047

IN THE SUPREME COURT OF FLORIDA

MARIO LAVON JENNINGS, :

Petitioner, :

v. : FLA.S.CT. CASE NO. 87,587

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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v.	:	Fla. S. Ct. No. 87,587
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	:	
	:	
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INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

The Record on Appeal consists of two volumes. The first volume contains the record, and pages therein shall be referred to as "(R #)". The second volume contains separately numbered transcripts of pretrial and sentencing proceedings. Pages in the first transcript will be referred to as "(Tr #)". Pages in the sentencing transcript shall be referred to as "(Sent. Tr #)".

STATEMENT OF THE CASE

This case is here on discretionary review of a decision of the First District Court of Appeal, which expressly declared as valid section 893.13(1)(c), Florida Statutes (1993), and rejected vagueness and lenity arguments expressly based on the due process clauses of the Florida and United States Constitutions. Jennings

v. State, 667 So. 2d 442 (Fla. 1st DCA 1996).[1] The controversy concerns the unconstitutionality of a criminal statute that reclassifies certain offenses taking place during the time period vaguely and ambiguously defined as between "6 a.m. and 12 a.m.," increasing the level of punishment. This Court accepted jurisdiction to review the decision below and dispensed with oral argument by Order dated June 14, 1996, pursuant to the authority of article V, section 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i),(ii).

STATEMENT OF THE FACTS

Petitioner was charged with five counts in two informations. In Case No. 94-408 CF, a four-count amended information charged petitioner Mario Jennings with (I) sale of a cocaine within 1000 feet of a school; (II) possession of cocaine within 1000 feet of a school with intent to sell or deliver; (III) possession of cocaine within 1000 feet of a school with intent to sell or deliver; and (IV) possession of drug paraphernalia. In Case No. 94-581 CF, an information charged petitioner with possession of cocaine within 1000 feet of a school with intent to sell or deliver. (R 110-11). Four of the five counts are the subjects of this petition; disposition of the possession of drug paraphernalia count should not be affected by the outcome.

Count I in Case No. 94-408 CF, alleged that

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[1] A copy of the District Court's opinion is attached in the Appendix at pp. A1-4.

> MARIO LAVON JENNINGS on the 29th day of JUNE, 1994, in COLUMBIA County, Florida, between the hours of 6:00 A.M. and 12:00 A.M, did then and there unlawfully sell or deliver a controlled substance, to-wit: cocaine, also known as "crack", in, on, or within 1000 feet of the real property comprising a public or private elementary, middle, or secondary school, to-wit: 9th grade center, contrary to Florida Statute 893.13(1)(c).

(R 1) (emphasis supplied). Count II alleged that

> MARIO LAVON JENNINGS on the 29th day of JUNE, 1994, in COLUMBIA County, Florida, between the hours of 6:00 A.M. and 12:00 A.M, did then and there possess with intent to sell or deliver a controlled substance, to-wit: cocaine also known as "crack", in, on, or within 1000 feet of the real property comprising a public or private elementary, middle, or secondary school, to-wit: the 9th grade center, contrary to Florida Statute 893.13(1)(c).

(R 1) (emphasis supplied). Count III alleged that

> MARIO LAVON JENNINGS on the 29th day of JUNE, 1994, in COLUMBIA County, Florida, between the hours of 6:00 A.M. and 12:00 A.M, did then and there unlawfully possess with intent to sell or deliver a controlled substance, to-wit: cocaine also known as "crack", in, on, or within 1000 feet of the real property comprising a public or private elementary, middle, or secondary school, to-wit: the 9th grade center, contrary to Florida Statute 893.13(1)(c).

(R 2) (emphasis supplied). Police alleged that the offenses quoted above occurred at 7:28 in the evening. (R 4; Tr 69).

The information in Case No. 94-581 CF alleged that

> MARIO JENNINGS on the 2nd day of July, 1994, in Columbia County, Florida, between the hours of 6:00 A.M. and 12:00 A.M, did then and there unlawfully possess with intent to sell, manufacture, or deliver a controlled substance, to-wit: cocaine also known as "crack", in, on, or within 1000 feet of the real property comprising a public or private elementary, middle, or secondary school, to-wit: the middle school, contrary to Florida Statute 893.13(1)(c).

(R 110) (emphasis supplied). Police alleged that this offense occurred at 1:20 p.m. (R 112; Tr 69).

Section 893.13(1)(c), Florida Statutes (1993), under which Mr. Jennings was charged in these four counts, provides:

> (c) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m. Any person who violates this paragraph with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 and must be sentenced to a minimum term of imprisonment of 3 calendar years.
>
> 2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> 3. Any other controlled substance, except as lawfully sold, manufactured, or

> delivered, must be sentenced to pay a $500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(Emphasis supplied.)

In the trial court, Mr. Jennings filed two motions in each case relevant to the issue presently pending before this Court. The first was a MOTION FOR COMPULSORY JUDICIAL NOTICE, asking the trial court to take notice of three particular matters:

> 1. The U.S. Government Printing Office Style Manual certifies that the abbreviation 12:00 p.m. stands for midnight.
>
> 2. The Director of the Time Service Department at the U.S. Naval Observatory takes the position that there is no such time of day as 12:00 a.m. and 12:00 p.m. Instead, that U.S. governmental agency takes the position that the terms noon or midnight should be utilized. It is that agency's position that using the terms 12:00 a.m. and 12:00 p.m. only serves to cause confusion. It is further a fact that due to the confusion caused by utilization of the terms 12:00 a.m. and 12:00 p.m., the Director of the Time Service Department receive questions asking for clarification of this issue on a daily basis.
>
> 3. As a result of the inconsistencies in the utilization of the abbreviations 12:00 a.m. and 12:00 p.m. to signify a specific time of day, reasonable persons may have differing opinions as to whether 12:00 a.m. stands for noon or midnight.

(R 31, 140). Attached to the motion were the following:

1. Excerpts from the U.S. Government Printing Office Style Manual, which refer to "p.m." as "midnight" but uses "m"

without an antecedent letter for "noon" and also uses "a.m." without definition. (R 33-34, 124-25).

2. Statements from the United States Naval Observatory, Time Service Department Director Gernot Winkler, in which he said the use of "12:00 a.m." and "12:00 p.m." is arbitrary, confusing, and illogical; that "[n]oon is neither 12 a.m. or p.m. and neither is midnight;" and recommended that neither "m" alone should be used, nor should "12:00 a.m." and "12:00 p.m." be used to refer to "noon" or "midnight." (R 35-38, 126-29).

3. Dictionary definitions of "midnight" and "noon", neither of which refer to "p.m.", "a.m.", or "m." (R 39-40, 130-31).

4. Newspaper articles relying in part on statements from the United States Naval Observatory, Time Service Department Director Gernot Winkler, discussing the ambiguity of "12:00 a.m." and "12:00 p.m." (R 41-46; 132-39).

The second motion relevant to this case was Mr. Jennings' MOTION TO DISMISS INFORMATION AND DISCHARGE DEFENDANT. (R 47-50, 120-23). The motion alleged that the phrase "between the hours of 6 a.m. and 12 a.m." in section 893.13(1)(c), as alleged in four counts of the informations recited above,

> is unconstitutionally vague and fails to adequately and reasonably give notice in violation of a right of a person not to be deprived of life, liberty, or property without due process of law, as secured by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and Article I, Section 9, Constitution of the State of Florida. Therefore, the enhancement for being within 1,000 feet of a school at the time of these alleged offenses is not available as to the above referenced counts in these cases.

(R 49, 122). Mr. Jennings also argued that because the language of the statute and the informations is susceptible to differing

constructions, the rule of lenity requires the statute be construed strictly and favorably for the accused.

> Dismissal is required by Florida Statutes §775.021(1), the Rule of Lenity, which provides "[T]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." In the instant case, there are obviously differing constructions as to the term 12:00 a.m. To some persons, it signifies noon. To others, it signifies midnight. For the Defendant to be guilty under the enactments of Florida Statutes §893.13(1)(c), the Court would have to interpret the term 12:00 a.m. to mean midnight, with no other possibility of differing constructions. Obviously, this is not the case. Because of differing constructions/interpretations of what the term 12:00 a.m. means, the Court is required by Florida Statutes §775.021(1) to interpret the term as contained in §893.13(1)(c) strictly, and in the light most favorable to the accused. In this case, that would require this Court to interpret 12:00 a.m. as referencing the noon time of day. As the incident in Case 94-408 CF occurred at 7:28 p.m. and the incident in Case 94-581 occurred at 1:20 p.m., the Defendant would not be guilty of this enhanced crime. However, the Defendant would concede that this would not prohibit the State from proceeding on the second degree felony offenses of sale of cocaine and possession of cocaine with intent to sell under Florida Statutes §893.13(1)(a).

(R 49, 122).

The motions were heard on October 31, 1994 by The Honorable Paul S. Bryan, Circuit Judge for the Third Judicial Circuit in and for Columbia County, Florida. The court considered the

motions to dismiss in conjunction with the motions for judicial notice.

Mr. Jennings cited the materials submitted in the motions for compulsory judicial notice along with a proffer of a public survey. (Tr 41-43). Mr. Jennings also argued that the court could take discretionary judicial notice of the items in the motion, which the court acknowledged it could do under section 90.202, Florida Statutes (1993). (Tr 32-35). Throughout the hearing the State opposed both compulsory and discretionary judicial notice on the procedural ground that the motion had not been served with sufficient notice, and on the substantive ground that these matters are not susceptible of being judicially noticed.

The court granted in part and denied in part the judicial notice motion. Referring to its authority under section 90.202(11), Florida Statutes (1993), the court granted Mr. Jennings' request to take judicial notice of the fact that reasonable persons may have differing opinions as to whether 12:00 a.m. stands for noon or midnight:

> THE COURT: The Court is going to take judicial notice of paragraph three. Specifically, I'm judicially noticing that reasonable persons may have differing opinions as to whether 12:00 a.m. stands for noon or midnight. . . .
>
> . . . .
>
> And I don't think it's a matter of much dispute that some people would say 12:00

> a.m. stands for noon, some would say it stands for midnight. So I'm going to take judicial notice that reasonable persons may have differing opinions as to that.

(Tr 44-45).

The court denied the motion for judicial notice as to the U.S. Government Printing Office Style Manual and statements of the U.S. Naval Observatory Time Service Department Director Gernot Winkler. (Tr 32, 36).

Mr. Jennings argued that the statute was vague and ambiguous both on its face and as applied in this case because the term "12:00 a.m." renders the statute equally susceptible of defining a period of time of either six hours or eighteen hours. Therefore, the statute does not give a person of ordinary reason sufficient notice of exactly when the prohibited conduct falls within the embrace of the reclassification statute for enhanced punishment. Mr. Jennings also argued that the rule of lenity under Florida law requires the court to construe the statute strictly and in the light most favorable to the accused. The State argued that the statute proscribes conduct between the hours of 6 a.m. and midnight when measured by standards of common understanding and practices -- even though the State conceded that the statute was poorly written -- and that statutes should be construed to uphold their validity. (Tr 47-57). The court denied the motions to dismiss. (Tr 57).

Consequently, Mr. Jennings pleaded no contest to the charges (R 68; Tr 57-71), and the court entered judgments of guilt as to all counts (R 81, 161). The judge sentenced Mr. Jennings in Case No. 94-408 CF to three years' imprisonment, including a three-year minimum mandatory term, for Count I (R 83, 85), and five years probation to follow imprisonment on the remaining three counts (R 88). In Case No. 94-581 CF, the judge imposed a concurrent sentence of three years' imprisonment, including a three-year minimum mandatory term, to be followed by two years' probation. (R 164-66). Mr. Jennings expressly reserved his right to appeal the judgments and sentences based on the trial court's decision to deny the motion to dismiss, which was dispositive of guilt as to the heightened offenses of sale and possession with intent to sell within 1,000 feet of a school, but not as to the lesser offenses of sale and possession with intent to sell. (Tr 57, 71; Sent. Tr 3-4). The court then authorized a supersedeas bond for Mr. Jennings' release pending appeal. (R 95, 177; Sent. Tr 18). Timely notices of appeal were filed on February 1, 1995. (R 98, 179).

On appeal to the First District, Mr. Jennings made the same claims he made in the trial court, arguing that section 893.13(1)(c) was unconstitutionally vague on its face and as applied, and even if constitutional, it should be narrowly construed in Mr. Jennings' favor under the rule of lenity. The arguments were expressly predicated on the fourteenth amendment

to the United States Constitution and article I, section 9, and article II, section 3, of the Florida Constitution.[2]

The First District Court of Appeal affirmed with a written opinion. Jennings v. State, 667 So. 2d 442 (Fla. 1st DCA 1996). The decision expressly rejected the argument that the statute should be struck down as vague, concluding "[w]e find no constitutional infirmity and affirm." 667 So. 2d at 443. The court's analysis rested in part on what it believed to be the Legislature's intent based on "common understanding and practices." Id. at 444. The court then spent the second half of its opinion acknowledging that judicial and nonjudicial authorities have given the term "12 a.m." varying interpretations, including numerous dictionaries, the U.S. Naval Observatory, and a New Jersey appellate court. Id. at 444-45. The court also acknowledged that to its knowledge only one other statute in Florida history, a 1945 statute, used the term "12 a.m." or "12 p.m." to define a period of time. Id. at 445. The court even suggested that the Legislature amend the statute to clarify its meaning. Id.

Mr. Jennings moved for rehearing, rehearing en banc, and certification of the issue. He maintained that the decision as to the constitutionality of the statute was wrong, but even if the statute was constitutional, the court overlooked the due

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[2] A copy of the argument made in the initial brief filed in the First District is attached in the Appendix at pp. A5-17.

process and statutory rule of lenity as argued in the trial court and in the initial brief. He also brought to the court's attention the fact that the Tenth Circuit Court issued a decision directly conflicting with the First District's decision, dismissing a charge filed under section 893.13(1)(c). State v. O'Neal, No. CF95-0407AI-XX (Fla. 10th Cir. Ct., June 26, 1995).[3] The First District summarily rejected his motions. Petitioner timely filed a notice to invoke this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

Section 893.13(1)(c), Florida Statutes (1993), reclassifies the crimes charged and enhances the punishment if the criminal conduct occurs between the hours of 6 a.m. and 12 a.m. That time period is vague and ambiguous because it is equally susceptible of two reasonable constructions in common usage and practice: 6 a.m. to noon or 6 a.m. to midnight. The vague and ambiguous time period renders the reclassification and penalty enhancement statute facially unconstitutional. Even if the statute is not facially unconstitutional, the statute cannot constitutionally be applied to petitioner because his conduct

[3] A copy of Mr. Jennings' argument made on rehearing in the First District is attached in the Appendix at pp. A18-21. A copy of the trial court's order in State v. O'Neal is attached in the Appendix at pp. A22-25. The Second District subsequently reversed the trial court's order on the authority of Jennings v. State and without further explanation. State v. O'Neal, 21 Fla. L. Weekly D791 (Fla. 2d DCA March 27, 1996), petition for review filed, No. 87,858 (Fla. May 1, 1996).

occurred between noon and midnight, during the period for which the clarity of the statute is most in doubt. At the very least, this ambiguous provision should be strictly construed in favor of petitioner under the constitutional and statutory rule of lenity. Brown v. State; Perkins v. State; Cabal v. State; Scates v. State; State v. Hart. Legislative intent is irrelevant to a vagueness/lenity inquiry. Linville v. State; Franklin v. State.

ARGUMENT

WHETHER THE DISTRICT COURT ERRONEOUSLY UPHELD AND FAILED TO NARROWLY CONSTRUE SECTION 893.13(1)(C), A CRIMINAL PUNISHMENT STATUTE DEFINING AN ELEMENT OF THE OFFENSE WITH THE VAGUE AND AMBIGUOUS TERM "12 A.M.," DESPITE THE FACT THAT THE DISTRICT COURT ACKNOWLEDGED THE STATUTE'S FACIAL AMBIGUITY AND DESPITE THIS COURT'S DIRECTIVE UNDER THE CONSTITUTION REQUIRING THE DISTRICT COURT TO CONSTRUE AN AMBIGUOUS OR VAGUE STATUTE IN THE MANNER MOST FAVORABLE TO THE ACCUSED.

This petition is best understood by first distinguishing what is and what is not in dispute. Petitioner Mario Lavon Jennings does not challenge Count IV in Case No. 94-408, which alleged possession of paraphernalia. Mr. Jennings also does not dispute that he engaged in the conduct of sale and possession with intent to sell crack cocaine, which are subsumed within the allegations in counts I, II, and III of Case No. 94-408 and the only count in Case No. 94-581 CF, and which constitute second-degree felonies under section 893.13(1)(a), Florida Statutes

(1993).[4] This petition concerns only the statutory reclassification of those offenses under section 893.13(1)(c) and subsection (1)(c)1., Florida Statutes (1993), which apply when the act of sale or possession with intent to sell occurs "in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m.". Subsection 893.13(1)(c)1. reclassifies the offense from the second-degree felony defined in section 893.13(1)(a)1. to a first-degree felony punishable by a minimum mandatory term of three years' imprisonment.

Mr. Jennings challenges that reclassification provision on its face and as applied because the term "12:00 a.m." in section 893.13(1)(c) is ambiguous and fails to put reasonable persons on notice of whether the period of time in which an offense is subject to reclassification ends at noon or midnight. At the

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[4] Section 893.13(1)(a), Florida Statutes (1993), provides:

> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

very least, this ambiguous provision should be strictly construed in favor of Mr. Jennings under the constitutional and statutory rule of lenity requiring strict construction of penal statutes.

This Court set forth some of the controlling principles that apply to this case in Brown v. State, 629 So. 2d 841 (Fla. 1994), and Perkins v. State, 576 So. 2d 1310 (Fla. 1991), and just reiterated in a new decision, Cabal v. State, 21 Fla. L. Weekly S255 (Fla. June 13, 1996). Brown addressed the vagueness principle with respect to a closely related statute, section 893.13(1)(i), Florida Statutes (Supp. 1990), and found it facially unconstitutional in violation of article I, section 9, of the Florida Constitution. This Court summarized the applicable principles as follows:

> The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). "The language of the statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice.'" Warren v. State, 572 So. 2d 1376, 1377 (Fla. 1991) (quoting State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985)). Because of its imprecision, a vague statute may invite arbitrary or discriminatory enforcement. Southeastern Fisheries [Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984)] at 1353. A statute is not void for vagueness if the language "'conveys sufficiently definite warning as to the proscribed conduct when measured by

> common understanding and practices.'" Hitchcock v. State, 413 So. 2d 741, 747 (Fla.) (quoting United States v. Petrillo, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947)), cert. denied, 459 U.S. 960, 103 S. Ct. 274, 74 L. Ed. 2d 213 (1982).
>
> When reasonably possible and consistent with constitutional rights, this Court should resolve all doubts of a statute in favor of its validity. State v. Wershow, 343 So. 2d 605, 607 (Fla. 1977). But this Court has also held that when there is doubt about a statute in a vagueness challenge, the doubt should be resolved "in favor of the citizen and against the state." Id. at 608. In the instant cases, there is sufficient doubt about the statute, requiring the doubt to be resolved in favor of the citizen and against the State. Thus, we find the statute facially invalid under the void-for-vagueness doctrine.

Brown, 629 So. 2d at 842-43.

Also applicable to this case are the due process and statutory principles embodied in the rule of lenity requiring strict construction of penal statutes, which this Court set forth in great detail in Perkins. This Court said:

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. E.g., State v. Jackson, 526 So. 2d 58 (Fla. 1988); State ex rel. Cherry v. Davidson, 103 Fla. 954, 139 So. 177 (1931); Ex parte Bailey, 39 Fla. 734, 23 So. 552 (1897). This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. E.g., Brown v. State, 358 So. 2d 16 (Fla. 1978); Franklin v. State, 257 So. 2d 21 (Fla. 1971); State v. Moo Young, 566 So. 2d 1380 (Fla. 1st DCA 1990). Words and meanings beyond the literal language may not be entertained nor

may vagueness become a reason for broadening a penal statute.

Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. Scull v. State, 569 So. 2d 1251 (Fla. 1990) (on petition for clarification); Franklin, 257 So. 2d at 23. For this reason,

> [a] penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation.

Gluesenkamp v. State, 391 So. 2d 192, 198 (Fla. 1980), cert. denied, 454 U.S. 818, 102 S. Ct. 98, 70 L. Ed. 2d 88 (1981) (citations omitted). Elsewhere, we have said that

> [s]tatutes criminal in character must be strictly construed. In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance.

State ex rel. Lee v. Buchanan, 191 So. 2d 33, 36 (Fla. 1966) (citations omitted); accord State v. Valentin, 105 N.J. 14, 519 A.2d 322 (1987). Thus, to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused. Palmer v. State, 438 So. 2d 1, 3 (Fla. 1983); Ferguson v. State, 377 So. 2d 709 (Fla. 1979).

The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Borges v. State, 415 So. 2d 1265,

1267 (Fla. 1982); accord United States v. L. Cohen Grocery Co., 255 U.S. 81, 87-93, 41 S. Ct. 298, 299-301, 65 L. Ed. 516 (1921) (applying same principle to Congressional authority). As we have stated,

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See Article II, Section 3, Florida Constitution.

Brown, 358 So. 2d at 20; accord Palmer, 438 So. 2d at 3. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers. Art. II, Sec. 3, Fla. Const.

Explicitly recognizing the principles described above, the legislature has codified the rule of strict construction within the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§ 775.021(1), Fla. Stat. (1987).

We thus must determine whether the district court honored the legal rule described here.

Perkins, 576 So. 2d at 1312-13 (footnote omitted); see also Cabal v. State, 21 Fla. L. Weekly S255 (Fla. June 13, 1996); Scates v. State, 603 So. 2d 504 (Fla. 1992).

As noted above, the trial court in this case took judicial notice of the fact that reasonable persons may have differing opinions as to whether 12:00 a.m. stands for noon or midnight. Thus it has been judicially determined that the relevant essential element in the statute is susceptible of different reasonable constructions because it is not clear in common usage, understanding, and practice. The trial court's finding of fact is supported by evidence and therefore cannot be disturbed on appeal. E.g. Doctor v. State, 665 So. 2d 1040 (Fla. 1995).

Respected dictionaries agree that the term "12 a.m." is ambiguous. Black's Law Dictionary, for example, defines "a.m." to mean "before noon" while "p.m." is defined as "afternoon." Black's Law Dictionary 79, 1155 (6th ed. 1990). According to that widely accepted treatise of legal definitions, it would be reasonable to infer that 12:00 a.m. is the hour of 12:00 o'clock that falls before noon, i.e., midnight, and 12:00 p.m. is the hour of 12 o'clock that falls after noon, i.e., also midnight. Of course, that cannot be the case. The same definitions are contained in the Oxford English Dictionary 66, 2217 (Compact ed. 1971). The Random House Dictionary of the English Language (1966 ed.) defines "a.m." both as the period "before noon", id. at 45, which leaves in question when "12 a.m." occurs; and as "the period from 12 midnight to 12 noon, esp. the period of daylight prior to noon," id., which could be

interpreted in the context of this statute as a definition favorable to petitioner's cause. The District Court below also resorted to dictionary definitions and agreed that the term "12 a.m." has no clear meaning:

> "A.M." is an abbreviation for the Latin phrase ante meridiem, or "before noon." Webster's Third New International Dictionary 91 (1993); see also Black's Law Dictionary 79 (6th ed. 1990). Similarly "P.M." is an abbreviation for the Latin phrase post meridiem, or "after noon." Webster's Third New International Dictionary 1773 (1993); see also Black's Law Dictionary 1155 (6th ed. 1990). Neither "12 a.m." nor "12 p.m." is an appropriate way to denote "noon." Either notation is also a problematic designation for midnight, although either appears equally (in)appropriate, because midnight can be viewed with equal justification as the end of one day or the beginning of the next. Midnight is the only twelve o'clock that falls before (or after) noon.

Jennings, 667 So. 2d at 444. For further examples, see the dictionary definitions in the record cited to the trial court when this issue arose (R 39-40, 130-31).[5]

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[5] Although the circuit court declined to take judicial notice of official United States government documents and actions as set forth in the attachments to Mr. Jennings' motion for judicial notice, this Court has the authority to take judicial notice of such materials independent of what proof was offered below. See, e.g., Raulerson v. State, 358 So. 2d 826, 830 (Fla.) ("we take judicial notice of the fact that a person named "Michael" is generally referred to as "Mike"), cert. denied, 439 U.S. 959, 99 S. Ct. 364, 58 L. Ed. 2d 352 (1978); Garver v. Eastern Airlines, 553 So. 2d 263, 268 (Fla. 1st DCA 1989) (appellate court took judicial notice of matter not noticed below, taking notice of the common sense fact "that the greater Los Angeles area is a large metropolitan region, encompassing numerous square miles of territory"), review denied, 562 So. 2d

Other courts have observed the same problem in defining this period of time. After Jennings was decided favorably to the State, Circuit Judge Robert Doyel rejected the State's position and granted a defendant's motion to dismiss a charge filed under section 893.13(1)(c), expressly rejecting the First District's Jennings rationale. State v. Bonney, No. CF95-5030A2-XX (Fla. 10th Cir. Ct., Feb. 27, 1996). Ironically, Judge Doyel quoted the second half of Jennings to support his conclusion that the statute is unconstitutionally vague. Bonney, slip op. at 1-3.[6]

The very same type of ambiguity present in this case caused at least one other court to strike down a prosecution that rested on the equally precarious term "12 p.m." State v. Hart, 530 A.2d 332 (N.J. Ct. App. 1987). That court was faced with a

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345 (Fla. 1990); Henderson Sign Serv. v. Department of Transp., 390 So. 2d 159, 160 (Fla. 1st DCA 1980) (appellate court took judicial notice that I-10 was and is part of the federal highway system even in the absence of any specific proof presented in the trial court), remanded on other grounds, 406 So. 2d 1099 (Fla. 1981); see generally Charles W. Ehrhardt, Florida Evidence § 207.2 (1994 ed.) ("Appellate courts can judicially notice adjudicative facts on appeal.") Petitioner asks this Court to take judicial notice of the official position of the U.S. Government Printing Office and the Time Service Department at the U.S. Naval Observatory, as set forth in the record on appeal and for which the State has ample notice.

Even if this Court declines to take judicial notice, the U.S. Government Printing Office Style Manual is like a dictionary or grammar book and can be relied on as persuasive authority absent judicial notice, as courts often do.

[6] A copy of Bonney is attached in the Appendix at pp. A26-29.

conviction for a parking violation where the meter's posted time of operation was to be from 8 a.m. until 12 p.m., and the underlying municipal ordinance regulated parking from "8:00 a.m. to 12:00 midnight," but the sign, which was the only notice of the effective hours of metered parking, did not use the language of the ordinance. The court had to construe whether "12 p.m." provided sufficient clarity to maintain the prosecution, or whether the ambiguity should be strictly construed in favor of Hart and against the State. The court first noted that defining "12 p.m." by the number of hours before and after "meridiem" produced illogical results and failed to clearly define "12 p.m." 530 A.2d at 332-33. (This mirrors the illogical result one finds when applying the Blacks' Law Dictionary definitions.) The court then rejected the trial court's conclusion that reason, logic, and "good discretion" impel a construction of "12 p.m." to mean midnight since revenues would be collected throughout the day. Instead, the appellate court said another logical construction of the statute was possible. 530 A.2d at 333. Next the court looked to varying definitions of "12 a.m." and "12 p.m." in New Jersey law and concluded that there had been no consistency. 530 A.2d at 333-34. Finally, the Court took judicial notice of the position taken by the Time Service Division of the United States Naval Observatory, which recommend against using "12 a.m." and "12 p.m." because the terms cause

confusion.[7] 530 A.2d at 334 n.1. Consequently, the court reversed the conviction, holding:

> We are thus loath to apply an absolute definition of the term 12 p.m. in a quasi-criminal context, especially where the municipality chose not to follow its own ordinance and use the word "midnight," but rather employed an ambiguous term in giving notice to the public.

Hart, 530 A.2d at 334.

As in Hart, another logical construction of the statutory language in section 893.13(1)(c) is possible. People reasonably could believe the Legislature focused on the period of 6 a.m. to noon because common experience shows that the morning hours are when most students attend school, as contrasted with the late night hours extending to midnight when few or no students would be around.

Also revealing is a survey of Florida Statutes (1993), which indicates that section 893.13(1)(c) is the only Florida statute defining a time period beginning or ending as "12:00 a.m." or "12:00 p.m." In other statutes, the Legislature apparently was cognizant of the inherent confusion and worked around it so that when time was a critical element, the

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[7] This is the same fact petitioner asks this Court to judicially notice in footnote 5, supra. Even if this Court does not accept judicial notice here, certainly the reasoning applied in Hart is persuasive authority on which this Court can rely.

Legislature's intent was clear and unambiguous.[8] The First District found only one other Florida statute dating back to 1945 that had a similar flaw. Jennings, 667 So. 2d at 445 (citing section 562.12(1), Florida Statutes (Supp. 1945) as the "only one instance" where the Legislature used the term "12 p.m." in defining a statutory prohibition). This research indicates that holding the statute unconstitutional would have very narrow application and would not appear to affect any other

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[8] Compare § 893.13(1)(c) ("between the hours of 6 a.m. and 12 a.m.") with § 48.091(2), Fla. Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to **12 noon**"); id. § 112.061(5)(b)2. ("Lunch -- When travel begins before **12 noon** and extends beyond 2 p.m."); id. § 198.331 (applying various provisions "to estates of decedents dying after **12:01 a.m.**, Eastern Standard Time, October 1, 1933."); id. § 324.251 ("This chapter [] shall become effective at **12:01 a.m.**, October 1, 1955."); id. § 373.069(1) ("At **11:59 p.m.** on December 31, 1976, the state shall be divided into the following water management districts..."); id. § 373.0693(7) ("At **11:59 p.m.** on December 31, 1976, the Manasota Watershed Basin..."); id. § 373.0693(8)(a) ("At **11:59 p.m.** on June 30, 1988, the area transferred from..."); id. § 373.0693(8)(c) ("As of **11:59 p.m.** on June 30, 1988, assets and liabilities of..."); id. § 373.0693(9) ("At **11:59 p.m.** on December 31, 1976, a portion of..."); id. § 373.0693(10) ("At **11:59 p.m.** on December 31, 1976, the entire area..."); id. § 381.00897(2) ("Owners or operators of migrant labor camps or residential migrant housing may adopt reasonable rules regulating hours of access each say during nonworking hours Monday through Saturday and between the hours of **12 noon** and 8 p.m. on Sunday"); id. § 440.05(4) ("such notice is effective as of **12:01 a.m.** of the day following the date it is mailed to the division in Tallahassee"); id. § 562.14(1) (precluding the sale of alcoholic beverages "between the hours of **midnight** and 7 a.m. of the following day"); id. § 671.301(1) ("This act shall take effect at **12:01 a.m.** on January 1, 1980."); id. § 713.36 ("Chapter 63-135 shall take effect at **12:01 a.m.**, October 1, 1963."); id. § 900.02 ("The Criminal Procedure Law shall become effective at **12:01 a.m.**, January 1, 1971"). (Emphasis supplied.)

statutes presently on the books. For whatever reason, the Legislature just missed the mark here.

This Court long ago counseled that "[f]ractions of days are not regarded in the law except where justice requires a careful examination as to the precise time of day at which an act was performed, in order to do right as between the parties." Savage v. State, 18 Fla. 970, 973 (1880). Yet the measure of time in section 893.13(1)(c), which must be precisely defined according to due process principles and "to do right between the parties," Savage, cannot be determined from the language of the statute where the critical term is equally susceptible of two different interpretations.

The statutory provision at issue can have only one of two meanings: It either embraces the period of 6 a.m. to noon, or 6 a.m. to midnight. If standing alone, either one of the meanings might be an unimpeachable legislative judgment. But the Legislature instead has left the public to guess at which meaning applies. Similarly, the fact that the period between 6 a.m. and noon is embraced within the statute under either view does not render the statute as a whole clear and unambiguous on its face because reasonable persons still do not know what time the statute defined. The District Court's decision was wrong because the vagueness of the statute is apparent on its face, defining a critical provision that restricts liberty by use of a term that defies clear understanding and definition in

dictionaries, law books, and through common usage. The ambiguity of the statute is reflected in the ambiguity of the District Court's Jennings opinion, as noted by Bonney: The court first said the statute is not vague, and then it offered evidence to demonstrate the statute's vagueness and asked the Legislature to fix it.

Even if the statute is not unconstitutional on its face, it cannot constitutionally be applied to Mr. Jennings, whose conduct was alleged to have occurred after noon and before midnight in both informations, well outside the time period for which a clear definition, if any, arguably existed. There is no clear notice provided by the language of the statute to fit Mr. Jennings within its grasp. Cf. Fiske v. State, 366 So. 2d 423, 424 (Fla. 1978)(statute proscribing possession of psilocybin held unconstitutional as applied to one convicted of possessing psilocybic mushrooms because statute did "not give fair warning that possession of the mushrooms possessed by appellant is a crime").

The State argued to the District Court that notice violations are irrelavant in a statute like the present one because the activity itself is unprotected. The District Court appears to have accepted that argument, saying:

> The present statute poses no danger, moreover, that innocent conduct will be punished as a crime. Section 893.13(1)(a) prohibits the sale and possession with intent to sell of controlled substances

> whatever the time of day. Subsection (1)(c) merely increases the gravity of the offense and the severity of the penalty when the sale (or possession with intent to sell) occurs within 1000 feet of a school during the time period specified.

Jennings, 667 So. 2d at 444. That analysis is inappropriate and was thoroughly repudiated by this Court's decision in Brown, 629 So. 2d at 841. Brown quashed another First District decision and struck down a closely related drug offense penalty enhancement statute, section 893.13(1)(i), Florida Statutes (Supp. 1990), holding that the term "public housing authority," used to define an area within which drug dealing merits more severe punishment, was unconstitutionally vague.

The State also argued to the District Court that the decision here should be guided by legislative intent and the "wisdom" of the statute. The District Court appears to have bought that argument, too, saying:

> In this way, the statute exhibits special concern that controlled substances not be peddled to school children. "In determining the intent of the Legislature, the courts must construe a statute in light of the purposes for which it was enacted and the evils it was intended to cure." Young v. St. Vincent's Medical Ctr. Inc., 653 So. 2d 499, 506 (Fla. 1st DCA 1995), review granted, 663 So. 2d 633 (Fla. 1995) (Mickle, J., concurring). We do not believe "common understanding and practices" lend support to the view that the Legislature intended to provide a greater penalty for drug sales at morning recess than for sales during the lunch hour or after school lets out. We can think of little justification for such an interpretation of the statute. In context,

> it is clear that the term "12 a.m." in section 893.13(1)(a), Florida Statutes (1993) must mean "midnight," by which time--the Legislature had reason to hope--school children will be at home fast asleep.

Jennings, 667 So. 2d at 444. Again, settled principles of law show that the District Court erred: A vagueness challenge like the one here does not hinge on legislative intent, making such analysis inappropriate.

For example, in Linville v. State, 359 So. 2d 450 (Fla. 1978), this Court reversed a drug conviction finding that a statute defining "chemical substance" was unconstitutionally vague, regardless of what the Legislature actually may have intended the statute to mean, because the language of the statute itself did not "convey sufficiently definite warnings of the proscribed conduct when measured by common understanding and practice." Id. at 451-52. This Court said:

> Regardless of whether the legislature in fact intended to proscribe the inhalation of the fumes from these products, the statute suffers from constitutional infirmities because due process will not tolerate a law which forbids or requires the doing of an act in terms so vague that the person of common intelligence must necessarily guess at its meaning.

Id. (emphasis supplied). Likewise, in Franklin v. State, 257 So. 2d 21 (Fla. 1971), this Court struck down a statute for vagueness irrespective of whether a clear definition of the language in the statute could be divined from the common law.

This Court distinguished between the "legal" understanding of a statute and the constitutionally required understanding of a statute measured by the "average man of common intelligence," holding that:

> Common law definitions are of course resorted to when the forbidden conduct is not defined. This may supply the deficiency for a legal understanding of a vague statute, but it cannot meet the constitutional requirement that the language of the statute be understandable to the common man.

Franklin, 257 So. 2d at 23 (emphasis in original; footnote omitted).

As in Franklin and Linville, this Court should not seek to divine legislative intent or impose its view of the "wisdom" of the statute to determine whether "12 a.m." is sufficiently clear to put the average person of common intelligence on notice of its meaning. A statute must be clear on its own terms, for the published language of the statute is the only language available to put a defendant on notice of the conduct being prohibited and the punishment to be meted out. The very fact that a court resorts to means outside the statute to determine whether the forbidden conduct is included supports petitioner's argument that the statute is not sufficiently clear to withstand a vagueness challenge, e.g., Brown, 629 So. 2d at 841; Linville, 359 So. 2d at 452; Franklin, 257 So. 2d at 21, or strict

construction under the rule of lenity, e.g. Perkins, 576 So. 2d at 1310; State v. Wershow, 343 So. 2d 605 (Fla. 1977).

Finally, the District Court's decision was wrong because it failed to obey this Court's express command directed to the district court in Perkins, which held that if a word or phrase in a statute is vague or ambiguous, "the district court was under an obligation to construe it in the manner most favorable to the accused. Art. I, § 9, Art. II, § 3, Fla. Const.; § 775.021(1), Fla. Stat. (1987)." 576 So. 2d at 1313 (emphasis supplied). Perkins strictly construed section 776.08, Florida Statutes (1987), which defines forcible felony to include "any other felony which involves the use or threat of physical force or violence against any individual," holding that cocaine trafficking did not fit within that statute as narrowly construed and therefore self defense was available to one charged with cocaine trafficking. In so doing, Perkins quashed a district court's decision that failed to follow the strict construction rule.

This Court just reiterated the same principles in Cabal v. State, 21 Fla. L. Weekly S255 (Fla. June 13, 1996), applying the rule stated in Perkins and other cases to strictly construe an arguably ambiguous statute that imposed extra punishment for wearing a mask in the commission of a robbery. This Court said the statute created a punishment enhancement and not a

reclassification of the crime that would have made it a higher degree felony. Part of this Court's rationale was that

> Rules of statutory construction require penal statutes to be strictly construed. State v. Camp, 596 So. 2d 1055 (Fla. 1992); Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Further, when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. Scates v. State, 603 So. 2d 504 (Fla. 1992).

Cabal, 21 Fla. L. Weekly at S256 (emphasis supplied).

Scates, on which Cabal relied, further supports Mr. Jennings. Scates relied in part on strict construction principles to limit the breadth of yet another drug-related penal statute, quashing the district court's decision and holding that judges may refer a defendant convicted under section 893.13(1)(e)(1), Florida Statutes (1989) to a drug abuse program rather than impose a minimum three-year sentence.

Mr. Jennings does not expect to escape punishment, for he acknowledged his criminal conduct by entering his plea. He merely contends that it is unfair and unconstitutional for the state to reclassify his crime and enhance his punishment based on an ambiguous penal statute.

CONCLUSION

For the reasons stated above, this Court should quash the decision under review and remand with instructions to order the reduction of the charges and the resentencing of Mr. Jennings.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by delivery to Mark Menser, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by mail to petitioner Mario Lavon Jennings, on this 3d day of July, 1996.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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APPENDIX

PAGE(S)

Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge.

Robin C. Lemonidis of Robin C. Lemonidis, P.A., Melbourne, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Senior Assistant Attorney General, Daytona Beach, for Appellee.

THOMPSON, Judge.

Scott McQuirk appeals his conviction for sexual battery [1] on the daughter of his former girlfriend. Testimony established that the victim was 19 at the time of the crime, but because she is mildly retarded, she perceives reality as a 10 to 12 year old. We affirm.

On appeal, McQuirk raised three issues concerning the admission of testimony at trial: 1) whether the trial court erred in allowing two experts to testify to the victim's credibility that, in their opinion, the victim was "very capable of telling the truth;" 2) whether the trial court erred in restricting the cross-examination of witnesses which adversely affected McQuirk's ability to develop his defense theory of the case; and 3) whether the cumulative errors of the trial court constituted fundamental error. Unfortunately, we are unable to review the alleged errors.

[1, 2] The general rule in Florida is that an attorney must make a contemporaneous objection to a trial court's ruling in order to preserve the error for appeal. This rule does not apply if the trial court commits fundamental error. *See Castor v. State*, 365 So.2d 701, 703 (Fla.1978) (holding that unless fundamental error, appellate courts will not review for first time on appeal points not preserved by contemporaneous objection by trial counsel and that appellate counsel is bound by acts of trial counsel). McQuirk's privately retained counsel never made specific, contemporaneous objections to the rulings of the trial court. Thus, they were not preserved for appeal. Further, we hold that the trial court committed no fundamental error in this sexual battery case. *See Assiaq v. State*, 565 So.2d 387, 388 (Fla. 5th DCA 1990) (holding that issue of whether trial court allowed two psychological experts to improperly vouch for credibility of sex crime victim was not preserved for appellate review by specific, contemporaneous objection at trial); *see also Glendening v. State*, 536 So.2d 212, 221 (Fla.1988), *cert. denied*, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989) (holding that expert's improper testimony that in her opinion child's father was person who committed sexual battery upon child was not preserved for appellate review where there was no contemporaneous objection at trial, nor was it fundamental error). Because the issues were not preserved for appeal and there was no fundamental error, we affirm.

AFFIRMED.

GOSHORN and GRIFFIN, JJ., concur.

1. § 794.011(5), Fla.Stat. (1993).

Mario Lavon JENNINGS, Appellant,

v.

STATE of Florida, Appellee.

No. 95-411.

District Court of Appeal of Florida, First District.

Jan. 26, 1996.

Rehearing Denied Feb. 22, 1996.

Defendant was convicted before the Circuit Court, Columbia County, Paul S. Bryan, J., of sale of cocaine within 1,000 feet of a school, three counts of possession of cocaine within 1,000 feet of a school with intent to sell it, and possession of drug paraphernalia, and he appealed. The District Court of Appeal, Benton, J., held that statutory section making sale of cocaine within 1,000 feet of a school a more serious crime if committed

"between the hours of 6:00 a.m. and 12:00 a.m." is not unconstitutionally vague.

Affirmed.

1. **Criminal Law** ⇐13.1(1)

Statute is void for vagueness if its language conveys sufficiently definite warning as to proscribed conduct when measured by common understanding and practices.

2. **Criminal Law** ⇐13.1(1)

Although language of statute must provide definite warning of what conduct is required or prohibited, measured by common understanding and practice, it need not attain ideal linguistic precision. U.S.C.A. Const.Amend. 14.

3. **Statutes** ⇐184

In determining intent of legislature, courts must construe statute in light of purposes for which it was enacted and evils it was intended to cure.

4. **Drugs and Narcotics** ⇐43.1

Statute which makes sale of cocaine within 1,000 feet of a school a more serious crime if committed "between the hours of 6:00 a.m. and 12:00 a.m." is not unconstitutionally vague, on ground that term "12:00 a.m." is ambiguous; in context, term "12:00 a.m." means "midnight" by which time school children will be at home fast asleep; legislature could not have intended to provide greater penalty for drug sales at morning recess than for sales during the lunch hour or after school lets out. West's F.S.A. § 893.13(1)(c).

An appeal from the Circuit Court for Columbia County, Paul S. Bryan, Judge.

Nancy A. Daniels, Public Defender; Chet Kaufman, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Mark Menser, Assistant Attorney General, Tallahassee, for Appellee.

BENTON, Judge.

Mario Lavon Jennings appeals his convictions for sale of cocaine within 1000 feet of a school, possession of cocaine within 1000 feet of a school with intent to sell it (three counts), and possession of drug paraphernalia. On appeal, Mr. Jennings argues that section 893.13(1)(c), Florida Statutes (1993), which makes such a sale of cocaine—or its possession in such circumstances with intent to sell—a more serious crime if committed "between the hours of 6 a.m. and 12 a.m.," is unconstitutionally vague. We find no constitutional infirmity and affirm.

Section 893.13(1)(a), Florida Statutes (1993), outlaws the sale, manufacture, delivery—or the possession with intent to sell, manufacture, or deliver—of any of a number of controlled substances. The seriousness of the crime depends in part on the nature of the controlled substance. In addition, subsection (1)(c) provides:

> Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle or secondary school between the hours of 6 a.m. and 12 a.m.

§ 893.13(1)(c), Fla.Stat. (1993). The sale of cocaine or its possession with the intent to sell, although otherwise a second degree felony, is a first degree felony if the crime is committed within 1,000 feet of a school and occurs "between the hours of 6 a.m. and 12 a.m." The conduct for which Mr. Jennings was convicted under subsection (1)(c) occurred after noon but before midnight.

Mr. Jennings argues on appeal that the subsection is unconstitutionally vague because the term "12 a.m." is ambiguous. He contends that section 893.13(1)(c), Florida Statutes (1993) fails to put reasonable people on notice whether the period in which selling or possessing cocaine with intent to sell constitutes a first degree felony (as opposed to a second degree felony) ends just before noon or twelve hours later.

[1, 2] But "a statute is not void [for vagueness] if its language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Hitchcock v. State*, 413 So.2d 741, 747 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed. 213 (1982) (quoting *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947)). Although "[t]he language of the statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice,'" *Warren v. State*, 572 So.2d 1376, 1377 (Fla.1991) (quoting *State v. Bussey*, 463 So.2d 1141, 1144 (Fla.1985)), it need not attain ideal linguistic precision. *State v. Manfredonia*, 649 So.2d 1388, 1390 (Fla.1995) (Even if a statute "is not a paradigm of legislative drafting.... this reason alone cannot justify invalidating the statute.").

The present statute poses no danger, moreover, that innocent conduct will be punished as a crime. Section 893.13(1)(a) prohibits the sale and possession with intent to sell of controlled substances whatever the time of day. Subsection (1)(c) merely increases the gravity of the offense and the severity of the penalty when the sale (or possession with intent to sell) occurs within 1000 feet of a school during the time period specified.

[3, 4] In this way, the statute exhibits special concern that controlled substances not be peddled to school children. "In determining the intent of the Legislature, the courts must construe a statute in light of the purposes for which it was enacted and the evils it was intended to cure." *Young v. St. Vincent's Medical Ctr. Inc.*, 653 So.2d 499, 506 (Fla. 1st DCA 1995), *review granted*, 663 So.2d 633 (Fla.1995) (Mickle, J., concurring). We do not believe "common understanding and practices" lend support to the view that the Legislature intended to provide a greater penalty for drug sales at morning recess than for sales during the lunch hour or after school lets out. We can think of little justification for such an interpretation of the statute. In context, it is clear that the term "12 a.m." in section 893.13(1)(a), Florida Statutes (1993) must mean "midnight," by which time—the Legislature had reason to hope—school children will be at home fast asleep.

"A.M." is an abbreviation for the Latin phrase *ante meridiem*, or "before noon." *Webster's Third New International Dictionary* 91 (1993); *see also Black's Law Dictionary* 79 (6th ed. 1990). Similarly "P.M." is an abbreviation for the Latin phrase *post meridiem*, or "after noon." *Webster's Third New International Dictionary* 1773 (1993); *see also Black's Law Dictionary* 1155 (6th ed. 1990). Neither "12 a.m." nor "12 p.m." is an appropriate way to denote "noon." Either notation is also a problematic designation for midnight, although either appears equally (in)appropriate, because midnight can be viewed with equal justification as the end of one day or the beginning of the next. Midnight is the only twelve o'clock that falls before (or after) noon.

A New Jersey appellate court reports that the Time Service Division of the U.S. Naval Observatory recommends against the use of the terms "12 a.m." and "12 p.m."

> We take judicial notice under *Evid.R.* 9(2)(e) that the Time Service Division of the U.S. Naval Observatory in an official statement dated January 1, 1985 entitled "Designation of Noon and Midnight" recommends that the abbreviations 12 a.m. and 12 p.m. not be used because they cause confusion. Instead, the Naval Observatory suggests the usage of the complete words "noon" and "midnight," of times such as 12:01 a.m. or 11:59 p.m. or of the 2400 system.

State v. Hart, 219 N.J.Super. 278, 530 A.2d 332, 334 n. 1 (1987). The Florida Legislature is not, of course, under any obligation to follow recommendations from the Naval Observatory, official or otherwise.

With the exception of section 893.13(1)(c), Florida Statutes (1993), however, the Legislature has avoided confusion that might flow from use of the terms "12 a.m." and "12 p.m.," opting instead for clearer language. *See* § 48.091(2), Fla.Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to 12 noon...."); § 112.061(5)(b)2., Fla.Stat. (1993) (allowance for lunch for public officers, employees, and authorized persons "[w]hen travel begins before 12 noon and extends beyond 2 p.m."); § 198.331, Fla.Stat. (1993) (retroactive effect of statutes to "estates of decedents dying after 12:01 a.m."); § 324.251, Fla.Stat. (1993)

(chapter to become effective at "12:01 a.m."); § 373.069(1), Fla.Stat. (1993) (dividing the state into various water management districts at "11:59 p.m."); § 381.00897(2), Fla. Stat. (1993) (access to migrant labor camp or residential migrant housing "between the hours of 12 noon and 8 p.m."); § 440.05(4), Fla.Stat. (1993) (notice effective as of "12:01 a.m."); § 562.14, Fla.Stat. (1993) (regulating the sale of alcohol "between the hours of midnight and 7 a.m."); § 671.301(1), Fla.Stat. (1993) (act to take effect "at 12:01 a.m."); § 713.36, Fla.Stat. (1993) (chapter to take effect "at 12:01 a.m."); § 900.02, Fla.Stat. (1993) (criminal procedure law to become effective "at 12:01 a.m.").

We have found only one instance where the Florida Legislature used the term "12 p.m." § 562.14(1), Fla.Stat. (Supp.1945) (prohibiting the sale and service of intoxicating beverages "between twelve o'clock p.m. Saturday and seven o'clock a.m. Monday"). The Legislature subsequently amended this section to read, "between twelve o'clock midnight Saturday and 7:00 o'clock A.M. Monday." Ch. 23746, Laws of Fla. (1947). Perhaps the Legislature will also amend section 893.13(1)(c), Florida Statutes (1993), in a similar fashion, to bring it up to its customary standard of precision.

Affirmed.

BOOTH and WOLF, JJ., concur.

FLORIDA DEPARTMENT OF REVENUE and Lawrence Fuchs, Appellants,

v.

LIBERTY NATIONAL INSURANCE COMPANY, Appellee.

No. 94-3665.

District Court of Appeal of Florida, First District.

Jan. 26, 1996.

Insurance company challenged Department of Revenue's exclusion of certain statutorily required expenses from its calculation of retaliatory tax. The Circuit Court, Leon County, P. Kevin Davey, J., granted insurance company summary judgment, and Department appealed. The District Court of Appeal held that payments to state Comprehensive Health Association were not excludable from calculation of retaliatory tax.

Affirmed.

1. Insurance ⇐19

Payments by life and health insurer to state Comprehensive Health Association were within retaliatory tax exclusion for special purpose obligations or assessments imposed in connection with particular kinds of insurance, where at relevant times exclusion was limited to obligations on assessments imposed by another state. West's F.S.A. § 624.5091(3).

2. Insurance ⇐19

Amendment deleting phrase "by another state," from insurance company retaliatory tax exclusion for special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance, did not operate retroactively, as retroactive amendment would have drastically altered tax liability for preceding years. West's F.S.A. § 624.5091(3).

An appeal from the Circuit Court for Leon County, Judge P. Kevin Davey.

Robert A. Butterworth, Attorney General, and C. Lynne Overton and Lisa M. Raleigh, Assistant Attorneys General, Tallahassee, for appellants.

Daniel C. Brown, Paul R. Ezatoff, and Richard E. Coates, of Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, Tallahassee, for appellee.

Michael R. Kercher of Broad & Cassel, Tallahassee, for amicus curiae, Paul Revere Ins. Co.

ARGUMENT

Issue:

SECTION 893.13(1)(C), FLORIDA STATUTES (1993) IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS, AND SHOULD BE STRICTLY CONSTRUED IN FAVOR OF JENNINGS, BECAUSE THE TERM "12:00 A.M." IS AMBIGUOUS ACCORDING TO COMMON UNDERSTANDING, USAGE, AND PRACTICES IN DEFINING WHETHER THE PERIOD IN WHICH THE OFFENSE WAS PROSCRIBED ENDS AT NOON OR MIDNIGHT

This appeal is best understood by first setting forth what is not in dispute. Appellant Mario Lavon Jennings does not challenge Count IV in Case No. 94-408, which alleged possession of paraphernalia. Jennings also does not dispute that he engaged in the conduct of sale and possession with intent to sell crack cocaine, which are subsumed within the allegations in counts I, II, and III of Case No. 94-408 and the only count in Case No. 94-581 CF, and which constitute second-degree felonies under section 893.13(1)(a), Florida Statutes (1993).[1] This

[1] Section 893.13(1)(a), Florida Statutes (1993), provides:

> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

appeal concerns only the statutory enhancement of those offenses under section 893.13(1)(c) and subsection (1)(c)1., Florida Statutes (1993), which applies when the act of sale or possession with intent to sell occurs "in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m."[2] Subsection 893.13(1)(c)1. raises the offense and punishment level from the second-degree felony defined in section 893.13(1)(a)1. to a first-degree felony punishable by a minimum mandatory term of three years' imprisonment. Jennings challenges that enhancement provision on its face and as applied because the term "12:00 a.m." in section 893.13(1)(c) is

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[2] Section 893.13(1)(c)1., Florida Statutes (1993), under which Jennings was charged, provides:

> (c) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m. Any person who violates this paragraph with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 and must be sentenced to a minimum term of imprisonment of 3 calendar years.

(Emphasis supplied.)

ambiguous and fails to put reasonable people on notice of whether the period in which the enhanced offense was proscribed ends at noon or midnight. At the very least, this ambiguous provision should be strictly construed in favor of Jennings under the constitutional and statutory rule of lenity requiring strict construction of penal statutes.

The trial court in this case took judicial notice of the fact that reasonable people may have differing opinions as to whether 12:00 a.m. stands for noon or midnight:

> THE COURT: The Court is going to take judicial notice of paragraph three. Specifically, I'm judicially noticing that reasonable persons may have differing opinions as to whether 12:00 a.m. stands for noon or midnight. . . .
>
> . . . .
>
> And I don't think it's a matter of much dispute that some people would say 12:00 a.m. stands for noon, some would say it stands for midnight. So I'm going to take judicial notice that reasonable persons may have differing opinions as to that.

(Tr 45-45). Thus it has already been judicially determined that the relevant essential element in the statute is susceptible of different reasonable constructions because it is not clear in common usage, understanding, and practice. The trial court's finding of fact is supported by evidence and therefore cannot be disturbed on appeal. E.g. Harvey v. State, 502 So. 2d 1305 (Fla. 1st DCA 1987); Clegg v. Chipola Aviation Inc., 458 So. 2d 1186 (Fla. 1st DCA 1984). Consequently, to the extent that a

clear understanding of "12:00 a.m." is necessary for proper construction of section 893.13(1)(c), the statute is unconstitutionally vague and cannot be applied to punish Jennings.

The Florida Supreme Court set forth the controlling principles that must apply to this case in Brown v. State, 629 So. 2d 841 (Fla. 1994), and Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Brown recently addressed the vagueness principle with respect to a closely related statute, section 893.13(1)(i), Florida Statutes (Supp. 1990), and found it unconstitutional in violation of artile I, section 9, of the Florida Constitution. The Court summarized the applicable principles as follows:

> The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed.2d 110 (1972). "The language of the statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice.'" Warren v. State, 572 So. 2d 1376, 1377 (Fla. 1991) (quoting State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985)). Because of its imprecision, a vague statute may invite arbitrary or discriminatory enforcement. Southeastern Fisheries [Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984)] at 1353. A statute is not void for vagueness if the language "'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" Hitchcock v. State, 413 So. 2d 741, 747 (Fla.) (quoting United States v. Petrillo, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed.

1877 (1947)), cert. denied, 459 U.S. 960, 103 S. Ct. 274, 74 L. Ed.2d 213 (1982).

> When reasonably possible and consistent with constitutional rights, this Court should resolve all doubts of a statute in favor of its validity. State v. Wershow, 343 So. 2d 605, 607 (Fla. 1977). But this Court has also held that when there is doubt about a statute in a vagueness challenge, the doubt should be resolved "in favor of the citizen and against the state." Id. at 608. In the instant cases, there is sufficient doubt about the statute, requiring the doubt to be resolved in favor of the citizen and against the State. Thus, we find the statute facially invalid under the void-for-vagueness doctrine.

Brown, 629 So. 2d at 842-43. Also applicable to this case are the due process and statutory principles embodied in the rule of lenity and strict construction of penal statutes, which the Supreme Court set forth in great detail in Perkins. The Court said:

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. E.g., State v. Jackson, 526 So. 2d 58 (Fla. 1988); State ex rel. Cherry v. Davidson, 103 Fla. 954, 139 So. 177 (1931); Ex parte Bailey, 39 Fla. 734, 23 So. 552 (1897). This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. E.g., Brown v. State, 358 So. 2d 16 (Fla. 1978); Franklin v. State, 257 So. 2d 21 (Fla. 1971); State v. Moo Young, 566 So. 2d 1380 (Fla. 1st DCA 1990). Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. Scull v. State, 569 So. 2d 1251 (Fla. 1990) (on petition for clarification); Franklin, 257 So. 2d at 23. For this reason,

> [a] penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation.

Gluesenkamp v. State, 391 So. 2d 192, 198 (Fla. 1980), cert. denied, 454 U.S. 818, 102 S. Ct. 98, 70 L. Ed.2d 88 (1981) (citations omitted). Elsewhere, we have said that

> [s]tatutes criminal in character must be strictly construed. In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance.

State ex rel. Lee v. Buchanan, 191 So. 2d 33, 36 (Fla. 1966) (citations omitted); accord State v. Valentin, 105 N.J. 14, 519 A.2d 322 (1987). Thus, to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused. Palmer v. State, 438 So. 2d 1, 3 (Fla. 1983); Ferguson v. State, 377 So. 2d 709 (Fla. 1979).

The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Borges v. State, 415 So. 2d 1265, 1267 (Fla. 1982); accord United States v. L. Cohen Grocery Co., 255 U.S. 81, 87-93, 41 S. Ct. 298, 299-301, 65 L. Ed. 516 (1921)

(applying same principle to Congressional authority). As we have stated,

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See Article II, Section 3, Florida Constitution.

Brown, 358 So. 2d at 20; accord Palmer, 438 So. 2d at 3. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers. Art. II, Sec. 3, Fla. Const.

Explicitly recognizing the principles described above, the legislature has codified the rule of strict construction within the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§ 775.021(1), Fla. Stat. (1987).

We thus must determine whether the district court honored the legal rule described here.

Perkins, 576 So. 2d at 1312-13 (footnote omitted).

The term "12:00 a.m." is unclear on its face, for as the trial court recognized, reasonable people disagree as to whether it signifies noon or midnight. A statute defining an offense by using a term that is unclear on its face cannot stand.

"Fractions of days are not regarded in the law except where justice requires a careful examination as to the precise time of day at which an act was performed, in order to do right as between the parties." Savage v. State, 18 Fla. 970, 973 (1880). The measure of standard time is that set forth for the entire United States as applicable to the time zone where the conduct took place. § 1.02, Fla. Stat. (1993). Yet the measure of time in section 893.13(1)(c), which must be precisely defined according to due process principles, the rule of lenity, and "to do right between the parties," Savage, cannot be determined from the language of the statute where the critical term is equally susceptible of differing interpretations. Even widely accepted dictionary definitions fail to define "a.m." in a manner that clearly sets forth what "12 a.m." means. Black's Law Dictionary, for example, defines "a.m." to mean "before noon" while "p.m." is defined as "afternoon." Black's Law Dictionary 79, 1155 (6th ed. 1990). Thus, according to that widely accepted treatise of legal definitions, it would be reasonable to infer that 12:00 a.m. is the hour of 12:00 o'clock that falls before noon, i.e., midnight, and 12:00 p.m. is the hour of 12 o'clock that falls after noon, i.e., also midnight. Of course, that cannot be the case. Yet there is no clear alternative on which reasonable people can rely. The ambiguous term thus renders the statute unable to convey sufficiently definite warning as to the proscribed conduct when measured by common

understanding, usage, and practice, as required by Brown, Perkins, and all the cases on which they relied.[3]

The same argument is apropos of the application of that ambiguous statute in this case. The two episodes of conduct alleged in the informations took place at 7:28 p.m. and 1:20 p.m., after "noon" but before "midnight" on the respective dates. If "12 a.m." in the statute is read to mean "noon," as the motions demonstrate is often the case, then the acts in this case took place outside of time period set forth in the statute. However, because the term is ambiguous, Perkins and Brown

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[3] Although the circuit court declined to take judicial notice of official United States government documents and actions as set forth in the attachments to Jennings' motion for judicial notice, this Court has the authority to take judicial notice of such materials independent of what proof was offered below. See, e.g., Garver v. Eastern Airlines, 553 So. 2d 263, 268 (Fla. 1st DCA 1989) (in reversing order, appellate court took judical notice of matter not noticed below, taking notice of the common sense fact "that the greater Los Angeles area is a large metropolitan region, encompassing numerous square miles of teritory"), review denied, 562 So. 2d 345 (Fla. 1990); Henderson Sign Serv. v. Department of Transp., 390 So. 2d 159, 160 (Fla. 1st DCA 1980) (First District Court of Appeal taking judicial notice that I-10 was and is part of the federal highway system even in the absence of any specific proof presented in the trial court), remanded on other grounds, 406 So. 2d 1099 (Fla. 1981); see generally Charles W. Ehrhardt, Florida Evidence § 207.2 (1994 ed.) ("Appellate courts can judicially notice adjudicative facts on appeal.") Appellant Jennings requests this Court to take judicial notice of the official position of the U.S. Government Printing Office and the Time Service Department at the U.S. Naval Observatory, as set forth in the record on appeal and for which the State has ample notice.

Even if this Court declines to take judicial notice, the U.S. Government Printing Office Style Manual is like a dictionary or grammar book and can be relied on as persuasive authority absent judicial notice, as courts often do.

require this Court to resolve doubt about the precise meaning of "12:00 a.m." in favor of Jennings and against the State.

The very same type of ambiguity present in this case caused at least one other court to strike down a prosection that rested on the precarious definition of "12 p.m." State v. Hart, 530 A.2d 332 (N.J. Ct. App. 1987). That court was faced with a conviction for a parking violation where the meter's posted time of operation was to be from 8 a.m. until 12 p.m., and the underlying municipal ordinance regulated parking from "8:00 a.m. to 12:00 midnight," but the sign which was the only notice of the effective hours of metered parking, did not use the language of the ordinance. The court had to construe whether "12 p.m." provided sufficient clarity to maintain the prosecution, or whether the ambiguity should be strictly construed in favor of Hart and against the State. The court first noted that defining "12 p.m." by the number of hours before and after "meridiem" produced illogical results and failed to clearly define "12 p.m." 530 A.2d at 332-33. (This mirrors the illogical result one finds when applying the Blacks' Law Dictionary definitions.) The court then rejected the trial court's conclusion that reason, logic, and "good discretion" impels a construction of "12 p.m." to mean midnight since revenues would be collected throughout the day. Instead, the appellate court said another logical construction of the statute was possible. 530 A.2d at 333. Next the court looked to varying definitions of "12 a.m."

and "12 p.m." in New Jersey law and concluded that there had been no consistency. 530 A.2d at 333-34. Finally, the Court took judicial notice of the position taken by the Time Service Division of the United States Naval Observatory which recommend against using "12 a.m." and "12 p.m." because the terms cause confusion.[4] 530 A.2d at 334 n.1. Consequently, the court reversed the conviction, holding:

> We are thus loath to apply an absolute definition of the term 12 p.m. in a quasi-criminal context, especially where the municipality chose not to follow its own ordinance and use the word "midnight," but rather employed an ambiguous term in giving notice to the public.

Hart, 530 A.2d at 334.

As in Hart, another logical construction of the statutory language is possible. The Legislature could have focused on the six-hour period of 6 a.m. to noon because common experience shows that the morning hours are when most students attend school, as contrasted with the late night hours that would be embraced within the statute if it were to be construed to extend to midnight.

Also revealing is a survey of Florida Statutes which indicates, to the knowledge of undersigned counsel, that section 893.13(1)(c) is the only Florida statute defining a time period

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[4] This is the same fact appellant asks this Court to judicially notice in footnote 3, supra. Even if this Court does not accept judicial notice here, certainly the reasoning applied in Hart is persuasive authority on which this Court can rely.

beginning or ending as "12:00 a.m." or "12:00 p.m." In other statutes, the Legislature apparently was cognizant of the inherent confusion and worked around it so that where time was a critical element, the Legislature's intent was made clear and unambiguous.[5] For whatever reason, the Legislature just missed the mark in this one statute. Thus, holding this statute unconstitutional would have very narrow application and would not appear to affect any other statutes presently on the books.

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[5] Compare § 893.13(1)(c) ("between the hours of 6 a.m. and 12 a.m.") with § 48.091(2), Fla. Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to **12 noon**"); id. § 112.061(5)(b)2. ("Lunch -- When travel begins before **12 noon** and extends beyond 2 p.m."); id. § 198.331 (applying various provisions "to estates of decedents dying after **12:01 a.m.**, Eastern Standard Time, October 1, 1933."); id. § 324.251 ("This chapter [] shall become effective at **12:01 a.m.**, October 1, 1955."); id. § 373.069(1) ("At **11:59 p.m.** on December 31, 1976, the state shall be divided into the following water management districts..."); id. § 373.0693(7) ("At **11:59 p.m.** on December 31, 1976, the Manasota Watershed Basin..."); id. § 373.0693(8)(a) ("At **11:59 p.m.** on June 30, 1988, the area transferred from..."); id. § 373.0693(8)(c) ("As of **11:59 p.m.** on June 30, 1988, assets and liabilities of..."); id. § 373.0693(9) ("At **11:59 p.m.** on December 31, 1976, a portion of..."); id. § 373.0693(10) ("At **11:59 p.m.** on December 31, 1976, the entire area..."); id. § 381.00897(2) ("Owners or operators of migrant labor camps or residential migrant housing may adopt reasonable rules regulating hours of access each say during nonworking hours Monday through Saturday and between the hours of **12 noon** and 8 p.m. on Sunday"); id. § 440.05(4) ("such notice is effective as of **12:01 a.m.** of the day following the date it is mailed to the division in Tallahassee"); id. § 562.14(1) (precluding the sale of alcoholic beverages "between the hours of **midnight** and 7 a.m. of the following day"); id. § 671.301(1) ("This act shall take effect at **12:01 a.m.** on January 1, 1980."); id. § 713.36 ("Chapter 63-135 shall take effect at **12:01 a.m.**, October 1, 1963."); id. § 900.02 ("The Criminal Procedure Law shall become effective at **12:01 a.m.**, January 1, 1971"). (Emphasis supplied.)

Mr. Jennings does not expect to escape punishment, for he acknowledges that he is guilty of criminal conduct. He merely contends that it is unfair and unconstitutional for the state to punish him in an enhanced fashion based on an ambiguous punitive statute.

CONCLUSION

For the reasons stated above, this Court should reverse the judgments and sentences and remand for imposition of a judgment of applicable lesser offenses and for resentencing.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARIO L. JENNINGS,

Appellant,

CASE NO. 95-411

vs.

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING, REHEARING EN BANC, AND TO CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE

Appellant Mario L. Jennings, by and through the undersigned counsel, moves this Court for rehearing because this Court's written opinion overlooked Mr. Jennings' argument that the rule of lenity requires reversal of his sentence enhancement. Appellant further moves this Court for rehearing en banc because the issue presented is one of exceptional importance. In the alternative, appellant moves to certify the issue presented in this case as one of great public importance requiring resolution by the Florida Supreme Court. Appellant avers in support:

1. This Court's written opinion held that section 893.13(1)(c), Florida Statutes (1993), was not unconstitutionally vague insofar as it uses the term "12 a.m." in the definition of an enhanced punishment provision. This Court held that the time period set forth in the statute, "between the hours of 6 a.m. and 12 a.m.," means between 6 a.m. and midnight, because this Court interpreted the term "12 a.m." to mean midnight. Jennings v. State, No. 95-411, slip op. at 4 (Fla. 1st DCA Jan. 26, 1996).

2. The initial brief argued two analyses to resolve this issue. One was the vagueness of the statute. The second was that even if the statute was not unconstitutionally vague, he was entitled to relief under the statutory, common law, and constitutional rule of lenity requiring strict construction of penal statutes in favor of the accused. Perkins v. State, 576 So. 2d 1310 (Fla. 1991); Art. I, § 9, Art. II, § 3, Fla. Const.; § 775.021(1), Fla. Stat. (1993); see Initial Brief of Appellant at 16, 19-22. This Court's opinion addresses only the vagueness issue.

3. In finding the statute not to be unconstitutionally vague, this Court dedicated almost three pages of its opinion to note that the meaning of the term "12 a.m." is legally and factually imprecise, historically avoided by the Legislature because of its imprecision, and has been the subject of controversy and varied interpretations. Slip op. at 4-7. This Court even went so far as to suggest the Legislature amend the statute. Slip op. at 6-7.

4. This Court's interpretation was the broadest, rather than the narrowest, of possible interpretations upholding the statute. The Court could have upheld the statute by holding that the term "12 a.m" means noon, which would have been a narrow construction consistent with the requirements of the rule of lenity. But instead, this Court interpreted the statute in the broadest possible way to the detriment of appellant, directly contrary to what the rule of lenity requires. This Court should have, but its opinion did not, look to Perkins for guidance.

In Perkins the Court was faced with two possible interpretations of the statutory scheme involving the availability of the defense of self defense during the commission of a cocaine trafficking. The Third District interpreted "forcible felony" and "felony which involves the use or threat of physical violence" in the harshest way to deny Perkins his defense. The Supreme Court quashed that decision, finding the statutory term "involves" to be slightly vague

or ambiguous, though not sufficiently so to render the statute void for vagueness; but because it was slightly vague or ambiguous, "the district court was under an obligation to construe it in the manner most favorable to the accused. Art. I, § 9, Art. II, § 3, Fla. Const., §775.021(1), Fla. Stat. (1987); Brown [v. State, 358 So. 2d 16 (Fla. 1978)]; Palmer [v. State, 438 So. 2d 1 (Fla. 1983)]; [State ex rel. Lee v.]Buchanan[, 191 So. 2d 33, 36 (Fla. 1966)]. " 576 So. 2d at 1313.

This Court completely overlooked Perkins and the application of the rule of lenity . Perkins requires the rule of lenity be employed to strictly construe this statute, which this Court acknowledged relies on a slightly vague or ambiguous term not rising to the level of unconstitutionality. The very controversy recognized to exist by this Court supports appellant's claim for relief under the rule of lenity. Appellant is entitled to relief under the rule of lenity irrespective of this Court's decision as to the vagueness argument.

5. The issue presented in this appeal is of exceptional importance and should be reheard en banc because the application of what this panel recognizes to be an imprecise statute will enhance the punishment of a large number of defendants throughout this district and the entire the State of Florida. Accordingly, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

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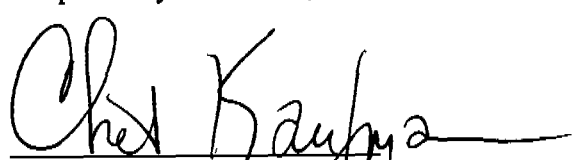
6. If this Court decides not to grant relief on rehearing or rehearing en banc, appellant urges this Court to certify to the Supreme Court the question of statewide application as follows:

> Is the time period set forth in section 893.13(1)(c) enhancing punishment for offenses committed "between the hours of 6 a.m. and 12 a.m." unconstitutionally vague on its face and as applied under the United States and Florida Constitutions, or alternatively should it be strictly construed under the rule of lenity to mean 6 a.m. to noon rather than 6 a.m. to midnight?

WHEREFORE, this Court should vacate its affirmance, reconsider the merits of this appeal, and reverse this cause for resentencing; or alternatively the Court should certify the question raised in this case as one of great public importance requiring immediate resolution by the Supreme Court.

Respectfully submitted,



CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 814253

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

VS. CASE NO. CF95-0407A1-XX

EUGENE ROHALIA O'NEAL,
Defendant.

95 JUN 27

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS MATTER came on for hearing on the defendant's motion to dismiss. The defendant is charged with purchase of cocaine within 1000 feet of a school, a felony punishable by life and requiring a mandatory minimum three-year sentence. Filed pursuant to Fla. R. Cr. Pr. 3.190(c)(4), his motion to dismiss claims that the Roosevelt Vocational School is not a "primary, middle or secondary school" within the meaning of the statute. He further attacks the facial validity of the statute, claiming that the time period "6 A.M. to 12 A.M." listed in the statute is unconstitutional as applied to his sale at 11:46 P.M.

The defendant withdrew the first issue and urges dismissal because of the vagueness of the term, "12 am". The law involved is fundamental.

Due process requires that penal statutes be so clear that people of ordinary intelligence will not differ as to their application or guess as to their meaning. That is to say, the statutes must put ordinary citizens on notice of what conduct is criminal.

The defendant claims that the term "12 A.M." is vague. According to him, it could mean noon or midnight. He claims that there is no other Florida statute containing this term, but there

are many references to "noon" or "midnight." In support of his position he refers to a prominent sign posted at the Polk County Jail which clearly refers to "12 A.M." in the context of the noon hour.

Of course the court must accord to the disputed words their ordinary meanings. Only if they are susceptible of two or more meanings in this context, may the court employ rules of statutory construction. Defendant urges the court to consult popular dictionaries. The usual definition of "A.M." as before, and "P.M." as after, noon are of no help. Technical definitions found in a popular celestial navigation text is likewise unavailing.

The defendant is correct that in the many thousands of pages of Florida statutes there is not one other reference to "12 A.M.", although there are dozens or references to noon and midnight.

The Supreme Court has referred to 12 A.M. as the starting time for a new Rule of Juvenile Procedure to become effective. In re: Amendments to the Florida Rules of Juvenile Procedure (Guardian Advocates for Drug-Dependent Newborns), 549 So.2d 66 (Fla 1989). But more often it used "12:01 A.M." or "midnight." See e.g., In re: Florida Rule of Criminal Procedure (Sentencing Guidelines), 628 So.2d 1084 (Fla. 1993); The Florida Bar In re: Criminal Rules, 389 So.2d 610 (Fla. 1980). It has summarized evidence in the court below referring to the arrival of a witness at "about 11 P.M. or 12 A.M. on the night of March 30 . . . " Craig v. State 585 So.2d 278 (Fla. 1991).

Witnesses who have been quoted by appellate courts have used the term "twelve A.M." to refer both to the noon hour (Wynn v. Pound, 653 So.2d 1116 [Fla. 5th DCA 1995]); and to midnight (State ex rel. Wheeler v. Cooper, 157 So.2d 875 [Fla. 2nd DCA 1963]).

In days gone by, the legislature has used the term to mean the opposite of its present use, although the meanings are clear in context. A special act creating the City of St. Marks required that the Supervisor of (voter) Registration of Wakulla County ". . .shall open books for

registration . . . from ten o'clock A.M. until twelve A.M. on the 20th and 27th of May . . . and the book shall be closed at 12 A.M. on June 10, 1961." State ex rel. Pope v. Shields, 140 So.2d 144 (Fla. 1st DCA 1962).

In the obverse of the present issue, a precursor to Florida's statute regulating the hours of sale of alcoholic beverages said: "no sales or service of intoxicating beverages may be made between twelve o'clock P.M. Saturday and seven o'clock A.M. Monday, except . . ." Laws 1943, c. 21944 ss 1 to 4. The statute clearly meant "midnight" since later versions of the same statute used that term as does the current version. See F.S. 562.14. Clearly the legislature has used the term 12 A.M. to mean noon, and 12 P.M. to mean midnight in other statutes.

These statutory and case-law references to "12 A.M." are certainly without precedential value but are consulted merely to determine if uniformity in the use of the term exists. Clearly, it does not. But the questions remains whether or not the use of "12 A.M." in the context of the drug law is so clear that a person of ordinary intelligence would be put on notice of the time periods which would subject him to a three-year minimum mandatory sentence.

Obviously, the legislature intended to protect children form the scourge of drugs. So most people would assume that the extra punishment would not stop at noon.

But midnight is long after the school day and the statute applies with equal force on weekends, school holidays, and over the summer vacation. So it is no more logical to set midnight as a limit on these days than noon. Because the term is ambiguous to people of common intelligence, the statute cannot withstand constitutional scrutiny. See State v. Thomas, 616 So.2d 1198 (Fla. 2nd DCA 1993). Accordingly, it is

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Order Granting Motion to Dismiss
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ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss is **granted** without prejudice to the filing of charges not involving a school.

DONE AND ORDERED in Bartow, Polk County, Florida, this 26th day of June, 1995.

ROBERT A. YOUNG
Circuit Court

COPIES FURNISHED TO:

STATE ATTORNEY (Kaylor)

ROBERT E. FORD, ESQUIRE, 800 W. Platt St., Suite 1, Tampa, FL 33606

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CF95-5030A2-XX
	)	
KENNETH TYRONE BONNEY,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING MOTION TO DISMISS 1000 FOOT PORTIONS OF INFORMATION

The defendant has challenged the portion of Section 893.13(1)(c), Florida Statutes, which enhances certain violations if they occur "between the hours of 6:00 a.m. and 12:00 a.m." on the grounds that the quoted phrase is unconstitutionally vague. The court agrees.

The First District Court of Appeal, in a decision which is not yet final and, therefore, not binding on this court, Jennings v. State, No. 95-411 (Fla. 1st DCA 1/26/96) (slip op.), has found otherwise. But the following paragraphs from pages 4-6 of the Jennings slip opinion establish just how vague the challenged language is:

> "A.M." is an abbreviation for the Latin phrase ante meridiem, or "before noon." Webster's Third New International Dictionary 91 (1993); see also Black's Law Dictionary 79

(6th ed. 1990). Similarly "P.M." is an abbreviation for the Latin phrase post meridiem, or "after noon." Webster's Third New International Dictionary 1773 (1993); see also Black's Law Dictionary 1155 (6th ed. 1990). Neither "12 a.m." nor "12 p.m." is an appropriate way to denote "noon." Either notation is also a problematic designation for midnight, although either appears equally (inappropriate, because midnight can be viewed with equal justification as the end of one day or the beginning of the next. Midnight is the only twelve o'clock that falls before (or after) noon.

A New Jersey appellate court reports that the Time Service Division of the U.S. Naval Observatory recommends against the use of the terms "12 a.m." and "12 p.m."

> We take judicial notice under Evid. R. 9(2)(e) that the Time Service Division of the U.S. Naval Observatory in an official statement dated January 1, 1985 entitled "Designation of Noon and Midnight" recommends that the abbreviations 12 a.m. and 12 p.m. not be used because they cause confusion. Instead, the Naval Observatory suggests the usage of the complete words "noon" and "midnight," of times such as 12:01 a.m. or 11:59 p.m. or of the 2400 system.

State v. Hart, 530 A.2d 332, 334 n.1 (N.J. Super Ct. App. Div. 1987). The Florida Legislature is not, of course, under any obligation to follow recommendations from the Naval Observatory, official or otherwise.

With the exception of section 893.13(1)(c), Florida Statutes (1993), however, the Legislature has avoided confusion that might flow from use of the terms "12

a.m." and "12 p.m.," opting instead for clearer language. See Section 48.091(2), Fla. Stat. (1993) ("Every corporation shall keep the registered office open from 10 a.m. to 12 noon ...."); Section 112.061(5)(b)2., Fla. Stat. (1993) (allowance for lunch for public officers, employees, and authorized persons "[w]hen travel begins before 12 noon and extends beyond 2 p.m."); Section 198.331, Fla. Stat. (1993) (retroactive effect of statutes to "estates of decedents dying after 12:01 a.m."); Section 373.069(1), Fla. Stat. (1993) (dividing the state into various water management districts at "11:59 p.m."); Section 381.00897(2), Fla. Stat. (1993) (access to migrant labor camp or residential migrant housing "between the hours of 12 noon and 8 p.m."); Section 440.05(4), Fla. Stat. (1993) (notice effective as of "12:01 a.m."); Section 562.14, Fla. Stat. (1993) (regulating the sale of alcohol "between the hours of midnight and 7 a.m."); Section 671.301(1), Fla. Stat. (1993) (act to take effect "at 12:01 a.m."); Section 713.36, Fla. Stat. (1993) (chapter to take effect at "12:01 a.m."); Section 900.02, Fla. Stat. (1993) (criminal procedure law to become effective "at 12:01 a.m.")

We have found only one instance where the Florida Legislature used the term "12 p.m." Section 562.14(1), Fla. Stat. (Supp. 1945) (prohibiting the sale and service of intoxicating beverages "between twelve o'clock p.m. Saturday and seven o'clock a.m. Monday"). The Legislature subsequently amended this section to read, "between twelve o'clock midnight Saturday and 7:00 o'clock A.M. Monday." Ch. 23746, Laws of Fla. (1947). Perhaps the Legislature will also amend section 893.13(1)(c), Florida Statutes (1993), in a similar fashion, to bring it up to its customary standard of precision.

This issue has previously been addressed by Circuit Judge

Robert A. Young of this circuit in an order dated June 26, 1995, in State v. Eugene Rohalia O'Neal, CF95-0407, a copy of which is attached hereto and made a part hereof by this reference. For reasons set forth in Judge Young's order, and relying generally on Rogue v. State, 20 Fla. L. Weekly S476 (Fla. Sept. 21, 1995) (commercial bribery statute unconstitutionally vague); Cuda v. State, 639 So.2d 22 (Fla. 1994) (terms "improper" and "illegal" in exploitation of the elderly statute unconstitutionally vague); Wyche v. State, 619 So.2d 231 (Fla. 1993) (loitering and purposes of prostitution statute unconstitutionally vague); Bertens v. Stewart, 453 So.2d 92 (Fla. 2d DCA 1984) (word "medicine" in school board student conduct code unconstitutionally vague), the court finds that the defendant's motion should be granted. It is, therefore,

ORDERED AND ADJUDGED that the defendant's Motion to Dismiss 1,000 Foot Portions of Information is **GRANTED.**

DONE AND ORDERED this 27 day of February, 1996.

ROBERT L. DOYEL
Circuit Judge

xc: John Lynch, APD
Monica Kay, ASA