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IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

OLIVER HOLLIDAY,
Petitioner

v.

CITY OF TAMPA,
Respondents.

CASE NO. 78,170

ON APPEAL, FROM A CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL IN LAKELAND, FLORIDA

BRIEF OF AMICUS CURIAE

AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES
SULPHER SPRINGS ACTION LEAGUE
PRISON CRUSADE, INC.

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I. INTRODUCTION

> "The fight against street drug sales is a serious business. No task is so grave as the task to rid our communities of the scourge of drug abuse, and no drug has devastated our communities as much as crack cocaine. No part of the 'crack' problem poses such difficult enforcement problems as does the open, blatant sale of 'crack' on our streets."
>
> Message from Mayor Sandra W. Freedman, O.U.A.D.: The City of Tampa's Drug Initiative (1989).

The sale and use of a wide variety of illicit drugs has become a nationwide crisis, and the toll that drug use and addiction has had on users, their families, and their communities is incalculable. Despite vigorous efforts, the problems associated with the use and sale of illegal drugs, and the evils generated from these activities, have

continued, particularly with the advent of "crack" cocaine.

The manifestations of the drug epidemic on the streets of Tampa led the City Council to adapt its anti-drug loitering ordinance [City of Tampa Code, §24.43], which is now under challenge by a criminal defendant convicted of violating the law. In adopting this ordinance, Tampa has joined many other cities across the nation, who have turned to anti-drug loitering measures to combat the scourge of street-level drug dealing. Some of the cities with these ordinances include Seattle, Baltimore, Milwaukee, Columbus, Tacoma, Yakima (Washington), Dallas, Alexandria (Virginia), Kalamazoo (Michigan), Sandford (Florida), and Melbourne (Florida).

Anti-drug loitering laws are aimed at the people who run, maintain, or patronize open-air drug markets. These people, young and old, men and women, stand idle for hours on the sidewalks and street corners of neighborhoods, selling crack and other drugs. The sellers wait for buyers for lengthy periods of time, often hailing passing cars and making subtle and not-so-subtle inquiries of people on foot. "You looking?," they may ask a mother walking with her child. "You want rock?," they may ask a senior citizen going to the grocery store.

Sales at an open-air drug market typically involve small amounts and occur at a rapid pace and in a routine manner. Almost always, contacts between the street seller and buyer end shortly after the completion of the exchange, as the participants in the deal, having completed their illegal activity, are eager to move on. Overall, these street contacts rarely last more than two minutes. All of the parties involved rely on the "openness" of the marketplace to feel less threatened. See R. Conner and P. Burns, The

Winnable War: A Community Guide to Eradicating Street Drug Markets 9-12 (1991).[1]

Open-air drug markets present a serious problem for communities, distinct from the problem of drug-use, with distinctly negative repercussions for the affected areas, particularly in residential neighborhoods. Public drug sales bring fear, intimidation, and unwanted solicitations to a community, along with increased traffic, noise, litter, and severely reduced property values. As the horrendous stories in the daily newspaper indicate, they also bring a steady stream of senseless violence. Adults are fearful about such every-day activities as going for a walk, visiting neighbors, or attending church. At the same time, parents become afraid to allow their children to go to a nearby park or library, and families begin to live lives of seclusion.

Aside from the danger of violence, the open-air drug trade flagrantly contravenes the anti-drug message coming from families, schools, churches, and synagogues. The markets present a disingenuous lure of easy money and prestige, representing an incentive for a life of crime and addiction. In short, flagrant drug markets change and paralyze residential areas, leaving them with a constraining aura of fear and avoidance.

Open-air drug markets hit especially hard on poorer and minority communities, who therefore have the most to gain by their elimination. These communities, who may lack political clout, are often the most attractive for drug dealers deciding where to "set up shop." See id at 13-14.

These neighborhood invasions have not gone unchallenged. Members of

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[1] A copy of the AARR report has been lodged with the Court.

the community, including grass-roots organizations such as the amici, have organized themselves and their neighborhoods to fight back. Citizens have undertaken various efforts to reclaim their streets, sidewalks, and playgrounds. These valiant and laudable activities, however, cannot, standing alone, eradicate the problem of street-level drug dealing in their neighborhoods. Cf. id. at **21-23.**

The practical limitations on their own voluntary efforts led the citizens of Tampa to request the assistance of the City Council. In response, the City Attorney's Office drafted the ordinance before the Court, based on the laws that were working so successfully in other jurisdictions around the country.

Anti-drug loitering ordinances work well because they address and confront the vital characteristics of **an** open-air drug market: the openness, the free marketing space, the **quick** and anonymous exchanges, and the sense of impunity in which drug dealers have been allowed to operate. Unlike other anti-drug measures, anti-loitering ordinances attack the market at its core: the person hanging out at a street corner waiting to pass on some drugs. It is these individuals that present an imminent threat to the well-being of a neighborhood, and they are the problem that the Tampa ordinance was passed to overcome.

Without an anti-drug loitering ordinance, the police can only intervene at the time of a drug sale. This requires either lying in wait, or arranging a complicated "buy and bust operation." These alternative tactics have proven both inefficient and ineffective, and require a community to live, day in and day out, with the devastation caused by a drug market until the "buy and bust" is ready to occur. The result has been

a widespread popular perception, strengthened by daily confrontations in urban centers with people known to be drug dealers, that the police are losing the war on drugs.

Anti-drug loitering ordinances work in the battle against drug trafficking, and enforcement of the anti-drug loitering law has made Tampa one of the marked success stories in the nation's struggle against illicit drugs. The Tampa ordinance has been called one of the "best weapons in the war on drugs" by the City police. See "Anti-drug Ordinance Survives Challenge," Tampa Tribune, January 31, 1990. The success the city has seen is consistent with the experience of the other jurisdictions enforcing similar ordinances. As the Tacoma, Washington City Attorney's Office states, anti-drug loitering ordinances have turned around that city's downtown, and are "vitally important to the citizens of the country who suffer from the ravages of open-air drug markets." Letter from Cheryl F. Carlson (Assistant City Attorney) to Rob Teir (April 30, 1991) (attached).

II. INTEREST OF AMICI

The Sulpher Springs Action League (SSAL) and Prison Crusade, Inc. (PCI) are two grass-roots anti-drug groups based in Tampa. SSAL seeks to maintain its neighborhood as a safe, healthy environment, and therefore supports legislation that protects against the scourge of activity surrounding illicit drugs. PCI seeks to assist ex-offenders trying to shed drug habits, including by limiting their contact with easily available drugs.

The American Alliance for Rights and Responsibilities (AARR) is a non-

profit public-interest group that was founded to provide a voice for civic and community organizations in legislation and litigation that affects their interests. The AARR is committed to a centrist balance in civil liberties matters, one that fully respects legitimate claims of individual rights, but also accounts for the community's right to a safe, healthy, and pleasant living environment. The AARR has assisted grass-roots groups from Alaska to Michigan to Virginia in promoting and defending useful and innovative anti-crime initiatives. Its Board of Directors includes eminent attorneys and professors, including a past President of the American Bar Association, the former Dean of American University Law School, and a former Assistant Attorney General of the United States.

The amici are united in their wish far safe, drug-free communities. Amici believe that the Tampa ordinance is fully consistent with the constitutional rights of the petitioner and other citizens of Tampa, and that the ordinance should be upheld as an exemplary law in the finest tradition of pro-active community service by responsive elected officials.

This case represents the first time that an anti-drug loitering ordinance will come before a state supreme court.[2] The decision by this Court will likely set a national precedent. The decision will either send a message that the community's wish for a safe living environment will be supported, or that extreme views of individual rights will stand in the way of enforcing one of the most effective anti-drug measures in the country.

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[2] The Washington Supreme Court will soon review Tacoma's anti-drug loitering ordinance.

III. THE TAMPA ORDINANCE PROHIBITS AN INDIVIDUAL FROM LOITERING ONLY IF THE PERSON IS LOITERING WITH THE ILLICIT PURPOSE OF ENGAGING IN DRUG-RELATED ACTIVITY.

The Tampa ordinance here challenged provides, in part, that:

> It shall be unlawful for any person to loiter in a public place in a manner and under circumstances manifesting the purpose of illegally using, possessing, transferring or selling **any** controlled substance as that term is defined in **§ 893.02** Florida Statutes (1988), as now enacted or hereafter amended or transferred.

City of Tampa Code §24-43(a). In subsequent sections, the ordinance expressly states that a person has not violated the law unless his conduct demonstrates a specific intent to participate in illegal drug-related activity. Id. The ordinance offers police a non-exhaustive list **of** factors for consideration in determining the presence of such intent, and mandates that those suspected of violating the ordinance be afforded an opportunity to explain their actions. Id.[3]

Properly construed, there are only two elements to the offense proscribed by this ordinance: 1) loitering in or near a public place; and 2) having **an** externally manifested intent to engage in unlawful drug-related activity. Unless ***both*** elements are present, no person may be arrested or convicted under the ordinance.

Petitioner, in seeking to overturn his conviction, asks the Court to adopt a broad, and improper, construction of this ordinance. Essentially, the petitioner asserts

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[3] **The** ordinance has no provision regarding the introduction at trial of the past misdeeds of **a** defendant, and does not purport to alter or affect Florida's existing evidentiary rules, judicial or statutory. **Any** argument relating to the introduction of past crimes **at** trial is therefore misplaced and irrelevant.

that the ordinance makes criminal any conduct that gives the appearance of an intent to engage in drug activity, regardless of whether that intent is actually present. Relying on this interpretation, opponents of the ordinance march into this Court, trumpeting a parade of horribles - none of which have been experienced under the Tampa law.

A plain reading of the statute demonstrates the petitioner's interpretation to be incorrect. The ordinance states that is illegal to loiter "in a manner and under circumstances ***manifesting the purpose***" of engaging in drug activity. Webster's Third New International Dictionary defines the verb "manifest" as to "make palpably evident or certain by showing or displaying." Id. at 1375 (1988). A thing cannot be shown to be palpably evident or certain unless it exists in fact. One cannot be convicted under this ordinance, therefore, unless his or her conduct reveals an actual intent to perform the specified illegal activity.

The ordinance does list behaviors which may be considered in ascertaining the presence of illegal intent, but neither the listed behaviors, nor any others, are elements of the offense. Rather, they are guidelines for police to use in answering the ultimate question of whether or not illegal intent is present. Such guidelines may be rare in statutes, but can only serve to constrain police conduct as compared to when the police are enforcing laws where no such direction is provided by the legislature. In sum, it is the criminal intent that is punished; conduct is relevant only insofar as it exposes criminal intent.

In this respect, the ordinance creates an offense analogous to crimes of attempt. One who is caught dousing his neighbor's barn with gasoline is not punished

for spilling the fuel, but rather for the intent to commit arson that his overt act belies. Similarly, under this ordinance, an individual is not punished for accepting money from a passing driver on a dimly-lit street corner but for the intent to traffic in drugs that this reveals. In both cases, the legislature **is** attempting to prevent the criminal from inflicting his or her evil upon a community instead of merely punishing him or her after the damage is already done.

Construing a virtually identical ordinance relating to prostitution, the Washington **Supreme** Court held: "[I]ntent is specifically required by the ordinance in question ... ***Intent*** *may* ***be inferred*** *[from] conduct* when it is plainly indicated as **a** matter of logical probability." City of Seattle v. Jones, **79** Wash.2d 626, 488 P.2d 750, 753 (Wash, 1971) (emphasis supplied). The majority of courts construing comparable ordinances have followed this interpretation, and there is no reason to deviate from it here.[4]

Interpretation of the ordinance in this manner not only fulfills the intent of the City Council and its advocates, it also is dictated by an "inveterate maxim" of Florida jurisprudence: "statutes are to be construed whenever possible to avoid constitutional infirmities." See, e.g., ITT Community Development Corp. **v.** Seay, 347 So.2d 1024, 1029 (Fla. **1977). By** focusing on intent, this Court can avoid troublesome constitutional questions - without any harm to the plain meaning of the ordinance, or the motivation

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[4] See. e.g., City of South Bend **v.** Bowman, **434** N.E.2d 104, **107** (Ind.App. 1982) (loitering circumstances tied to purpose of solicitation); Lambert v. **City** of Atlanta, 242 Ga. **645,** 250 S.E.2d 456, 457 **(1978)** (same); City of Akron v. Massey, *56* Ohio Misc. 22, **381** N.E.2d 1362, 1365 (Ohio Mun. Ct. 1978) (same); Matter of D., **27** Or.App. 861, 557 P.2d **687** (Or. **App.** 1976), appeal dism'd sub. nom., D. v. Juvenile Department of Multnomah County, **434 U.S.** 914 (1977) (same); City of Milwaukee **v.** Wilson, 96 Wis.2d 11, 291 N.W.2d **452,** 457 (Wis. 1980) (same).

behind it.

IV. THE TAMPA ORDINANCE IS NEITHER OVERBROAD NOR UNCONSTITUTIONALLY VAGUE BECAUSE IT APPLIES ONLY TO PERSONS WHO LOITER WITH THE INTENT TO ENGAGE IN UNLAWFUL DRUG-RELATED ACTIVITY.

Properly construed, the Tampa ordinance prohibits loitering **only by** those who have **a** specific criminal intent to engage in unlawful narcotics activity. The specific intent requirement limits the ordinance's application to non-constitutionally protected activity and serves to provide adequate guidance to both citizens and the police as to the scope of prohibited activity. Thus, the intent requirement insulates the ordinance from constitutional challenge based on the doctrines of either overbreadth or vagueness.

A. The Tampa Ordinance is Not Overbroad Because It Does **Not** Crirninalize or Deter Any Conduct Protected by the United States Constitution.

The stringent overbreadth doctrine has been invoked frequently in challenges to modern anti-loitering ordinances. However, because the types of drug-loitering and prostitution-loitering ordinances at issue require proof of specific intent to engage in criminal activity, these challenges have consistently failed. See City of South Bend v. Bowman, **434** N.E.2d 104, **107** (Ind.App. 1982); City of Akron v. Massey, 56 Ohio Misc. 22, **381** N.E.2d **1362, 1365** (Mun. Ct. **1978);** People v. Smith, **89** Misc.2d 754, **393** N.Y.S.2d **239** (App.Div. 1977), affd, 44 N.Y.2d 613, 407 N.Y.S.2d **462, 378** N.E.2d **1031 (1978).**

A statute is overbroad, and thus unconstitutional, if while purporting to criminalize unprotected activity, it also deters activity within the ambit of constitutional protection. See Grayned v. City of Rockford, 408 U.S. 104 (1972). The Supreme Court has cautioned that the overbreadth doctrine is "strong medicine: to be used "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). This Court has interpreted the doctrine to apply "only if legislation is susceptible of application to conduct protected by the First Amendment." Southeastern Fisheries Assoc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984).[5]

As with any constitutional challenge to a legislative enactment, the burden of proving that a statute is impermissibly overbroad falls heavily on the petitioner. Peoples Bank of Indian County River v. State Dept. of Banking and Finance, 395 So.2d 521 (Fla. 1981). Petitioner must demonstrate a significant and inherent intrusion by the statute on constitutionally protected liberties. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Members of City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984); L. Tribe, American Constitutional Law § 12-25 (1988). As one court has observed, "some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is

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[5] Petitioner has not alleged that his own conduct is constitutionally protected. In fact, he has not specified which, if any First Amendment-protected activities are constrained by the Tampa ordinance. Instead, he asks the Court to strike down the ordinance because of an alleged potential to "restrict the normal societal activities that are inherent in the American scheme of life." Petitioner's Initial Brief at 5. Amici have no idea what activities are encompassed in this nebulous phrase, let alone how they are affected by the ordinance.

probable." Magill v. Lynch, 560 F.2d **22, 30** (1st Cir. **1977);** cert. denied, **434 U.S. 1063 (1978).**

Here, the petitioner's burden **is** even heavier because the Tampa ordinance regulates drug-related conduct rather than pure speech. "[W]here conduct and not merely speech is involved **...** the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Trushin v. State, 425 So.2d **1126, 1131** (Fla. **1983)** [quoting Broadrick v. Oklahoma, **413 U.S. 601, 615 (1973)].**

Petitioner cannot carry the burden of demonstrating overbreadth. Because the Tampa ordinance prohibits only loitering with intent to engage in drug trafficking, the ordinance is not overbroad. The petitioner's claim of overbreadth arises from an erroneous reading of the statute, which construes its enumerated behaviors as sufficient in **and** of themselves to sustain either an arrest or a conviction under the statute.

As demonstrated above, the statute countenances no such thing. The law explicitly provides that only those with demonstrable intent to traffic in drugs have anything to fear from this ordinance. Those innocently walking the streets, talking with friends, buying ice cream, or merely star-gazing are outside of the law's purview. In City gf Milwaukee v. Wilson, the Supreme Court of Wisconsin upheld the constitutionality of a loitering **for** prostitution ordinance with an enumerated behaviors provision, noting **that,** "because of the additional element of intent, one engaged in constitutionally protected activity could not properly be found guilty of a violation." See id., **291** N.W.2d

452, **458** (Wis. 1980).[6]

The Tampa ordinance can, on this ground, be distinguished from the Dade County ordinance rejected by a federal court in Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). That ordinance made it a crime to loiter with another with knowledge that an illegal drug was being unlawfully used or possessed. The ordinance did not require any participation in a substantive narcotics offense by the accused, or an intent to commit such **an** offense. For that reason, the Fifth Circuit invalidated it. Id. at **317.** Tampa has learned from Dade County's mistake. The Tampa ordinance reaches only loitering with the intent to traffic in illegal drugs, thus foreclosing an overbreadth objection to its constitutionality.[7]

In sum, by limiting its application to those loitering with an intent to engage in illegal drug-related activity, Tampa's ordinance forcibly repels any overbreadth challenge.

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[6] There is, of course, no constitutionally protected liberty to engage in illegal activity related to narcotics, whatever form the activity may take. See, e.g., Scott v. United States., 129 U.S. **App.** D.C. 396, 395 F.2d 619 (D.C. Cir.), cert. denied, **393 U.S. 986** (1968) (no constitutional right to use or possess marijuana).

[7] The Fifth Circuit's decisions also rested on a broad constitutional right to associate **for** social purposes. The existence of such **a** right was later rejected by the United States Supreme Court in City of Dallas v. Stranglin, **490 U.S. 19 (1989).**

B. The Tamoa Ordinance is Not Unconstitutionally Vague Because **Its** Intent Reauirement Offers Adequate Guidance to Citizens and Adequate Limitations on Police,

The void-for-vagueness doctrine is concerned with two potential defects in statutes. First, laws should "give the person of ordinary intelligence **a** reasonable opportunity to know what it prohibited." Grayned, 408 **U.S.** at 108. Second, a law must contain minimal guidelines to govern its enforcement. See Kolender v. Lawson, **461 U.S. 352 (1983).** Tampa's ordinance more than satisfies both these requirements by limiting its application to those with an intent to traffic in illegal drugs.

1. The ordinance provides citizens with clear guidance as to what conduct is prohibited.

With respect to the law-abiding citizen, this ordinance provides clear guidance as to what is prohibited. Its command is very simple: do not loiter with the intent to buy, sell, or use drugs. The conduct to be avoided is narrow, and easy to avoid, except if one wishes to violate the drug laws and contribute to an open-air drug market.

"The Constitution does not require that (an) ordinance reach impossible standards in an attempt to give notice to the citizenry of its prohibitions. All that is required is that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." City of Cleveland v. Howard, **40** Ohio Misc.2d 7, 532 N.E.2d 1325, 1330 (Ohio Mun. Ct. 1987); City of Portland v. Deskins, 104 Or.App. 609, 802 P.2d 687 (1990), rev. denied, 311 Or. 166,806 P.2d 1153 (1991); see also Scullock v. State, **377** So.2d **682** (Fla. **1979);** Smith v. State, 237 So.2d 139 (Fla. **1970).** "It is not required that a statute, to be valid, have the degree

of exactness which inheres in a mathematical theorem." Smith v. Peterson, 131 Cal.App.2d 241, 280 P.2d 522 (1955).

The Supreme Court has recognized that the inclusion of "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982). Tampa's ordinance has a scienter requirement - an intent to deal drugs - so people should have no problem distinguishing between mere loitering and unlawful conduct. See People v. Superior Court (Caswell), 46 Cal.3d 381, 250 Cal.Rptr. 515, 758 P.2d 1046, 1050 (1988) (persons of ordinary intelligence need not guess at the applicability of the section; so long as they do not linger for the proscribed purpose, they have not violated the statute).'

Because of its focus on a manifested intent, this ordinance is clearer in its prohibition than the State loitering ordinance [Fla. Stat. Ann. § 856.0211, which has been previously upheld by this Court. See State v. Ecker, 311 So.2d 104 (Fla. 1975), cert. denied sub. nom., Bell v. Ecker, 423 US. 1019 (1975); State v. Williams, 315 So.2d 449

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[8] See also Ford v. United States, 498 A.2d 1135, 1139 (D.C.App. 1985)-("defendant was clearly put on notice of the illegality of her actions" by ordinance prohibiting loitering for the purpose of prostitution); Short v. City of Birmingham, 393 So.2d 518 (Ala.App. 1981); City of South Bend v. Bowman, 434 N.E.2d 104 (Ind.App. 1982); State v. Armstrong, 282 Minn. 39, 162 N.W.2d 357 (1968); State v. Evans, 73 N.C.App. 214, 326 S.E.2d 303 (1985); City of Akron v. Parrish, 1 Ohio Misc.2d 7, 437 N.E.2d 1220 (Ohio Mun. Ct. 1981), aff'd, 1982 Westlaw 5902 (Ohio App.1982); City of Seattle v. Jones, 79 Wash.2d 626, 488 P.2d 750 (1971); City of Milwaukee v. Wilson, 96 Wis.2d 11, 291 N.W.2d 452 (1980).

(Fla. 1975).[9] Under the state loitering law, individuals must figure out for themselves if their desired conduct will be judged to be "not usual," either in time or in manner, or likely to arouse "justifiable and reasonable alarm" for public safety. However, as this Court held in Ecker, a person of ordinary intelligence can make these subjective judgements. The same person surely is capable of knowing whether he intends to traffic in drugs. This is the only judgment the Tampa ordinance requires him to make. Thus, the ordinance is sufficiently clear to avoid any actual infringement or chilling effect on legitimate, constitutionally-protected activities.

2. The ordinance provides guidelines for its enforcement and limits the discretion of police.

By allowing arrests only upon an officer's belief that a loitering suspect has an intent to traffic in illegal drugs, this ordinance sufficiently limits the discretion of law enforcement officials. "We are not here dealing with the historical loitering and vagrancy statute that makes status a crime and gives uncontrolled discretion to the individual law enforcement officer to make the determination of what is a crime." Ecker, 311 So.2d at 110.

Furthermore, the Tampa ordinance provides additional protection against arbitrary law enforcement conduct by providing detailed guidance that the police should

[9] Fla. Stat. Ann § 856.021 provides, in part: "It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." Id.

employ when evaluating whether a person is loitering for drug activity. *See* City of Milwaukee v. Wilson, 96 Wis.2d 11, 291 N.W.2d 452,457 (Wisc. 1980) (requirement of conduct manifesting an unlawful purpose ensures proper police application).

Any vagueness challenge must operate under the peculiar presumption that the police must somehow be forbidden from making judgements as to a person's intentions. Such judgment is, of course, routine, expected, and required for a police officer to perform his or her job, and society expects its police to make such judgments every day. As the Washington Supreme Court observed, "the mere fact that a person's conduct must be subjectively evaluated by a police officer to determine if that person has violated a statute does not make that statute unconstitutionally vague. If this is so, most criminal statutes would be void for vagueness." State v Maciolek, 101 Wash.2d 259, 676 P.2d 996, 1000 (1984).[10]

The Tampa ordinance tightly channels police discretion into the question of whether or not illegal intent is present. It is not a catch-all provision; rather, arrest and conviction may occur only upon an affirmative and articulable finding of illegal intent. These limits vitiate any allegation of unconstitutional vagueness.

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[10] The mere fact that an innocent person may be mistakenly arrested under a law does not render a law unconstitutional. See generally State v. Worrell, 111 Wash.2d 537, 543, 761 P.2d 56 (1988). 'The ordinance is sufficiently definite to allow judges and juries to administer it fairly and is therefore constitutional." Rogers v, State, Fla. App., slip op. (July 9, 1991) at 4.

V. THE EXPLANATION PROVISION ONLY BENEFITS SUSPECTS AND DOES NOT VIOLATE THE FIFTH AMENDMENT.

The ordinance's provision calling upon the police to allow **a** suspect to explain his or her conduct does not violate the Fifth Amendment privilege against self-incrimination. Florida's loitering ordinance, Fla. Stat. Ann. § 856.021, contains an explanation provision identical in substance to the provision found in Tampa's law. This Court, in Ecker, rejected a claim that the opportunity for exoneration violated the Fifth Amendment. See id., **311** So.2d at **109-110;** see also State v. Rash, **458** So.2d 1201, 1205 (Fla.App. **1984);** Hurst **v.** State, **464** So.2d 534 (Fla.1985). There is no logical reason to reach a different result here.

First, no speech is compelled. On the contrary, suspects are completely free to choose whether to speak or to remain silent. Second, suspects are not penalized for asserting the right to silence. One who chooses to remain silent is in the exact same position he **or** she would have been had the opportunity to exonerate one's self not been included in the ordinance. If he speaks, he may convince the officer that she was mistaken in stopping him. If he does not, the police officer is left with whatever facts she had that prompted the original stop. The ordinance does not "criminalize silence" because the criminal activity would have been completed by the time that the opportunity to **speak** has been provided. Failure to speak is not and cannot be an element of the offense. See State v. Rash, 458 So.2d 1201; V.E. **v.** State, **539** So.2d **1170** (Fla.App. 1989).

The explanation provision benefits suspects by offering them a chance to

exonerate themselves before arrest. It does not violate the Fifth Amendment in any way.

VI. THE ORDINANCE DOES NOT PERMIT STOPS THAT VIOLATE A SUSPECT'S RIGHTS UNDER THE FOURTH AMENDMENT

No one can be stopped under this ordinance unless an officer has reasonable suspicion that the person has or is about to commit a crime. Thus, the law is entirely consistent with the Fourth Amendment. See Terry v. Ohio, **392 U.S. 1 (1968).**

Opponents of anti-drug loitering ordinances sometimes argue that the ordinances circumvent the Terry rule by allowing the police to stop a suspect for violation of the anti-drug loitering law when the officer has less than reasonable suspicion that the suspect is actually engaging in illegal drug trafficking, as opposed to "merely" waiting around, intending to **do** so.

This argument is specious and arises from a misreading of Terry. That landmark case simply provided that **a** police officer must have reasonable suspicion that a person is about to commit (or has committed) a crime before the officer may stop that person. Terry **was** entirely procedural and said nothing about the substantive law justifying the stop. For example, should a legislature pass **a** law making it illegal to carry a loaded assault rifle on a public street, Terry would apply only to guarantee that police reasonably suspected that a suspect was carrying such a weapon before stopping her pursuant to the law. Terry would not speak to the issue of whether or not the "loaded assault rifle" law was constitutionally sound.

Returning to Tampa, the City Council's decision to criminalize loitering

with intent to traffic in drugs does not implicate Terry questions. As with every other criminal statute, police will enforce the law in compliance with Terry's command that they have reasonable suspicion that a person is violating the ordinance before a stop can occur. Cf. People v. Superior Court, 46 Cal.3d 381, 758 P.2d 1046, 250 Cal.Rptr. 515 (1988).[11]

In fact, the ordinance offers protection beyond that mandated by Terry by providing peace officers with guidance as to how to determine whether a stop is warranted. The enumerated behaviors help officers "point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [an] intrusion." Id., 392 U.S. at 21. There is, therefore, no encroachment upon the procedural rights suspects have under the Fourth Amendment.[12]

The amici include members of the community who have every reason to fear an inappropriate and unlawful application of this ordinance. Thus, they share the petitioner's concerns in this area. However, if a pattern of abuses which the petitioner and others fear will result from this ordinance actually occurs, this Court (and the other courts of the state) are not powerless to alleviate the problem, either by case-by-case review or by holding the law unconstitutional as *applied.*

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[11] The offense under the ordinance is *not* trafficking in drugs, and thus there is no requirement of reasonable suspicion that such trafficking is occurring. Rather, like any attempt statute, the police will be looking for loitering with the intent to traffic in drugs. Police will, of course, require reasonable suspicion that the intent element is present before enforcing the ordinance.

[12] Similarly, the legality of the arrest will continue to turn on whether there was probable cause to believe the suspect was committing a crime. See Gerstein v. Pugh, 420 U.S. 103 (1975); Draper v. United States, 358 U.S. 307 (1959).

VII. TAMPA'S INNOVATIVE APPROACH TO THE PROBLEM OF STREET-LEVEL DRUG DEALING.

The ordinance here is one of a class of statutes passed in response to the United States Supreme Court rejection of "mere loitering laws." See Papachristou v. City of Jacksonville, 405 U.S. 156 **(1972).** The older loitering laws largely prohibited the mere act of wandering and were derived from the old English laws aimed at controlling the unemployed and fugitive serfs. Cf. **J.** Stephen, History of the Criminal Law of England **226-75** (1883). Often, these laws criminalized a person's status - making it an offense simply to be **a** beggar, gambler, drunkard, or prostitute. See Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status. Crimes of General Obnoxiousness. Crimes of Displeasing Police Officers. and the Like, **3** Crim. **L.** Bull. 205,205 (1967).

Such laws were consistently -- **and** quite rightly -- attacked on constitutional grounds. In **1972,** the Supreme Court struck down **a** Jacksonville ordinance, after it was used to arrest and convict a man for standing in **a** driveway. See Papachristou, 405 **U.S.** at 160.

The Supreme Court's objection to the older style **of** "mere loitering" laws was clear: they made criminal harmless activity engaged in by people lacking any illicit intentions. Thus, the old laws could apply to mere strollers and star-gazers, activities which were "historically part of the amenities of life as we **know** them." See e.g., City of St. Louis **v.** Burton, **478** S.W.2d 320 (Mo. 1972) (striking down ordinance prohibiting wandering about the streets in the nighttime or frequenting places of public resort **by** lewd women, etc.); Sherry, Vagrants, Rogues and Vagabonds: Old Concepts in Need of

Revision, 48 Cal.L.Rev. 557, 559-601 (1960).

The appellant would be hard-pressed to argue that standing on the street because a person wants to buy or sell drugs is part of the historical "amenities of life as we know them." The Tampa ordinance leaves behind the innocent activities and generalized laws that were struck down in Papachristou -- and is part of a new generation of laws aimed at those who insist upon loitering for a specific unlawful purpose.

The modern loitering law differs from the unconstitutional statutes in at least five marked ways. First, they are aimed at an activity - and thus do not criminalize the defendant's status, regardless of what that status is. Although there may be a right to *be* a drug dealer, there is no constitutional right to deal in drugs. See Scott, 395 F.2d 619. Second, the liability imposed by these ordinances rests upon the individualized guilt of the offender.[13] Third, the activities that the ordinances seek to curtail, like drug-trafficking, are clearly within the government's legitimate regulatory interest. Fourth, the ordinances do not provide free discretion to the police to pick and choose whom to arrest. Rather, the laws proscribe a specific intent that must be found in order to sustain arrest and conviction. See supra, § 4(B).

Finally, the Tampa law and its counterparts require an intent to commit another act, which is crirninalized by a state statute, See Comment, The Validity of

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[13] In Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980), the court struck down a law prohibiting loitering with another person with knowledge that an unlawful drug was being used. This ordinance enabled a person to be punished for the acts of another. The Tampa ordinance only reaches individuals who, themselves, intend to violate the drug laws.

Loitering Laws, 50 Ohio St. L. R. 717, 30 (1989) ("Laws that prohibit loitering with some specified illicit intent are probably the most common type of loitering laws and almost certainly the safest constitutionally.").

Loitering laws, today, are thus only aimed at specific conduct which threatens the public peace and safety. Cf. Ecker, 311 So.2d 104. Today, there are few greater threats to the peace and safety of a residential neighborhood than an open-air drug market. When a person walks the street for the purpose of prostitution, a community is harmed. See South Bend Mun. Code, Chapter 13, Art. 4, §13-55.1(a). When a person waits in public restrooms, hoping for sex, the public is harmed. See Cal. Penal. Code §647(d). When a person waits on the street for actual and potential drug customers, a community is harmed. In the ordinance at issue, Tampa is seeking to alleviate that harm.

VIII. SUMMARY AND CONCLUSION

All statutes and ordinances are presumed to be constitutional, and "all doubts as to the validity of a statute should be resolved in favor of its constitutionality." McKibben v. Mallory, 293 So.2d 48 (Fla. 1974); see also Scullock v. State, 377 So.2d 682 (Fla. 1979). The defendant has an enormous burden in trying to show that an important and useful ordinance, used with success in Tampa and many other jurisdictions to combat street drug dealing, is void on its face. See Biscayne Kennel Club, Inc. v. Florida State Racing Commission, 165 So.2d 762 (Fla. 1964); State v. Ocean Highway and Port Authority, 217 So.2d 103 (Fla. 1968).

The challenge presented by open-air drug markets is to rescue Tampa's

neighborhoods from the deterioration and destruction causes by flagrant drug dealing in a manner consistent with legitimate claims of individual liberties. The City Council has done so - with an ordinance that reaches only those milling around street corners, planning to commit a crime, and who are on the street because they want to break the law by selling or buying drugs. Just as there is no constitutional right to deal drugs - there is also no right to linger on street corners to do so.

The residents of the city expect their elected representatives to address major social problems, such as drug dealing, and to do so in a constitutional manner. Tampa citizens have every reason to be pleased with the passage of the anti-drug loitering ordinance, and its successful application. Amici sought to have their voices heard in this case because they do not want the gains accomplished through this ordinance to be destroyed merely because a criminal defendant unreasonably fears that other people's constitutional rights could somehow be in danger. Because people who do not intend to deal or buy drugs are still free to go about their business, no such danger exists.

The right that is really threatened in this case is the community's right to enjoyment of its public spaces, and to a safe, healthy, and pleasant place to live and raise a family. It is that right that is challenged on a daily basis by threatening, violent, and intrusive drug dealers. The Tampa ordinance helps law-abiding people re-assert that right, and now the citizens groups respectfully request this Court to do the same.

We sincerely urge your **honors to uphold this useful, needed, fair, and constitutional ordinance.**

Respectfully Submitted,

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On **behalf of itself, the Sulpher Springs Action League, and** Prison **Crusade, Inc.**

Dated:

August 6, 1991

(4)

City of Tacoma **Police Department**

April 30, 1991

Mr. Rob Teir
American Alliance for Rights & Responsibilities
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Washington, DC 20006

RE: City of Tacoma v. Luvene
Washington State Supreme Court NO, 57591-6
Constitutional Challenge to Drug Loitering Ordinance

Dear Mr. Teir:

Enclosed please find a copy of the Brief of Appellant and Brief of Respondent, *City* of Tacoma, in the above-referenced matter. I trust that these documents will be of assistance to you.

Other docuemnts which are of record with the Supreme Court are the Motion for Discretionary Review, the City of Tacoma's joinder in that motion, and *the* Court's order granting discretionary review.

I enjoyed our *discussion* yesterday. I anxiously await the reading of an amicus brief on behalf *of* your organization. I agree 1000% that drug loitering ordinances, such as Tacoma's, are constitutional and vitally important to the citizens of this country who suffer the ravages of "open air" drug markets in their neighborhoods. As I indicated to you in our phone conversation, enforcement of our drug loitering ordinance, coupled with proactive, creative policing, has "turned around" our core downtown area. Through the use of specialized teams of police officers providing concentrated policing services in our hardest hit neighborhoods we have been able to rtduce the incidence of the "open air" markets,

If we can be *of* service to any of the cities or organizations you work with in demonstrating the successes of drug loitering, please do not hesitate *to* give me a call.

Again, thank you for your support and interest.

Sincerely,

Cheryl F. Carlson
Police Legal Advisor/
Assistant City Attorney

County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402-2189

cc: Wm. Barker, City Attorney
Chief Fjetiand

CERTIFICATE OF **SERVICE**

I hereby certify that **a copy** of the foregoing **brief was sent** to the **following** parties on Tuesday, August *6,* 1991, **by** United States mail, first class, postage prepaid:

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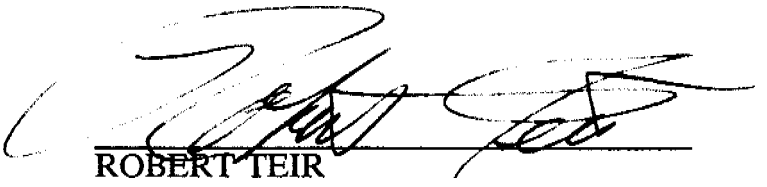

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