87,587

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IN THE SUPREME COURT OF FLORIDA

MARIO LAVON JENNINGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

DCA CASE NO. 95-411

Fla. S. Ct. NO. 87,087

PETITIONER'S BRIEF ON JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

MARIO LAVON JENNINGS,	:	
	:	
Petitioner,	:	DCA CASE NO. 95-411
	:	
v.	:	
	:	FLA. S.CT. NO. _____
STATE OF FLORIDA,	:	
	:	
	:	
Respondent.	:	
_____/		

PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

This case is about the unconstitutionality of a criminal statute that enhances the punishment of certain offenses taking place during the time period vaguely defined as between "6 a.m. and 12 a.m." The decision below expressly declares valid section 893.13(1)(c), Florida Statutes (1993), and rejects vagueness and lenity arguments expressly based on the due process clauses of the Florida and United States Constitutions. This Court has jurisdiction to review the decision below. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(i),(ii). Because this decision has statewide implications in approving unconstitutional convictions and sentences predicated on a vague and broadly construed statute, and because other circuit courts have reached a contrary decision on the same issue, this Court should exercise its jurisdiction and quash the judgment entered below.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with five counts in two informations. The counts relevant to this petition include one count of sale of a cocaine, and three counts of possession of cocaine with intent to sell or deliver. Each of these four charges allege that the acts took place "within 1000 feet of a school between the hours of 6:00 A.M. and 12 A.M." on two different dates in 1994. The conduct for which petitioner was convicted occurred after noon but before midnight on both respective dates. Section 893.13(1)(c), Florida Statutes (1993), under which these charges were filed, enhances the second-degree felonies of sale and possession with intent to sell cocaine to first-degree felonies and imposes three-year minimum mandatory terms of imprisonment when the illegal conduct takes place "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."

Jennings moved to dismiss these penalty-enhancement charges on the grounds that the statute is unconstitutionally vague under the due process clauses of the United States and Florida Constitutions; and even if not facially unconstitutional, the statute should be strictly construed under the rule of lenity. He argued that the term "12 a.m." is vague and imprecise, and has been the subject of varying interpretations. Therefore, the time period set forth in the statute is vague as to whether it applies

to crimes committed between 6 a.m. and noon or 6 a.m. and midnight. The trial court denied the motion. Jennings pled no contest to all charges in a plea agreement, expressly reserving his right to contest the trial court's decision to deny his motion to dismiss, which was dispositive.

On appeal, the petitioner made the same claims, 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 petitioner's 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.

The First District Court of Appeal affirmed with a written opinion. Jennings v. State, 21 Fla. L. Weekly D264 (Fla. Jan. 26, 1996). (A copy is attached as Appendix A). The decision expressly rejected the argument that the statute should be struck down as vague, concluding "[w]e find no constitutional infirmity and affirm." 21 Fla. L. Weekly at D264. The court's analysis rested in part on what it believed to be the legislature's intent based on "common understanding and practices." Id. The court then spent the second half of its opinion acknowledging that judicial and nonjudicial authorities have in fact given the term "12 a.m." varying interpretations, including numerous dictionaries, the U.S. Naval Observatory, and a New Jersey court. Id. at D264-65. The court also acknowledged that 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 D265. The court even suggested that the legislature amend the statute to clarify its meaning. Id. Nonetheless, the court upheld the validity of the statute.

Petitioner moved for rehearing, rehearing en banc, and certification of the issue. Petitioner maintained that the decision as to the constitutionality was wrong, but even if the statute was constitutional, the court overlooked the due process rule of lenity as argued in the trial court and in the initial brief. Petitioner also brought to the court's attention the fact that the 10th 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). Nonetheless, the First District summarily rejected petitioner's motions. Petitioner timely filed a notice to invoke this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

This Court clearly has jurisdiction, so the only issue is whether it should exercise that jurisdiction. It should because the issue has statewide importance and has resulted in conflict among the courts; the opinion on its face is self-contradictory; the statute on its face is unclear and ambiguous; this Court recently exercised discretionary jurisdiction to strike down a

closely related statute on the same grounds in Brown v. State, 629 So. 2d 841 (Fla. 1994); and the statute should have been strictly construed pursuant to the constitutional obligation this Court imposed on district courts in Perkins v. State, 576 So. 2d 1310 (Fla. 1991), but the district court refused to do so.

ARGUMENT

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION TO REVIEW AND QUASH A DECISION THAT UPHELD AND FAILED TO NARROWLY CONSTRUE AN UNCONSTITUTIONALLY VAGUE CRIMINAL STATUTE DESPITE ACKNOWLEDGING THAT IT IS AMBIGUOUS AND SUBJECT TO VARIOUS INTERPRETATIONS, A HOLDING THAT CONFLICTS WITH CIRCUIT COURT DECISIONS RENDERED BOTH BEFORE AND AFTER THIS DECISION WAS MADE

It is quite clear that this Court has jurisdiction to review the decision below because it expressly upholds the constitutionality of a statute and construes due process provisions of the Florida and United States Constitutions. The only real question is whether this Court should exercise its discretion. It should.

Two circuit courts have rejected the very rationale on which the First District relied, thereby demonstrating the issue has statewide importance, will continue to arise, and has generated conflict conflict among the courts. Circuit Judge Robert Young, who decided O'Neal in June 1995, pointed out, among other things, various case law references to the term "12 a.m." that demonstrate no uniformity in courts' understanding of the term. He concluded that because the term is "ambiguous to people of

common intelligence, the statute cannot withstand constitutional scrutiny." Id., slip op. at 3. (A copy of O'Neal is attached as appendix B.) Even after Jennings was decided, Circuit Judge Robert Doyel 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. (A copy of Bonney is attached as appendix C.)

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 lack of clarity also is demonstrated by the two conflicting halves of the district court's own majority decision, as noted by Bonney.

The present case is similar to Brown v. State, 629 So. 2d 841 (Fla. 1994), where this Court exercised discretionary jurisdiction to quash another First District decision and strike down a closely related statute, section 893.13(1)(i), Florida Statutes (Supp. 1990). This Court held that the term "public housing authority" in a similar drug-related penalty enhancement statute was unconstitutionally vague in violation of article I, section 9, of the Florida Constitution. This Court should review

the decision below because the same court made the same error that this Court found in Brown.

The district court's decision also failed to apply the rule of lenity that this Court described and applied in Perkins v. State, 576 So. 2d 1310 (Fla. 1991) to narrowly construe a law that was ambiguous though not vague enough to be facially unconstitutional. This Court specifically held in Perkins 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. The First District here did not obey that command.

CONCLUSION

For the reasons stated above, this Court should grant the petition for review and quash the decision below.

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 13th day of March, 1996.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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APPENDIX

A. Jennings v. State, 21 Fla. L. Weekly D264 (Fla. Jan. 26, 1996)

B. State v. O'Neal, No. CF95-0407AI-XX (Fla. 10th Cir. Ct., June 26, 1995)

C. State v. Bonney, No. CF95-5030A2-XX (Fla. 10th Cir. Ct., Feb. 27, 1996)

certify the following question to be one of great public importance:

WHETHER A *DOWNWARD DEPARTURE* SENTENCE MAY BE AFFIRMED WHERE THE REASONS FOR THE DEPARTURE SENTENCE ARE SUPPORTED BY THE EVIDENCE, WELL REASONED, LEGALLY SOUND, AND ORALLY PRONOUNCED AT THE TIME OF SENTENCE WHEN THE FAILURE TO ENTER A WRITTEN ORDER CONTAINING THE REASONS FOR DEPARTURE DOES NOT APPEAR TO BE A RESULT OF INADVERTENCE ON BEHALF OF THE TRIAL COURT?

(VAN NORTWICK, J., concurs; MINER, J., concurs in result only.)

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[1]While we are not the first court to criticize *Ree* and its progeny, we feel we must do so here because of the inequitable result it causes in this case. See Justice Well's concurring opinion in *Colbert v. State*, *supra*.

[2]Appellee committed the underlying offenses for the violation of probation prior to January 1, 1994, and therefore is not subject to the 1994 sentencing guidelines rules pursuant to 3.702, but rather 3.701(d)(11) which states:

> Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. Any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction or the instant offenses for which convictions have not been obtained.

[3]We would note that the state does not challenge the reasons stated for the downward departure, but only the fact that the written reasons were not entered at the time of the sentencing.

[4]Just as the striking of well-thought-out reasons for upward departures orally announced by a trial court would appear to be fundamentally unfair to the citizens of the state of Florida.

* * *

Criminal law—Provision of statute making sale of cocaine within 1000 feet of school a more serious crime if it occurs between hours of 6 a.m. and 12 a.m. is not unconstitutionally vague—In context, statute's reference to 12 a.m. clearly must mean midnight

MARIO LAVON JENNINGS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-411. Opinion filed January 26, 1996. An appeal from the Circuit Court for Columbia County. Paul S. Bryan, Judge. Counsel: 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, J.) 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.

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.

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*, __ So. 2d __ (Fla. Nov. 6, 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, 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* § 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.)

* * *

Workers' compensation—Credits—Salary payments under employment contract—JCC had jurisdiction to interpret employment contract insofar as it affected award of workers' compensation benefits—JCC properly construed contract as permitting credit only against those workers' compensation benefits accruing during term of contract

TAMPA BAY AREA NFL FOOTBALL, INC. d/b/a TAMPA BAY BUCCANEERS and JOHNS EASTERN CO., Appellants, v. CURTIS JARVIS, JR., Appellee. 1st District. Case No. 94-3411. Opinion filed January 23, 1996. An appeal from Order of the Judge of Compensation Claims. Kathleen Hudson, Judge. Counsel: James N. McConnaughhay of McConnaughhay, Roland, Maida & Cherr, P.A., Tallahassee, for Appellants. Richard A. Sicking, Miami, for Appellee.

(ALLEN, J.) The employer appeals a workers' compensation order by which it was allowed a time-limited credit for salary payments under the contract of employment. The employer contends that the judge of compensation claims lacked jurisdiction to interpret the employment contract, and that the contract authorizes a dollar-for-dollar credit which is not time-limited. We conclude that the judge had jurisdiction to interpret the contract insofar as it affects an award of workers' compensation benefits, and that the judge properly construed the contract as permitting a credit only against workers' compensation benefits accruing during the term of the contract.

The claimant was a professional football player who sustained a compensable injury during the 1990 football season. He worked for the employer under a standard player contract which was effective for one year ending in February 1991. This contract was governed by a collective bargaining agreement which required the employer to obtain workers' compensation coverage or guarantee equivalent benefits. The employer elected to furn workers' compensation coverage.

As provided in the player contract, the claimant was paid full salary during the remainder of the contract year after he w injured, even though the injury rendered him unable to perfo his usual employment duties. The claimant thereafter sou workers' compensation benefits, and the employer assert entitlement to a dollar-for-dollar credit of the post-injury sala payments against all indemnity benefits under the Worker Compensation Law.

In ruling on the claim for workers' compensation benefits t judge attempted to reconcile the player contract, the collecti bargaining agreement, and the pertinent workers' compensatio statutes. Although a judge of compensation claims lacks juri diction to resolve disputes which encompass only private co tractual rights, *e.g. Rudolph v. Miami Dolphins*, 447 So. 2d 2 (Fla. 1st DCA 1983), *rev. denied*, 453 So. 2d 45 (Fla. 1984), t judge may address contractual rights and obligations whi impact an award of compensation benefits. *E.g., Barragan City of Miami*, 545 So. 2d 252 (Fla. 1989). When the judge jurisdictional authority has been invoked by a proper worker compensation claim the judge may award workers' compensatio benefits so as to remedy an impermissible deduction against, effectuate an agreement for payment of, such benefits ev though this involves consideration of contractual rights a obligations. *E.g., Barragan*; *City of Pensacola v. Wincheste* 560 So. 2d 1273 (Fla. 1st DCA 1990). In the present case t judge was thus entitled to interpret the player contract and colle tive bargaining agreement in connection with the claim for wor ers' compensation benefits.

While the collective bargaining agreement refers to covera under the "compensation laws," this does not preclude t parties from contractually expanding the coverage or benef which would otherwise pertain under the workers' compensatio statutes. As the judge recognized, an employer may becom contractually obligated for greater workers' compensation co erage or benefits, and this obligation will be enforced within t workers' compensation system. *See City of Pensacola*; *Hou knecht v. City of Dania*, IRC Order 2-3276 (November 1 1977), *cert. denied*, 368 So. 2d 1368 (Fla. 1979). The judge consideration was therefore not limited to the offset which mig otherwise pertain under section 440.09(8), Florida Statut (Supp. 1990), as the parties' rights and obligations were al properly assessed in light of the collective bargaining agreeme and player contract. The judge accordingly gave effect to par graph 10 of the player contract, which provides:

> WORKMEN'S COMPENSATION. *Any compensation paid* Player under this contract or under any collective bargaini agreement in existence during the term of this contract for period during which he is entitled to workmen's compensatio benefits by reason of temporary total, permanent total, temp rary partial, or permanent partial disability will be deemed advance payment of workmen's compensation benefits d Player, and Club will be entitled to be reimbursed the amount such payment out of any award of workmen's compensation.

The judge interpreted this provision as permitting an offset on against workers' compensation benefits accruing during the ter of the contract. This approach applies the reference to reimburs ment out of "any award" in relation to payments "under th contract . . . for a period during which he is entitled to wor men's compensation benefits . . . ." This construction is be reasonable and appropriate, as the reimbursement or offset ther by pertains to any award of workers' compensation indemni benefits for the specified period of time during which the clai ant was still under contract and receiving his salary. In acco dance with the parties' contractual agreement, and without r gard to whether section 440.09(8) would otherwise permit greater offset, the judge properly allowed the employer to cre the post-injury salary payments against only those worker

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, excepe . . ." 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

- **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

cc: PC SC

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