IN THE SUPREME COURT OF FLORIDA

MARIO LAVON JENNINGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,587

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or "the State." Petitioner, MARIO LAVON JENNINGS, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State does not accept the Petitioner's statement of the case and facts, except for its basic outline of the procedural history of the case and the Petitioner's admission that he was arrested while selling drugs within 1,000 feet of a school during the middle of the afternoon. The Respondent also agrees that the Petitioner presented evidence of differing interpretations of the terms "12 a.m." and "12 p.m.," including an admission by the Naval Observatory that "12 a.m." is accepted as "midnight" by the makers of virtually all digital timepieces. (R. 35). The statement provided by the Petitioner is otherwise rejected as an extension of his argument, and is procedurally improper. Thompson v. State, 588 So. 2d 687 (Fla. 1st DCA 1991).

SUMMARY OF ARGUMENT

ISSUE

The issue before the Court is whether a statute creating enhanced penalties for drug trafficking within 1,000 feet of a school should be declared unconstitutionally vague because a reasonable drug dealer might be confused by the meaning of the term "12 a.m." The Petitioner suggests that the availability of a single "vague" interpretation of the statute supersedes Legislative intent and all other constructions of the statute so as to compel a finding of unconstitutionality. This is an incorrect approach to statutory review.

The statute in question must be afforded a common sense reading with an eye towards legislative intent. In addition, the "rule of lenity," which only applies if no evidence of legislative intent can be found, still does not require an absurd or strained construction of the law. Finally, the selling of drugs is not a constitutionally protected activity, so the defendant is not entitled to "notice" regarding "time," nor can he assert a "mens rea" defense to the issue of "time." Thus, "vague" or not, this alleged defect does not reach to a constitutional issue.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF §893.13(1)(c) AGAINST A "VAGUENESS" CHALLENGE. (Restated)

Section 893.13(1)(c), Fla. Stat., has been challenged as unconstitutionally vague to the extent that it enhances the penalties for dealing drugs within 1,000 feet of a school between the hours of "6 a.m." and "12 a.m." Two general issues are presented by this case. First, there is the issue of statutory construction, particularly under the "rule of lenity." Second, there is the question of how the specific statute at bar can or should be interpreted, to see whether it is "vague." It is submitted that the Petitioner is suggesting an incorrect approach to statutory construction, the net result of which is an incorrect assessment of the constitutionality of the statute.

A: STATUTORY CONSTRUCTION

The Petitioner takes the position that all statutes exist at the sufferance of the "rule of lenity," and are facially unconstitutional if a "vague" construction of their terms is possible. This view is decidedly incorrect.

In State v. Stadler, 630 So. 2d 1072 (Fla. 1994), this Court held:

> We note that in assessing a statute's constitutionality this Court is bound "to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent." State v. Elder, 382 So.2d 687,690 (Fla. 1980). Further, "[W]henever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this Court may, under proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment."

In State v. Iacovone, 660 So. 2d 1371 (Fla. 1995), this Court held:

> Under standard rules of construction, "it is our primary duty to give effect to the legislative intent; and if a literal interpretation leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, we must examine the matter further." Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So. 2d 577, 580 (Fla. 1964). Statutes, as a rule, "will not be interpreted so as to yield an absurd result." Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986).

In addition, this Court has recognized that the legislature has the specific authority to enact laws safeguarding "its citizens, particularly children, when such harm outweighs the interests of the individual." Griffin v. State, 396 So. 2d 152 (Fla. 1981), quoted in Jones v. State, 640 So. 2d 1084 (Fla. 1994).

The Petitioner, however, suggests that these standards are superseded by a preemptive "rule of lenity" analysis. This is not correct.

The "rule of lenity" concept derives from a similar "venerable rule of lenity" employed by the United States Supreme Court in construing federal statutes and from codification in Florida under section 775.021(1), Florida Statutes. The rule, however, does not provide the starting point for statutory construction or review as suggested by the Petitioner, but, rather, is applied only after other analyses have been exhausted.

In Albernaz v. United States, 450 U.S. 333 (1981) , the Court noted that the "rule of lenity" was not a device designed to allow the Court to manufacture statutory vagueness or ambiguity in order to defeat the intent of Congress. Thus:

> Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Callanan v. United States, supra, at 596, 81 S.Ct., at 326.

In Smith v. United States, __ U.S.__, 113 S. Ct. 2050 (1993), the Court similarly held:

> Finally, the dissent and petitioner invoke the rule of lenity. . . . The mere possibility of articulating a

> narrower construction, however, does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where," [a]fter seiz[ing] every thing from which aid can be derived,'" the court is "left with an ambiguous statute."

Accord: United States v. Chapman, 500 U.S. 453 (1991).

Turning to the term "ambiguity," the Supreme Court held in Reno v. Koray, __ U.S. __, 115 S. Ct. 2021 (1995):

> Finally, the rule of lenity does not apply here. A statute is not "ambiguous" for purposes of the rule merely because there is a division of judicial authority over its proper construction. Rather, the rule applies only if, after seizing everything from which aid can be derived, this Court can make no more than a guess as to what Congress intended.

Florida interprets its Constitution, particularly along "due process" guidelines, in a manner similar to the United States Supreme Court's interpretation of the Constitution of the United States. Perez v. State, 620 So. 2d 1256 (Fla. 1993); Fla. Canner's Assoc. V. Dept. Of Citrus, 371 U.S.. 503 (Fla. 2d DCA 1979). Thus, there is no reason to utilize a different form of "rule of lenity" than that utilized in construing the federal Constitution. Indeed, this Court recognized the United States Supreme Court's standard for assessing statutory "vagueness" issues in State v. Manfredonia, 649 So. 2d 1388 (Fla. 1995), adopting the standard announced by the high court in Roth v. United States, 354 U.S. 476 (1957).

In discussing the standard for reviewing statutes for "vagueness," this Court, in State v. Wershaw, 343 So. 2d 605 (Fla. 1977), held:

> 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. . . . The language of the statute must provide a definite warning of what conduct is required or prohibited, measured by common understanding or practice.

For the purposes of this case, it is clear that the "rule of lenity" is not an overarching standard for the review of presumptively constitutional statutes. It is equally obvious that the unfortunate ability of litigants to indulge sophistry and apply unnatural meanings to terms, a talent noted in other contexts in Boyde v. California, 494 U.S. 370 (1990)("parsing jury instructions for shades of meaning" to create "vagueness"), cannot serve to establish "vagueness" in relation to the statute under attack.

B: STATUTORY ANALYSIS

Section 893.13(1)(c), Fla. Stat., states in relevant part:

> 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.

Contrary to the patently "forced" uncertainty of the Petitioner's brief, the statute is unambiguous in both its meaning and its intent. The purpose of the statute is to protect school children from drug dealers during school hours. Obviously, the way to protect school children from dealers is to create a statutory prohibition which would be in effect during the hours when children are likely to be in school; from their potential arrival at six in the morning until midnight when all extracurricular activities should be over.

This reading is apparent to anyone who attempts a good faith reading of the statutes. In any event, there is a Legislative staff analysis, which states:

> Provisions relating to mandatory minimum sentences (with one exception) and certain release mechanisms are deleted to conform to the sentencing guidelines revision. The bill retains the three year mandatory minimum sentence for the sale, manufacture or delivery or possession with the intent to sell, manufacture or deliver, a controlled substance within 1,000 feet of a school. However, the offense is revised to provide that such offense only occurs between the hours of 6 a.m. and 12 midnight.

The term "midnight" is used in the legislative analysis, and serves as the necessary indicator of the intent of the Legislature when it used the term "12 a.m."

The Petitioner, however, complains that the United States Naval Observatory provided hearsay evidence that the terms "12 a.m." and

"12 p.m." are grammatically incorrect.[1] The issue of grammatic precision was addressed in State v. Manfredonia, 649 So. 2d 1388 (Fla. 1995), and is no longer relevant.

The lower courts noted the existence of intellectual disagreement over the meaning of "a.m." and "p.m.," and the State has never doubted the existence of a debate on point. The term "a.m." stems from the Latin "ante meridiem" (before the middle of the day) while "p.m." stems from "post meridiem," or "after the middle of the day." The "meridiem," on Roman sun dials, was "noon." Thus, 12 hours "ante" the meridiem was midnight, while 12 hours "post" meridiem was also "midnight." Interestingly, since the "meridien" is noon, it really matters little if "a.m." or "p.m." is used, since the "meridien" cannot be twelve hours "ante" or "post" itself, while "midnight" fits either description. Thus, no good faith argument could be made for the proposition that Mr. Jennings felt secure in selling drugs after the passage of only six hours (6 a.m. till Noon). Furthermore, since time does not run backwards, and the statute spans the time from 6 a.m. until 12 a.m., the time frame clearly spans 18 hours from six hours before

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[1]In actual fact, and in order to absolutely ensure that there be no confusion on when something should be done, the U.S. Navy uses a 24 hour time system which does not depend on a.m. or p.m. to properly identify times.

the meridien until 12 hours before the next meriden, rather than from midnight to 6 a.m.

The Petitioner's exhibit from the Naval Observatory (R. 35) notes that virtually all digital watchmakers have assigned "12 a.m." as "midnight" (this Court may note that the broadcast industry and electronic media in the United States do the same thing, as a glance at any radio or television listing will reveal). Thus, while theorists can debate the heady issue of whether midnight is "ante" or "post" the meridiem, the simple truth is that our society (or at least those members who can tell time or watch television or listen to radio) has been conditioned to understand 12 a.m. as being the appellation for midnight. The rest is sophistry.

Turning to the statute, the intent of the Legislature, again, was to keep drug dealers away from children. Even if the Petitioner chooses to feign confusion over the meaning of "12 a.m.," no intelligent person would suggest that the Legislature enacted a law to prevent dealers from selling drugs from six in the morning until lunch time, but not to punish drug sales during the noon lunch hour or the end of the school day, or during after school activities like ball games, club meetings or dances. Furthermore, the intent of the legislation would not be met by

banning drug sales between midnight and 6 a.m. The Petitioner's argument to the contrary would, in violation of the rules of statutory construction, result in a strained and absurd result. It's a rule of lenity for ambiguous statutes not a rule of absurdity for unambiguous statutes:

This, of course, is not the first attempt to apply an unnatural or forced construction to this statute. In State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989), aff'd., Burch v. State, 558 So. 2d 1 (Fla. 1990), the issue of how to measure 1,000 feet was raised as an issue of "vagueness." The District Court noted several very important points:

1) The Court held that a reasonable statutory interpretation, based upon Legislative intent, could be applied to interpret the "1,000" feet as meaning "as the crow flies" rather than some circuitous route devised by some defense team to enable the dealer to sell his wares closer to the children.

2) There is no constitutionally protected right to sell illegal drugs, so the "notice" arguments raised by the defendant were of no force.

This holding is especially significant in its adoption of the reasoning in United States v. Agilar, 779 F. 2d 123 (2d Cir.), cert. denied, 475 U.S. 1068 (1986), regarding "notice," since the

essence of the Petitioner's argument is that drug pushers have a right to notice regarding the collateral issue of "time" so that they can minimize their possible sentences while breaking the drug laws. Constitutional requirements regarding "vagueness" exist so that people will not be prosecuted for innocent or lawful conduct. The requirement does not extend to cover criminal conduct.

There is a federal statute, 21 U.S.C. §860, similar to the Florida Statute under attack in its restriction of drug activities within 1,000 feet of a school. (Unlike our statute, the federal law applies 24 hours a day.) Since the statute criminalizes drug sales, not "distance," the federal courts have uniformly rejected vagueness challenges based on the computation of "1,000 feet" on the grounds that dope pushers are not entitled to "notice" in the absence of any constitutionally protected right to sell drugs. See United States v. Offaril, 779 F.·2d 791 (2d Cir. 1985), cert. denied, 475 U.S. 1079 (1986), cited in State v. Burch, supra.

This is the same answer to the feigned confusion of the Petitioner at bar. The solution to Jennings' problem was for Jennings not to sell illegal drugs in the first place, regardless of time or distance. Since drug pushing is not a constitutionally protected activity, the State has no obligation to advise Mr. Jennings of the optimum business hours for his illegal trade. The

simple concept of "obeying the law" is the one factor not cited in any of the vigorous challenges raised against the Florida and federal statutes.

It should also be noted that there is no "mens rea" requirement attending the "time" or "distance" factors. Burch, supra. Thus, the question of "what 12 a.m. means" is irrelevant, since Jennings' knowledge of the time or his intent in relation to the time would not constitute a defense.

In sum, the constitutionality of the statute at bar should be upheld because:

1) The intent of the Legislature and the meaning of the statute are known, so the "rule of lenity" analysis is not reached.

2) The term "12 a.m." is recognized as meaning "midnight."

3) The Petitioner is not entitled to "notice" in any event, because the crime of drug dealing is not a constitutionally protected activity.

4) There is no "mens rea" requirement attending time or distance under this statute, so the alleged confusion at bar does not even suggest a viable defense.

CONCLUSION

The decision of the First District Court of Appeal, upholding the constitutionality of a Florida Statute, should be affirmed.

Respectfully submitted,

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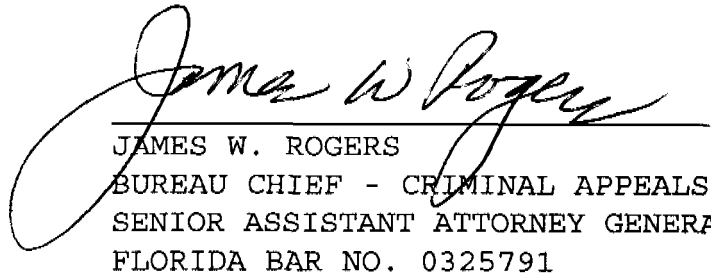

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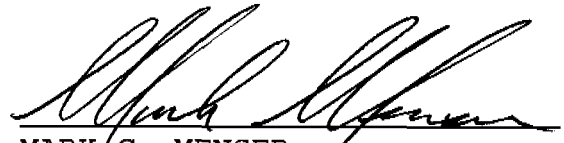

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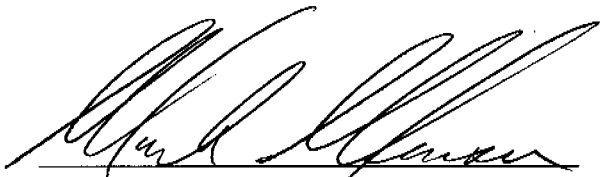
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by U.S. Mail to **MR. CHET KAUFMAN**, Assistant Public Defender, 301 South Monroe Street, Leon County Courthouse, Suite 401, North, Tallahassee, Florida 32301, this 12 day of July, 1996.



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