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IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

OLIVER HOLLIDAY)
Petitioner,)
vs.) Case No. 78,170
CITY OF TAMPA and)
STATE OF FLORIDA,)
Respondents.)

BRIEF AMICUS CURIAE ON BEHALF OF THE FLORIDA LEAGUE OF CITIES, INC.

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PRELIMINARY STATEMENT

The City of Tampa's Loitering for Prostitution Ordinance is at issue before this Court in Wvche v. State, Case No. 77,440. If the current case, Holliday v. State, and Wvche v. State are joined and presented to this Court as companion cases, Amicus respectfully requests that this Court view the arguments presented in this Brief as applying to each case.

STATEMENT OF THE CASE AND FACTS

Amicus, Florida League of Cities, Inc., accepts Respondents' Statement of the Case and Facts.

SUMMARY OF ARGUMENT ON APPEAL

Tampa Ordinance Section 24-43 is neither unconstitutionally vague nor overbroad. The ordinance is written sufficiently narrow so as not to encompass protected speech or associations, while serving as the City of Tampa's least intrusive means to achieve the legitimate government goal of protecting public safety by curbing illegal street level drug trafficking. The ordinance is specific, clear and unambiguous such that men of common intelligence need not guess at its meaning. The ordinance also provides police officers with guidelines to prevent arbitrary enforcement of it.

INTRODUCTION

The issue sub judice is whether a Florida municipality may pass an ordinance prohibiting loitering in a public place with the intent to participate in illegal drug-related activity. Amicus respectfully submits that a Florida municipality may enact such legislation and rests its position on the sound application of established constitutional, statutory and legal principles.

Initially, municipalities in Florida have broad home rule powers. Article VIII, Section 2(b), Fla. Const. (1968), in part provides:

> (b) Powers. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

See Chapter 166, Fla. Stat., known as the Municipal Home Rule Powers Act (the Act). In adopting the Act, the legislature generally granted to the legislative body of each municipality the power to enact legislation concerning any subject matter upon which the state legislature could act. Section 166.021(3), Fla. Stat. However, municipalities may not enact legislation which is expressly preempted by or in conflict with state law.

In State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978), this Court held the only constitutional limitation placed on the authority of municipalities to conduct municipal government,

perform municipal functions, and render municipal services, is that such power be exercised for a valid "municipal purpose." This Court has defined "municipal purpose" as all activities essential to the health, morals, protection, and welfare of the municipality. State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951). Also, this Court has noted that legislative declarations of a public purpose are presumed valid and are to be considered correct unless patently erroneous. State v. Division of Bond Finance, 495 So.2d 183 (Fla. 1986).

Tampa Ordinance Section 24-43 prohibits loitering in a public place with the intent to participate in illegal drug-related activity. The ordinance is clearly designed to protect community health and welfare from illegal drug possession, sale or use and the dangerous circumstances associated with this activity. Also, the ordinance does not conflict with nor is the subject matter preempted by state law. Because protection from illegal drug-related activity is a valid municipal purpose, this Court should uphold Tampa Ordinance Section 24-43 unless the ordinance is shown to violate a constitutionally protected right.

ARGUMENT

TAMPA ORDINANCE SECTION 24-43 IS NEITHER OVERBROAD NOR UNCONSTITUTIONALLY VAGUE BECAUSE IT APPLIES ONLY TO PERSONS WHO LOITER WITH THE INTENT TO ENGAGE IN UNLAWFUL ACTIVITY.

The Petitioner contends that Chapter 24, Article II, Section 24-43 of the Tampa Municipal Code is facially unconstitutionally vague and overbroad. The ordinance in question reads:

> (a) 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 Section 893.02, Fla. Stat. (1988), as now enacted or hereafter amended or transferred. Among the circumstances which may be considered in determining whether such a purpose is manifested are:
>
> > (1) The person is a known illegal user, possessor or seller of controlled substances, or the person is at a location frequented by persons who illegally use, possess, transfer or sell controlled substances; and
> >
> > (2) The person repeatedly beckons to, stops, attempts to stop or engage in conversations with passers-by, whether such passers-by are on foot or in a motor vehicle, for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer, or buy any controlled substances; or
> >
> > (3) The person repeatedly passes to or receives from passers-by, whether such passers-by are on foot or in a motor vehicle, money, objects or written material for the purpose of inducing, enticing, soliciting or procuring another to illegally possess, transfer, or buy any controlled substance.
>
> (b) In order for there to be a violation of subsection (a), the persons affirmative language or conduct must be

such as to demonstrate by its express or implied content or appearance a specific intent to induce, entice, solicit or procure another to illegally possess, transfer, or buy a controlled substance.

(c) No arrest shall be made for a violation of subsection (a) unless the arresting officer first affords the person an opportunity to explain his conduct, and no one shall be convicted of violating subsection (a) if it appears that the explanation given was true and disclosed a lawful purpose.

(d) For the purpose of this section, a known illegal user, possessor or seller of controlled substances is a person who, within one (1) year previous to the date of arrest for violation of this section, has within the knowledge of the arresting officer been convicted of illegally manufacturing, using, possessing, selling, purchasing, or delivering any controlled substance.

Tampa Ordinance Section 24-43 prohibits persons from loitering in a public place with the intent to participate in illegal drug-related activity. The specific intent requirement limits the ordinance's application to non-protected conduct and serves to provide adequate guidance to both citizens and the police as to the scope of prohibited activity. The ordinance's clear, narrow prohibition and intent requirement insulate it from constitutional challenge based on the doctrines of either overbreadth or vagueness.

(A) Presumption of Constitutionality and Burden of Proving Unconstitutionality.

This Court has recognized the following general principles of statutory construction. In determining whether an ordinance is constitutional the court must presume that the enactment is valid. City of New Smvrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980). When reviewing a city ordinance "the motives of the commission and the reasons for which it induced passage of the ordinance are irrelevant." City of Pompano Beach v. Big Daddy's, Inc., 375 So.2d 281 (Fla. 1979). All presumptions are in favor of an ordinance's validity and all ordinances will be construed, if possible, to give a result which renders them constitutionally valid. High Ridge Manasement Corp. v. State of Florida, 354 So.2d 377 (Fla. 1977). If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. City of Miami Beach v. Cayfetz, 92 So.2d 798 (Fla. 1957); Hardase v. City of Jacksonville Beach, 399 So.2d 1077 (Fla. 1st DCA 1981). See State v. Ecker, 311 So.2d 104 (Fla.) cert. denied 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed 2d 391 (1975) (recognizing the judicial principle of construing the wishes of the legislative body in a manner that would make legislation constitutionally permissible).

The presumption of constitutionality imposes a heavy burden of proof upon the Petitioner who is attacking the validity of Tampa Ordinance Section 24-43.

> When construing statutes, the courts must assume that the Legislature intended to enact an effective law. Statutes are presumptively valid and constitutional, and will be given

> effect if possible. All doubts will be resolved in favor of constitutionality. Acts of the Legislature are presumed valid and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. (citations omitted)

ABA Industries, Inc. v. City of Pinellas Park, 366 So.2d 761, 763 (Fla. 1979).

(B) Tampa Ordinance Section 24-43 Is Not Overbroad Because It Does Not Criminalize Or Deter Any Conduct Protected By The United States Constitution.

Petitioner asserts that Tampa Ordinance Section 24-43 is overbroad, in that the ordinance can be enforced against innocent conduct. Petitioner refers to such conduct as, "the normal societal activities that are inherent in the American way of life." Petitioner's Brief at 5.

Overbreadth refers to a challenge to a statute which achieves its governmental purpose to control or prevent activities properly subject to regulation by means that sweep too broadly into constitutionally protected freedoms. State v. Gray, 435 So.2d 816 (Fla. 1983). If an enactment deters constitutionally protected conduct then it may be said to be overbroad. Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972). This Court has interpreted the overbreadth 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).

In describing conduct entitled to First Amendment protection, the New York Court of Appeals stated:

> Clearly, any criminal statute penalizes conduct and may, in the abstract, be said to impinge on speech or association in some fashion. But the protections afforded by the First Amendment are not absolute and the statute at issue here does not impermissibly sweep "within its prohibitions what may not be punished under the First and Fourteenth Amendments" (Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.

> 2d 222, supra). That defendant may have employed language and the public streets to ply her trade (prostitution) does not imbue her conduct with the full panoply of First Amendment protections. On the contrary, the statute, by its terms, is limited to conduct "for the purpose of prostitution, or of patronizing a prostitute" - behavior which has never been a form of constitutionally protected free speech. People v. Smith, 44 N.Y. 2d 613, 407 N.Y. S.2d 462, 378 N.E.2d 1031, 1037-1038 (1978).

The court in People v. Smith, supra, upheld a loitering for prostitution law against overbreadth and vagueness challenges. Just as loitering for prostitution has never been constitutionally protected free speech or behavior, neither is loitering with the intent to participate in illegal drug-related activity protected speech or behavior. Simply because the Petitioner may have employed public streets and speech while loitering with the intent to participate in illegal drug-related activity, "does not imbue (his) conduct with the panoply of First Amendment protections." Thus, Tampa Ordinance Section 24-43 does not infringe on conduct specifically protected by the First Amendment.

An unconstitutionally overbroad statute is also one that in a "real and substantial" way infringes upon expression or association that is guaranteed by the United States Constitution but not specifically regulated by the statute in question. Such statutes cause people to avoid violating them, thus producing a "chilling effect" in the exercise of these First Amendment rights. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973). This Court has stated that, "where 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 statutes plainly legitimate sweep." Trushin v. State, 425 So.2d 1126, 1131 (Fla. 1983) (quoting Broadrick v. Oklahoma, 413 U.S. at 615).

Petitioner in no way demonstrates how Tampa Ordinance Section 24-43 in a "real and substantial" manner infringes on rights guaranteed by the First Amendment. Petitioner broadly claims that the ordinance could possibly infringe on, "the normal societal activities that are inherent in the American scheme of life." Petitioner's claim of overbreadth is based on a conception of the ordinance that would permit police to arrest anyone walking or talking in public places. This conception is far-fetched.

Tampa Ordinance Section 24-43 specifically prohibits only loitering with the intent to engage in illegal drug-related activity. The ordinance's plain, narrow sweep is to prohibit specific intent loitering, a legitimate government endeavor. See State v. Ecker, supra. For example, the ordinance would be violated if a person, at a location know for drug-related activity, repeatedly stop and conversed with passers-by for the purpose of buying or selling drugs. The ordinance is narrowly drawn and only those persons who loiter with a demonstrated intent to participate in illegal drug-related activity are covered by its proscription. Thus, the Petitioner's broad assertion fails to satisfy the "real and substantial" standards.

The overbreadth doctrine does have its limitations. "The 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, 1045 S.Ct. 2118, 80 L.Ed. 2d 772, (1984). L. Tribe, American Constitutional Law Section 12-25 (1988) states:

> "Implicit in overbreadth analysis is the notion that a law should not be voided on its face unless its deterrence of protected activities is substantial. Thus, the Supreme Court has not struck down on their face trespass, breach of the peace, or other ordinary criminal laws in which the number of instances in which these laws may be applied to protected expression is small in comparison to the number of instances of unprotected behavior which are the law's legitimate targets. A statute drafted narrowly to reflect a close nexus between the means chosen by the legislature and the permissible ends of government is thus not vulnerable on its face simply because occasional applications that go beyond constitutional grounds can be imagined."

As indicated, Petitioner can imagine certain applications of Tampa Ordinance Section 24-43 which could unconstitutionally infringe on, "normal societal activities that are inherent in the American scheme of life." Even if such applications can be imagined, this is not sufficient to render Tampa Ordinance Section 24-43 susceptible to an overbreadth challenge. The ordinance's legitimate target is the unprotected conduct of loitering in a public place with the intent to participate in illegal drug-related activity. This is the ordinance's clear, narrowly drawn proscription, and imagined instances of impermissible application should not be used to defeat the law's legitimate targets.

Tampa Ordinance Section 24-43 can be distinguished from several Florida municipal drug-related loitering ordinances which

have been found to be unconstitutionally overbroad. In Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980), a Metropolitan Dade County ordinance made it a crime to knowingly loiter in any place with one or more persons knowing that a narcotic or dangerous drug was being unlawfully used or possessed. The 5th Circuit rejected the ordinance because it punished an individual for mere association with another known to be in possession of or engaged in the use of narcotics: the ordinance did not require any active or intended participation in a substantive narcotics offense by the accused. Id. at 316-317. Unlike the ordinance at issue in Sawyer, a violation of Tampa Ordinance Section 24-43 is based on the unlawful conduct of the accused, not on the conduct of another. The Tampa ordinance is based on the accused's intent to participate in illegal drug-related activity, not upon mere association.

The Sawyer court continued, in gratuitous dicta, to state if local governments failed to adopt local ordinances regulating drug activity, state laws provided law enforcement officers "with a vast array of tools with which to combat illegal narcotics activity." Id. at 318. Petitioner and Petitioner's Amicus may rely on this comment and other Sawyer dicta to propose that any local regulations on illegal drug-related activity (and specifically prohibitions against loitering with the intent to participate in illegal drug-related activity) must be overbroad because state laws already exist on the subject matter.

Amicus is unaware of any decision by this Court holding that a municipality's ordinance is by definition overbroad simply

because it addresses a subject that has been addressed by state law. In fact, Florida's courts have repeatedly held ordinances and statutes addressing the same subject can co-exist. Laborers' International Union of North America, Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989); Pinellas County Department of Consumer Affairs v. Castle, 392 So.2d 1292 (Fla. 1980); City of Miami Beach v. Rocio Corp., 404 So.2d 1066 (Fla. 3rd DCA 1981) rev. denied 408 So.2d 1092.

Amicus submits that the fact that state laws regarding illegal narcotics activity exist in no way preempts local regulations on the subject. As long as there is no conflict with state law or the Florida or United States Constitutions, local governments may enact appropriate legislation to protect public health, safety and welfare. Under these principles and based on the authority cited herein, Tampa Ordinance Section 24-43 is a valid municipal legislative enactment.

Two municipal drug-related loitering ordinances have recently been determined to be unconstitutionally overbroad by Florida trial courts. In the Interest of E.L., Case No. 89-1876 (Fla. 18th Jud. Cir. 1990) (Sanford Ordinance 2032) on appeal, State v. E.L., 5th DCA Case No. 90-0794; and State v. Calloway, Case No. 89-4717 (Fla. 18th Jud. Cir. 1989) (Melbourne Ordinance 88.62), on appeal State v. Callowav, 5th DCA Case No. 89-2606.

Both of the above ordinances provided that it was unlawful for a person to loiter in a public or private place, "in a manner and under circumstances manifesting the purpose to engage in (illegal)

drug related activities." The ordinances went on to list ten separate circumstances which could be considered when determining whether such a purpose was manifested. These circumstances included that the person, "is a known unlawful drug user, possessor or seller," and that the, "area involved is by public repute known to be an area of unlawful drug use and trafficking."

There appears to be certain circumstances under these two ordinances in which an individual loitering in a public place may be arrested because that person has a prior drug conviction, or is in an area known to be an area for drug activity. under such circumstances, these ordinances appear to make an individual's status (prior drug conviction) or an individual's physical location alone a circumstance to be considered when determining if that person is displaying an intent to engage in illegal drug-related activities. Amicus is not attempting to state the Melbourne or Sanford city councils' intent for enacting such ordinances or how such ordinances should be interpreted. It will be up to the Fifth District Court of Appeal to answer these and other questions, after it has thoroughly reviewed the principles of statutory construction and constitutional law. Rather, Amicus references these two ordinances for comparison purposes only to Tampa Ordinance Section 24-43.

An individual loitering in a public place who has within the past year been arrested for illegal drug-related activity cannot be arrested under these facts alone for violating Tampa Ordinance Section 24-43. These facts simply do not warrant an arrest. The

Tampa ordinance has a two-part test when determining if an individual manifests an intent to engage in illegal drug-related activity: (1) the person is a known illegal drug user or seller or the person is at a location frequented by illegal drug users or sellers; and (2) such person exhibits other overt conduct for the purpose of engaging in illegal drug-related activity. The fact that a person is a known illegal drug user or seller is not, by itself, used to determine a person's intent under Tampa Ordinance Section 24-43. A person's conduct must also be considered when determining intent. On these points, Tampa Ordinance Section 24-43 can be distinguished from the Sanford and Melbourne ordinances.

(C). Tampa Ordinance Section 24-43 Is Not Unconstitutionally Vaaue Because Its Intent Requirement Offers Adequate Guidance To Citizens And Adequate Limitations On Police As To What Conduct Is Proscribed.

The test for determining whether an ordinance is vague is whether that ordinance, "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." Falco v. State, 407 So.2d 203 (Fla. 1981). See also Schultz v. State, 361 So.2d 416 (Fla. 1978).[1]

In applying the "common understanding" test, courts have held that the presumption of validity for legislative enactments still applies. "(W)e have the responsibility to avoid a holding of unconstitutionality if a fair construction of the statute can be made within reasonable constitutional limits. See State v. Beasley and the cases cited therein." White v. State, 330 So.2d 3 (Fla. 1976). See also Schultz v. State, supra, and State v. Beasley, 317 So.2d 750 (Fla. 1975).

The challenged Tampa ordinance clearly states what conduct is prohibited: do not loiter in a public place with the intent to participate in illegal drug-related activity. The ordinance centers on the fact that an individual is expressing a manifest intent to

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[1] The vagueness test has been restated in the following terms: whether the ordinance is "sufficiently certain to provide fair notice to persons of ordinary intelligence of its meaning and application." Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213, 1219 (11th Cir. 1982); and whether an ordinance "give(s) the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed. 2d 362 (1982).

participate in such activities. It is not a prohibition against loitering in general; rather, it prohibits loitering with a manifest intent to engage in illegal conduct. This prohibited conduct was the very conduct the Petitioner was arrested for, charged with, and pled no contest to.

Despite the clear prohibition against the conduct which he engaged in, the Petitioner asserts that the ordinance in question is vague because there are certain applications which are not clear. This argument must fail for several reasons.

The "common understanding" test recognizes that it is impossible to draw a statute or ordinance with exact precision and still prohibit all the offensive conduct which the ordinance intends to forbid.

> We pointed out that not every detail is required to be set forth in the statute as long as prohibitive conduct is in such a language that it is understood by the average person. Bradshaw v. State, 286 So.2d 4, 7, (Fla. 1973).

The Supreme Court of the United States stated:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. Colten v. Kentucky, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972).

Further, a defendant may not rely on hypothetical situations not applicable to his case to challenge an ordinance for being vague. In Village of Hoffman Estates v. Flipside Hoffman Estates,

supra, the Supreme Court said that the Circuit Court of Appeals erred when it:

> "... determined that the ordinance is void for vagueness because it is unclear in same of its applications to the conduct of Flipside and of other hypothetical parties." Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. at 495.

The Supreme Court rejected the argument that a complainant whose conduct is clearly within the conduct prohibited by an ordinance may defeat the ordinance by arguing that there are certain unconstitutionally vague applications. To succeed, however, the complainant must demonstrate the law is impermissibly vague in all its applications. Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. at 497. The Florida Supreme Court has adopted the same position.

> While the statute might be unconstitutionally applied in certain situations, there is no ground for finding the statute itself unconstitutional. State v. Ecker, 311 So.2d at 110.

Therefore, this Court should not consider any hypothetical unconstitutionally vague situations presented by the Petitioner.

The plain language of Tampa Ordinance Section 24-43 is clear and unambiguous. It prohibits specific conduct, unlike the old Florida vagrancy law which covered many broad areas. *See* Pasochristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972).

The language in the ordinance at issue is far clearer in describing what conduct is prohibited than other language that has been upheld by the courts. Schultz v. State, 361 So.2d 416 (Fla.

1978) (gambling laws); White v. State, 330 So.2d 3 (Fla. 1976) and Bradshaw v. State, 286 So.2d 4 (Fla. 1973) (disorderly conduct statute); Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976) (Little FTC Act); State v. Ecker, 311 So.2d 104 (Fla.) cert. denied 96 S.Ct. 455, 423 U.S. 1019, 46 L.Ed. 2d 391 (1975) and State v. Williams, 315 So.2d 449 (Fla. 1975) (loitering statute); and Village of Hoffman Estates v. Flipside Hoffman Estates. Inc., supra, and Florida Businessmen for Free Enterprise v. City of Hollywood, supra, (headshop statute).

In State v. Ecker, supra, this Court upheld the state loitering statute, Section 856.021, Fla. Stat., against overbreadth and vagueness challenges. This statute is designed to protect "individual citizens from imminent criminal danger to their persons or property." (emphasis added) State v. Ecker, 311 So.2d at 107. Black's Law Dictionary (5th Edition) defines "imminent" as, "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."

Section 856.021(1), Fla. Stat., prohibits loitering in a place, time or manner "not usual for law-abiding individuals", and "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." This Court determined that the above standards were not vague and concluded that individuals of ordinary intelligence could make subjective judgments as to what conduct would violate the statute. State v. Ecker, 311 So.2d at 109.

Tampa Ordinance Section 24-43, which focuses on an individual's manifest intent, is clearer in its prohibition than the state loitering statute. Both the statute and ordinance are drawn to protect citizens from "imminent" criminal danger; however, the statute applies generally to loitering for all criminal activity, while the challenged ordinance focuses on loitering with the intent to participate in illegal drug-related activity. The Tampa ordinance is clear in its prohibition and adequately informs individuals of ordinary intelligence what conduct would violate its proscriptions: loitering in a public place with the intent to further the proliferation of illegal drugs. Because the challenged ordinance is specifically drawn to proscribe loitering that threatens public safety, it should be upheld under the Ecker reasoning.

Tampa Ordinance Section 24-43 does not give uncontrolled discretion to individual law enforcement officers to make the determination of what is a crime. The ordinance specifically authorizes an arrest only where the person is (1) loitering in a public place and (2) such loitering is under circumstances manifesting the purpose of participating in illegal drug-related activity. The ordinance goes on to list factors which may be used by law enforcement officers when determining if an individual is loitering with the intent to participate in illegal drug-related activity. By requiring law enforcement officers to make this determination of intent, along with guideline factors to consider, the ordinance narrowly limits an officer's discretion to arrest

under it.

The whole purpose of Tampa Ordinance Section 24-43 is to provide law enforcement with a suitable tool to prevent drug-related crime and allow a specific means to eliminate a situation which a reasonable man would believe could result in illegal drug-related activity. State v. Ecker, 311 So.2d at 110.

In State v. Ecker, supra, this Court stated:

> "... under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity" mean(s) those circumstances where peace and order are threatened **or** where the **safety of** persons **or** properties is jeopardized. In justifying an arrest for this offense, we adopt the words of the United **States** Supreme Court in Terry v. Ohio, 392 U.S. **1, 21, 88** *S.C.* **1868, 1880, 20 L.Ed.** 2d **889, 906 (1968): "...** the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a finding that a breach of the peace is imminent or the public safety is threatened. (emphasis added) State **v.** Ecker, **311 So.2d** at **109.**

Under the Tampa ordinance, a police officer **also** must point to **"specific** and articulable facts" of an individual's activity and rationally infer fromthis activitythat the individual is engaging in loitering with an intent to participate in illegal drug-related activity before an arrest can be made.

CONCLUSION

BASED upon the cases, authorities and policies cited herein, the Florida League of Cities respectfully request this Honorable Court to affirm the decision of the Second District Court of Appeal, answer the certified question in the affirmative and uphold Tampa Ordinance Section 24-43.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail this 16th day of August, A.D. 1991 to:

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