IN THE SUPREME COURT OF FLORIDA

MARIO LAVON JENNINGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,587

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Mario Lavon Jennings, was the defendant in the trial court and the appellant in the district court. This brief will refer to Petitioner as such, as the Defendant, or by proper name. Respondent, the State of Florida, was the appellee below; the brief will refer to Respondent as such, the prosecution, or the State.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. "JB" will designate Petitioner's Jurisdictional Brief. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within the original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent does not accept the statement of the case and facts provided by the Petitioner. The statement is an argumentative dissertation on the perceived justice of the Petitioner's cause, and is not the fair statement required by ***Fla. R. App. P. 9.210.*** See ***Thompson v. State, 588 So. 2d 687 (Fla. 1st***

DCA 1991); Overfelt v. State, 434 So. 2d 1385 (Fla. 4th DCA 1983).

The Respondent will rely on the following facts:

The Petitioner, Mario Jennings, was charged by Information with (I) Sale of Cocaine within 1,000 feet of a school; (II) Possession of Cocaine within 1,000 feet of a school; (III) Possession of Cocaine within 1,000 feet of a school with intent to sell or deliver; and (IV) Possession of Drug Paraphernalia. Counts I, II, and III alleged that the crimes occurred "between the hours of 6:00 A.M. and 12:00 A.M. on June 29, 1994." A second Information charged the Petitioner with another count of possession of cocaine with intent to sell, within 1,000 feet of a school, "between the hours of 6:00 A.M. and 12 A.M." on July 2, 1994." (R. 1-2; 110-111).

The Petitioner filed a pretrial motion to dismiss challenging the constitutionality of ***§893.13(1)(c), Fla. Stat. (1993).*** The Petitioner eventually entered into a plea bargain, preserving the right to appeal the constitutional issue.

On appeal to the First District Court of Appeal, Petitioner argued that the term "12 A.M." was unconstitutionally vague, and could be construed as meaning "noon" rather than "midnight." The District Court rejected this unnatural construction of the statute and legislative intent, stating:

> 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, 500 (Fla. 1st DCA 1995). . . . We do not believe "common understanding and practices" lend support to the view 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.

[slip opinion at p. 4].

The District Court went on to discuss other interpretations of the term "a.m." and concluded that the statute in question was constitutional as applied. This action ensued.

SUMMARY OF ARGUMENT

Relying upon the mantra "rule of lenity," the Petitioner applies a grossly unnatural and illogical construction to a Florida statute in an effort to contest its constitutionality. It is respectfully submitted that this Court should not grant discretionary review to consider such challenges to Florida Statutes simply because the argument, as rejected by the District Court, addressed the constitutionality of the challenged statute.

ARGUMENT

WHETHER THE COURT SHOULD GRANT DISCRETIONARY REVIEW TO CONSIDER A CHALLENGE TO THE CONSTITUTIONALITY OF §893.13(1)(a), FLA. STAT. (1993).

The issue before this Honorable Court is whether discretionary review should be granted to review the First District Court of Appeal's rejection of a constitutional challenge to ***§893.13(1)(a), Fla. Stat. (1993)***. It is submitted that the absence of any logical challenge to the statute should preclude discretionary review.

This Court has discretionary jurisdiction to review District Court rulings on the constitutionality of Florida Statutes. ***Fla. R. App. P. 9.030(a)(2)(A)(i) or (ii).*** The Court's discretionary review power gives it the ability not to burden itself with review of every constitutional challenge to every statute. The rule also enables the Court to avoid addressing constitutional issues unnecessarily; to wit:

> Although this Court acquires jurisdiction by virtue of the district court's ruling that expressly construes a provision of the Florida Constitution, we adhere to the settled principle of constitutional law that courts should endeavor to implement the legislative intent of the statutes and avoid constitutional issues.

State v. Mozo, 655 so. 2d 1115 (Fla. 1995).

The case at bar provides an outstanding example of the kind of litigation the rule was created to avoid. The Petitioner argued that the statute in question was unconstitutionally vague and, in addition, violated the "rule of lenity." When the State responded to the constitutional arguments, the defense criticized the State for discussing constitutional statutory construction and tried to redefine its position under the "rule of lenity," while denying that a constitutional issue was before the district court. (See Appellant's Reply Brief at 2, 3.)

The Petitioner's Jurisdictional Brief, again, addresses the "rule of lenity," thus clearly calling into question the issue the defense wants to argue. The "rule of lenity" does not provide a separate ground for discretionary Florida Supreme Court review under ***Fla. R. App. P. 9.303(a)(2)(A)(I) or (ii).***

The Petitioner has failed to allege or show any actual error or infirmity in the First District Court of Appeal's interpretation of the statute at issue. The district court carefully construed the statute in terms of "vagueness" and, as suggested by this Court, in terms of obvious legislative intent.

The issue before the district court was whether the statute in question was unconstitutionally vague because of alleged confusion over the meaning of the abbreviation of "a.m." as applied to 12

o'clock. The argument tendered by the Petitioner was that the statute providing for enhanced penalties for pushing drugs near a school could be construed as only applying to drug sales taking place between six in the morning and "noon," but not to any drug sales committed during the lunch period or after school. Thus, according to Petitioner, pushers arrested near the schools during the afternoon were unfairly surprised by the statute. In support of this argument, the Petitioner came up with an obscure federal memorandum from the U.S. Naval Observatory, apparently cited in a New Jersey case, construing "12 a.m." as "noon" rather than "midnight" as commonly understood. There was never any showing that the Petitioner relied upon the United States Naval Observatory when scheduling narcotics transactions.

The State argued, and the District Court concurred, that the constitutional issue was to be resolved according to the standards announced in this Court's decision in ***Brown v. State, 629 So. 2d 841 (Fla. 1994)***; to wit:

> 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. . . . "The language of the statute must 'provide a definite warning of what conduct is required or prohibited, measured by common understanding or 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 the arbitrary or discriminatory enforcement. Southeastern Fisheries Assn., 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.).

The district court applied this standard, noting as well this Court's holding in ***State v. Manfredonia, 649 So. 2d 1388, 1390 (Fla. 1995)***, that a statute, even if not "a paradigm of legislative drafting" need not require ideal linguistic precision in order to be valid, as well as the rule that the courts should construe a statute in keeping with the intent of the Legislature. ***Young v. St. Vincent's Medical Ctr.. Inc., 653 So. 2d 499, 506 (Fla. 1st DCA 1995), review granted, ___ So. 2d ___ (Fla. 1995).***

The District Court thus concluded that the statute, by any reasonable reading, conveyed the warning that illegal drug sales within 1,000 feet of a school during those hours when children might be present were subject to enhanced penalties.

Boiled down to its essence, the real request of the Petitioner is that this Court employ the "rule of lenity" to apply a bizarre or unnatural meaning to statutory terms, and frustrate legislative intent for the benefit of drug dealers who prey on children. It is submitted that in the absence of any logical or cogent challenge to

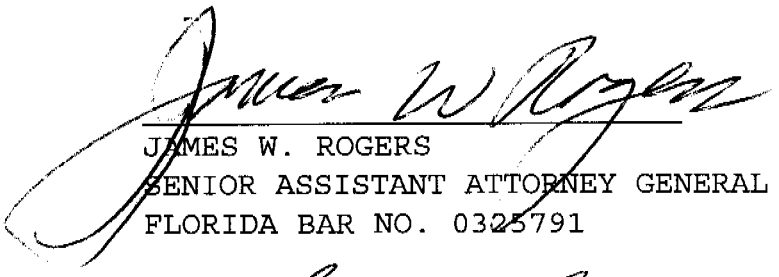
the well-reasoned decision of the district court, discretionary review should not be granted.

CONCLUSION

Based on the foregoing discussions, the State respectfully submits that discretionary review should not be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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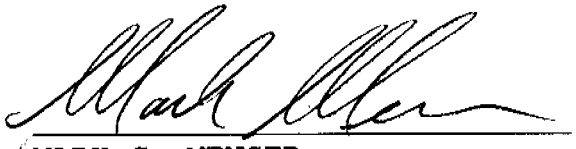

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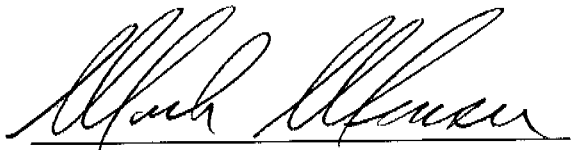
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional Brief has been furnished by U.S. Mail to **MR. CHET KAUFMAN**, Assistant Public Defender, 301 South Monroe Street, Leon County Courthouse, Tallahassee, Florida 32301, this 12th day of April, 1996.



MARK C. MENSER
Assistant Attorney General

[A:\JENNINGS.JB --- 4/1/96,9:19 am]

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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CASE NO. 87,587

APPENDIX

APPENDIX FOR RESPONDENT'S BRIEF ON JURISDICTION

Mario Lavon Jennings v. State of Florida,
___ So. 2d ___ (Fla. 1st DCA January 26, 1995)

95-110907RR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MARIO LAVON JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-411

Opinion filed January 26, 1996.

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

94-4108, 94-5181

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.

1-30-96

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.