IN THE SUPREME COURT OF FLORIDA

MARIO LAVON JENNINGS, :

Petitioner, :

v. : Fla. S. Ct. Case No. 87,587

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER

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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 #)". Pages in Petitioner Mario Lavon Jennings' Initial Brief shall be referred to as "(IB #)". Pages in the State's Answer Brief shall be referred to as "(AB #)".

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.

Petitioner feels compelled to respond to the State's answer brief as follows:

1. The State's selective "rejection" of the statement of facts, (AB 2), is absurd, irresponsible, and unprofessional. Florida Rule of Appellate Procedure 9.210(c) requires the respondent to "clearly specif[y]" areas of disagreement in the statement of facts if any exist. The State's answer brief fails to comply with the rule and does absolutely nothing to refute the uncontested procedural history and facts averred by the petitioner. To the contrary, everything said in petitioner's statement of facts is borne out by the record, especially given that there are no facts in dispute, and this case is presented solely on the basis of a plea and legal arguments. The State's cursory and conclusory "rejection" violates the rules and does a disservice to this Court.

2. The State is confused (or confusing). In its statement of the argument, the State erroneously characterizes the case as a vagueness attack on the facial validity of section 893.13(1)(c), Florida Statutes (1993). (AB 4). Then, the State argues the rule of lenity, incorrectly alleging that petitioner deems this to be the starting point of analysis. (AB 4-7).

If any clarification is needed, Petitioner Jennings restates unequivocally that he has argued in the trial court, the district court, and this Court, that (1) the statute is facially unconstitutional on vagueness/overbreadth grounds; (2) if not facially unconstitutional, the statute is unconstitutional as applied on vagueness/overbreadth grounds; and (3) even if the statute passes constitutional muster facially and as applied, the statute must be read pursuant to the constitutional and statutory rule of lenity in the light most favorable to the accused.

3. The State's argument appears to be predicated, at least in part, on a general rule that where two interpretations of a statute are possible -- only one of which is constitutional -- the Court must apply the interpretation upholding the validity of the statute. (AB 5). That rule does not apply here because each of the two conflicting interpretations of the present statute, if standing alone, would be legitimate, constitutional interpretations. The problem is that members of the public cannot be expected to know which of the two independent and conflicting constitutional interpretations is embraced within the prohibition of this statute based on the language the Legislature chose to employ.

4. The State erroneously declares that the Florida Constitution's due process clause is interpreted "similar" to that of the United States Supreme Court's interpretation of the federal due process clause in the fourteenth amendment. (AB 7).

That is wrong. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (Florida Constitution's due process clause provides more protection than federal constitution's due process clause); see also Traylor v. State, 596 So. 2d 957 (Fla. 1992) (emphasizing primacy of Florida Constitution).

5. The State pretends that the vagueness of the statute is a mere quirk of "grammatic precision" and bears no relation to the substantive meaning of the statute. (AB 9-10). Grammar concerns the structure and rules applicable to the joining of the elements of language in composing written communication. E.g. The American Heritage Dictionary 571 (2d College ed. 1985). Grammar is not at issue. The definition of a critical element of an offense, one that may cost petitioner Jennings three years of his life, cannot be so lightly disregarded.

6. Petitioner finds it difficult to appreciate's the State's Solomonic declaration that "our society . . . has been conditioned to understand 12 a.m. as being the appellation for midnight." (AB 11). Given all the evidence to the contrary, including the trial court's own finding of fact in taking judicial notice in this case, (Tr 44-45), the State's Solomonic declaration should receive all the merit it is worth -- none.

7. The State speaks about legislative intent. (AB 9, 11). In doing so, however, the State totally ignores the controlling decisions of this Court, cited in the Initial Brief, which quite clearly demonstrate the inapplicability of legislative intent in

a vagueness challenge of the sort raised here. (IB 28-30, discussing Linville v. State, 359 So. 2d 450 (Fla. 1978), and Franklin v. State, 257 So. 2d 21 (Fla. 1971)). If this Court's own precedent could have been distinguished, surely the State would have attempted to do so. Apparently, however, the State chooses to pretend that this Court's precedents and the principles on which they rely simply do not exist.

8. The State argues that an accused has no right to know the meaning of a critical element of the offense enumerated in the statute because it creates a penalty enhancement. (AB 12-14). As demonstrated in the Initial Brief, however, (IB 26-27), this Court already rejected that argument in Brown v. State, 629 So. 2d 841 (Fla. 1994), where it held unconstitutional a closely related drug penalty enhancement statute. The State's answer brief totally ignores Brown and petitioner's reliance thereon. Moreover, the State's position flies in the face of notice requirements long held to be part of due process both under the Florida and United States Constitutions.

9. The State makes a "mens rea" argument that is procedurally barred and has no bearing whatsoever on this case. (AB 13-14). Until now, the State has not tried to defend the statute on that basis. Furthermore, that has nothing to do with the facial clarity of the statute and whether it provides sufficient notice to the general public.

CONCLUSION

For the reasons stated above and in petitioner's Initial Brief, 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 16th day of July, 1996.

Respectfully submitted,

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