United States* v. *Watson*, 788 F. Sup. 22, 25 n.5 (D.D.C. 1992) ("likelihood that most drug transactions in the District of Columbia necessarily occur near a school or playground simply because in this urban area there are schools or playgrounds almost everywhere"); *United States* v. *White*, United States District Court for the District of Connecticut, Docket No. N-90-40 (D. Conn. December 10, 1990) ("almost all of New Haven [Connecticut] falls within the protected 1000 foot school zone").[4] Under the majority opinion's interpretation of § 21a-278a (b), at the whim of a police officer's timing of the arrest, he or she could add three years imprisonment to the mandatory penalty. I am unwilling to hand over to the police the power of imposing penalties.[5]

Accordingly, I dissent with respect to parts I and II of the majority opinion.[6]

[1] I disagree with the majority when it states in footnote 1 "that there is neither a claim by the defendant nor any evidence in the record to suggest that Pitts chased or caused the defendant's vehicle to travel onto Padanaram Road in a southerly direction."

I agree that Pitts did not chase the defendant. Pitts, however, did follow the defendant until he got within 1500 feet of the school, notwithstanding that he had the same cause to stop him when he first observed the defendant in the North Street Shopping Plaza, as the majority opinion concedes. It is therefore a reasonable conclusion that Pitts deliberately followed the defendant until he got within 1500 feet of a school.

[2] General Statutes § 21a-278a (b) was amended in 1992 to increase the scope of the prohibited zone from 1000 feet to 1500 feet. See Public Acts 1992, No. 92-82.

[3] "Sale" is defined broadly by statute as, "any form of delivery which includes barter, exchange or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor, agent, servant or employee . . . ." General Statutes § 21a-240 (50); see *State* v. *Wassil*, 233 Conn. 174, 194, 658 A.2d 548 (1995). "Delivery" is "the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship . . . ." General Statutes § 21a-240 (11).

[4] The defendants in those cases were charged under 21 U.S.C. § 860, which is similar to General Statutes § 21a-278a (b). Connecticut, however, defines the zone around a protected property even more broadly. Compare 21 U.S.C. § 860 (a) ("within one thousand feet") and General Statutes § 21a-278a (b) ("within one thousand five hundred feet").

[5] Likewise, I would find error in the charge to the jury.

[6] I, therefore, would not reach the issue of prior misconduct evidence raised in part IV of the majority opinion.