IN THE SUPREME COURT OF FLORIDA

EUGENE R. O'NEAL, :

Petitioner, :

vs. : Case No. 87,858

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner adopts his Statements of the Case and Facts as presented in the Initial Brief on the Merits.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S ORDER TO DISMISS THE INFORMATION CHARGING PETITIONER UNDER SECTION 893.13-(1)(c), FLORIDA STATUTES (1993), A CRIMINAL PUNISHMENT STATUTE DEFINING AN ELEMENT OF THE OFFENSE WITH THE VAGUE AND AMBIGUOUS TERM "12 A.M.," AND FAILING TO NARROWLY CONSTRUE THE STATUTE IN QUESTION IN THE MANNER MOST FAVORABLE TO THE ACCUSED?

In support of its argument, Respondent offers an uncited Legislative staff analysis of the statute in question. Ans. Brief at 10. This analysis, as quoted by Respondent, noted:

> 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.

Id. Respondent thus argues "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.'" Id.

This overlooks two points made in Petitioner's initial brief. First, as noted, legislative intent is irrelevant to a void-for-vagueness inquiry. Linville v. State, 359 So. 2d 450 (Fla. 1978). See also, Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971). The focus in on what the person of common intelligence understands the

language used to mean, not what the Legislature intended it to mean.

Second, and more importantly, this precise argument was considered, and found lacking by the New Jersey Court of Appeals in State v. Hart, 530 A. 2d 332 (N.J. Ct. App. 1987), the only other court to apparently consider the constitutionality of the terms "12 a.m." or "12 p.m." In Hart, the New Jersey Court of Appeals was faced with a prosecution that criminalized behavior for parking at an expired meter during a time period that was marked on the meter to be from 8 a.m. to "12 p.m.," where the underlying municipal ordinance regulated such parking from "8:00 a.m. to midnight."

The Hart court was faced with the question of whether the meter sign, the only notice given, provided sufficient clarity to maintain the prosecution, or whether the ambiguity should be strictly construed in favor of the defendant and against the State. The Hart court reversed the conviction, finding:

> 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 follow its own ordinance and use the word "midnight," but rather employed an ambiguous term in giving notice to the public.

Id. at 334.

That being so, the facts in the instant case are much more in favor of a finding of unconstitutional vagueness than in Hart. In Hart, the ordinance used the unambiguous term "midnight," while the sign on the meter used the unconstitutionally vague term "12 p.m." Yet, the court still reversed the conviction.

In the instant case, the statute itself uses the unconstitutionally vague term "12 a.m." Yet, the State would rely on the proposition that a Legislative staff analysis is enough to provide notice and clarity to the person of common intelligence as to the what the ambiguous term in the statute really means. Such an argument clearly flies in the face of logic, and as such, must fail.

CONCLUSION

WHEREFORE, based on the above argument, citations to authority, and references to the record, both in this Reply Brief and Petitioner's Initial Brief on the Merits, this Court should reverse the decision under review, and reinstate the order granting defense counsel's motion to dismiss.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of August, 1996.

Respectfully submitted,

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