

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :  
                    Petitioner, :  
vs. :                    Case SC02-2288  
                    J.P., :                    No.  
                    Respondent. :  
                    :  
\_\_\_\_\_:

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State's statement of the case and facts is accurate.

SUMMARY OF THE ARGUMENT

The Tampa juvenile curfew is a state-formulated and state-imposed blueprint regarding the "proper" way to raise curfew-aged minors during curfew hours. This, the state cannot do. The curfew is vague and it fails the strict scrutiny test.

The curfew is vague because it is not clear who it applies to, how it is to be enforced, and what activities it excepts. Thus, it is subject to discriminatory enforcement.

The curfew fails the strict scrutiny test because it outlaws conduct the state has no compelling interest in regulating and it allows conduct in which the state interests which justify the curfew are implicated (often

to a greater extent that in conduct the curfew forbids). The curfew prohibits minors from engaging in (and their parents from allowing them to engage in) many activities which do not expose minors to significant danger or cause any serious harm, while also permitting many activities that may expose minors to significant harm. Although the state has compelling interests here, the curfew is not narrowly tailored to promote those interests by the least restrictive means.

Adult curfews are subject to strict scrutiny. They are valid if justified by an emergency and limited to cover only the affected area for a brief time. Jeffrey F. Ghent, Validity and Construction of Curfew Statute, Ordinance, or Proclamation, 59 A.L.R.3d 321 (1974). The Tampa curfew clearly fails this test.

Non-emergency juvenile curfews may be valid if they promote a state interest that applies to minors but not to adults. There are two such interests: 1) protecting minors from their own poor decisions on important matters (decisions that may lead to crime commission or victimization); and 2) supporting the authority of parents who want the curfew.

These interests overlap to some degree. The poor decision-making interest does not authorize state regulation of any activity of minors that may involve decisions. Rather, this interest is compelling when minors are faced with decisions that require some maturity to make and that may significantly affect their lives. In such cases, the state has an interest in "protect[ing] its youth from ... their own immaturity by requiring parental consent to or involvement in important decisions by minors." Bellotti v. Baird, 443 U.S. 622, 638 (1979).

However, "state deference to parental control over children" is the constitutional norm because "[the parenting] process, in large part, is beyond the competence of impersonal political institutions" and "the parental role implies a substantial measure of authority over one's children." Id. Thus, while the state may enact regulations on minors that are "supportive of the parental role," id., the state cannot interference in areas where reasonable parents may disagree on proper child-rearing, in order to enforce some state-formulated vision that may conflict with the wishes of many par-

ents.<sup>1</sup>

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<sup>1</sup> The state cannot "standardize its children," Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), or require them or their parents to "conform to some state-designed ideal ...." Hodgson v. Minnesota, 497 U.S. 417, 452 (1990). "[T]he state may not ... legislate on the generalized assumption that a parent ... will not act in his or her child's best interests ...." Id. at 454, n. 37. "[S]ome parents may at times be acting against the interests of their children," but that does not lead to "[t]he statist notion that [the state] should supersede parental authority in all cases because some parents abuse and neglect children"; nor is state intervention allowed "[s]imply because the decision of a parent ... involves risks ...." Parham v. J.R., 443 U.S. 584, 603 (1979). "The fundamental liberty interest of natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents ...." Santosky v. Kramer, 455 U.S. 745, 753 (1982). "The regulation of constitutionally protected decisions ... must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." Hodgson, 497 U.S. at 435.

Some cases identify "preventing juvenile crime and victimization" as a state interest promoted by curfews. However, the state has the same interest with respect to adults; this interest does not justify greater regulation of minors and will not justify a curfew. To the extent that "preventing juvenile crime and victimization" really means "protecting juveniles from their own poor decisions," this is an interest that justifies greater regulation of minors; but that interest is a "poor decision-making" interest, not a "crime or victimization prevention" interest.

Some cases suggest the state interest here is compelling parents who have lost control of their children to reestablish that control. However, the Tampa curfew is not targeted at such parents (unless we assume the parents of any child who is out during curfew doing something other than what the state thinks appropriate -- as established by the curfew's exceptions -- have lost control of that child). Further, the curfew allows parents to avoid all responsibility for curfew violations by simply notifying the police that their children are out without their permission. See Tampa City Code ("TCC") 14-26, sec. 6(a). Further, it is absurd to think that a state-imposed curfew will help parents reestablish authority over their children. Further, this is not a separate interest distinct from the poor decision-making interest. We identify "lost control" parents by the fact that they are not preventing their children's poor decisions; indeed, if the children are not making poor decisions, the state has no authority to intervene, even if parents have lost control. Thus, a curfew targeted at children making poor decisions will inevitably net "lost control" parents. However, since the Tampa curfew is not targeted at juveniles making poor decisions, it is not targeted at "lost control" parents.

The Tampa curfew is not narrowly tailored to promote either interest. The poor decision-making factor is not equally present at all times in all minors out during curfew. Many minors, engaged in many activities the curfew outlaws, are in no danger of making poor decisions with disastrous results. Since the curfew does not target those minors and activities when poor decision-making is a significant risk, the curfew sweeps too broadly.

As to the parental support interest, since the curfew applies regardless of whether parents want it, it is not narrowly tailored to promote that interest. The curfew restricts parental discretion regarding a crucial part of childrearing: decisions concerning when children will be allowed some independence at night. Such decisions are difficult and they must be based on a careful assessment of many factors, including the child's matu-

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Finally, the state may intervene on the basis that parents have lost control only upon a case-specific finding that particular parents have indeed lost control. Troxel v. Granville, 530 U.S. 57, 68-69 (2000); Action for Childrens' Television v. F.C.C., 58 F.3d 654, 678-79 (D.C. Cir. 1995)(Edwards, C.J., dissenting).

Thus, there is a crucial distinction between state regulations designed to support parental authority and regulations designated to supersede that authority. The latter promote the independent state interest in preventing harm to children resulting from parental abuse or neglect.



rity, her companions, and the activities she will engage in. Since such decisions relate to "the care, custody and management" of children, the state constitution protects such decisions as fundamental parental rights. Von Eiff v. Azicri, 720 So. 2d 510, 513 (Fla. 1998). The state cannot interfere with parental decisions unless "significant harm to the child [is] threatened by or result[s] from those decisions." Id. at 514. The curfew is not limited to such decisions. The curfew usurps the authority of parents who believe they are better able than the state to decide what is best for their children.

The curfew is also underinclusive with respect to both interests. As to poor decision-making, the curfew's exceptions allow minors to be out in numerous circumstances where poor decisions may be made as easily as when minors are not within an exception. As to parental support, the curfew allows minors to be out in numerous circumstances (including some where poor decision-making is a risk) regardless of whether parents approve.

The primary problem with juvenile curfews is that they are not really intended to prohibit what they ex-

pressly prohibit, i.e., mere presence in public during curfew hours. Rather, they are intended to give police a reason to sweep perceived "troublemakers" off the street when there is no other reason to do so. Curfews are really intended to target minors who are "hanging out." However, curfews do not expressly prohibit hanging out, for obvious reasons: A law that used such language would be unconstitutionally vague.<sup>2</sup> Curfews approach the problem from the other direction: They provide a laundry list of state-approved activities and assume that minors not engaged in such activities are hanging out (and thus engaged in activities deemed unworthy or dangerous). The flaws in this assumption are that: 1) Curfew activities the state disapproves have no value or are potentially dangerous; and 2) activities the state approves are not. The usefulness and dangerousness of a particular activity depends on numerous factors (e.g., minors' and parents' personal view of what is "useful" activity, the minor's character, the surrounding circumstances); the crude assumptions curfews are based upon are invalid.

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<sup>2</sup>See City of Chicago v. Morales, 527 U.S. 41, 57-58; Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Nunez v. City of San Diego, 114 F.3d 935, 941 (9th Cir. 1997).

## ARGUMENT

### THE TAMPA CURFEW IS VAGUE AND IT FAILS THE STRICT SCRUTINY TEST

#### I. THE TAMPA CURFEW IS VAGUE

##### A. APPLICATION AND ENFORCEMENT

The Tampa curfew applies to persons under seventeen "whose disabilities have not been removed by marriage or by a court ... or otherwise." TCC 14-26, sec. 2(d). It is not clear what "or otherwise" means.

The curfew makes it unlawful for parents "or other adult[s] having the care, custody or control of a juvenile to allow said juvenile to violate the curfew ...." Id., sec. 6. The meaning of "adult ... having the care, custody or control" is unclear. Cf. Hallberg v. State, 649 So. 2d 1355, 1357-58 (Fla. 1994), with Crocker v. State, 752 So. 2d 615, 616-17 (Fla. 2d DCA 1999).

It is also unlawful for "any business or other establishment to knowingly permit a juvenile to remain ... upon the premises ... during curfew hours." TCC 14-26, sec. 7. The meaning of "other establishment" is unclear. Establishments cannot allow minors on premises even if they are within an exception: The parental sec-

tion uses the phrase "allow the juvenile to violate the curfew," while the establishment section uses "remain ... upon the premises ... during curfew." This means minors cannot lawfully be at establishments for any reason during curfew. Thus, minors cannot visit establishment premises even if they are with a parent.<sup>3</sup>

The curfew's enforcement provisions are problematic. Sections 2(i) and 3 provide that a minor violates the curfew if he fails to "leave premises" when "request[ed]" to do so by a police officer.<sup>4</sup> "Request" means "order"; failure to obey a "request" is an unlawful "remain[ing]." Id., sec. 2(i)(2).

Presumably, "premises" refers to "business or other establishments." The curfew provides no guidance concerning when an officer may order a minor to "leave premises." If this is read as meaning the order is valid

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<sup>3</sup> Compare TCC 14-26, secs. 2(j) and 7, with the similar curfew at issue in Metropolitan Dade County v. Pred, 665 So. 2d 252 (Fla. 3d DCA 1995)(Dade County Ordinance 94-1, secs. 5(f) and (i)) and the interpretation of similar exceptions in Hutchins v. District of Columbia, 188 F.3d 531, 545 (D.C. Cir. 1999), Schleifer v. City of Charlottesville, 159 F.3d 843, 854 (4th Cir. 1998), and Outb v. Strauss, 11 F.3d 484, 495 (5th Cir. 1993).

<sup>4</sup> Under section 2(i), a "request" to leaves premises may be made by "a police officer or the ... person in control of the premises." If this was intended to mean that the officer can order minors to leave premises only if requested by the "person in control," that intent was poorly expressed.

only if the minor is violating the curfew, it conflicts with the curfew's other enforcement provisions. Under section 5, the officer is not to simply "request" violators to "leave premises"; rather, the officer "shall [either] make arrangements for the juvenile to return home [or] take the juvenile into custody." Id., secs. 5(d) and (e). Thus, it appears the curfew gives police unfettered discretion to order minors to "leave premises" even though there is no curfew violation, with it being a violation to disobey the order. This is unconstitutional. See Morales, 527 U.S. at 56-57; Papachristou, 405 U.S. at 170; Allen v. Bordentown City, 524 A.2d 478, 481 (N.J. Super. 1987).

Sections 5(a)-(c) authorize police to detain a "suspected juvenile in violation of the curfew" and require the suspect to identify himself and explain his presence, with the officer to "verify" his statements. This authorizes the detention of any person any officer feels might be underage in public during curfew hours. See Hodgkins v. Goldsmith, 2000 WL 829964 at \*4 (S.D. Ind. July 3, 2000). Although the curfew applies only to under-17s, over-17s who look younger may be detained, at

least for the time it takes to prove their age.<sup>5</sup> The curfew has exceptions but the officer usually will not know before the detention whether a suspect is within one. Requiring the officer to have reason to believe the suspect is not within an exception before the detention would make valid detentions almost impossible. The determination of whether the suspect is a minor, or is within an exception, is to be made during the detention. See TCC, secs. 5(a)-(d).

However, police cannot detain citizens without a founded suspicion of criminal activity. Sighting an apparent minor during curfew does not provide that suspicion. Although, with a younger minor, it may be possible to tell at a glance that she is underage, the age of older minors is not so obvious. In either case, it is hard to tell if the minor is within an exception, particularly if he is moving at the time; as discussed below, several of the curfew's exceptions include "di-

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<sup>5</sup> When the police began reinforcing the Pinellas Park curfew at issue in the companion case of State v. T.M., #SC02-2452, four of the first nine "suspected juveniles" detained were in fact overage. Anne Lindberg, Curfew Returns on a Seemingly Peaceful Night, St. Petersburg Times, July 2, 2000, at 4B. See also Brown v. Ashton, 611 A.2d 599, 602 (Md. App. 1992), modified on other grounds, Ashton v. Brown, 660 A.2d 447 (Md. 1995).

rect route" provisos that authorize minors to travel to and from state-approved activities. Stationary minors may also be within an exception; they may be married, emancipated, standing on a permissible sidewalk, homeless, or "exercising First Amendment rights." The mere presence of a "suspected juvenile" during curfew hours does not provide a founded suspicion of a violation. Compare United State v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975).

The curfew's "identify and explain presence" provisions, TCC 14-26, sec. 5, are also troublesome. A suspect cannot be compelled to identify himself if the police have no founded suspicion that he committed a crime. Brown v. Texas, 443 U.S. 47 (1979); Kolender, 461 U.S. at 360, n.9 and 362-67. If the police have a founded suspicion, a suspect may be compelled to provide a name and address, but he "cannot be required to explain his presence and conduct; this being constitutionally prohibited." State v. Ecker, 311 So. 2d 104, 108 (Fla. 1975). Presumably, he could not be compelled to reveal his age; in this context, that may be incriminat-

ing.<sup>6</sup> Further, "the failure of a suspect to answer an inquiry of a policeman cannot constitute a criminal act [and] a suspect's silence may not be used as a predicate for a separate offense . . . ." People v. Bright, 520 N.E.2d 1355, 1360 (N.Y. 1988); see also Florida v. Royer, 460 U.S. 491, 497-98 (1983). If the suspect exercises his right of silence, how is the officer to "verify" the suspected violation? Minors cannot be compelled to waive their constitutional rights to avoid improper arrest for curfew violations; nor can the state impose on suspects the burden of proving to police they committed no crime. Compare Bright, 520 N.E.2d at 1360. Thus, to the extent that these provisions seem to authorize police to arrest "suspected juveniles" who do not answer the officer's questions to her satisfaction, they violate self-incrimination principles.

Finally, if the suspect identifies herself and explains her presence, what amounts to proper "verification"? What if parents or other "verifiers" cannot be

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<sup>6</sup> Minors have a constitutional right of silence, In Re Gault, 387 U.S. 1, 55 (1967), and it applies in this context. See Berkemer v. McCarthy, 468 U.S. 420, 434 (1984).



reached?<sup>7</sup> Can a minor be arrested simply because an officer does not believe her?

Similar provisions have been held invalid in numerous cases.<sup>8</sup>

## **B. THE EXCEPTIONS**

The curfew contains eleven exceptions. TCC 14-26, secs. 4(a)-(k). Exception (i) is sufficiently specific; the others are not.

(a) "Accompanied by parent" -- Does "authorized ... to have care and custody of the juvenile" require an express grant of authority that specifically includes (or is limited to) the activity the minor is engaged in when stopped by the police? If a parent allows a minor to "hang out" with a 21-year-old on a regular basis, is this a general authorization, valid at all times and places? Or must the authorization be more specific and,

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<sup>7</sup> The curfew assumes that parents of curfew-age minors (and of overage children who look like they might be underage) must sit by the phone while their children are out, in order to provide verification when the police call. Minors whose parents have no phone, work at night, wish to go to bed early or go out themselves, or have to leave home for an emergency, are out of luck; these minors will be arrested because verification is unavailable.

<sup>8</sup> E.g., Kolender, 461 U.S. at 357-58; Hynes v. Borough of Oradell, 425 U.S. 610, 622 (1976); Bright, 520 N.E.2d at 1360; People v. Berek, 300 N.E.2d 411 (N.Y. 1975).

if so, how specific? See Appeal in Maricopa County, 887 P.2d 599, 602, 612 (Ariz. App. 1994); City of Maquoketa v. Russell, 484 N.W.2d 179, 184 (Iowa 1992); cf. Hallberg, 649 So. 2d at 1357, with Crocker, 752 So. 2d at 616.

"Accompanied" is also vague, since it is not clear whether this requires individualized supervision. City of Milwaukee v. K.F., 426 N.W. 2d 329, 343 (Wisc. 1989)(Heffernan, J., dissenting). (b) "Lawful

employment activity ... direct route" -- Does "lawful employment activity" include applying for a job, or is it limited to existing jobs? What about self-employment? Unpaid or volunteer work, such as running an errand for the boss on your own time or helping a friend with a newspaper route? An aspiring musician sitting in with a band (without pay) or providing free entertainment on the sidewalk?

As to the "direct route" proviso -- "shortest path of travel ... without any detour or stop," TCC 14-26, sec. 2(b) --, must minors in cars ignore traffic signals? Must pedestrian minors run through intersections, dodging cars matador-like? Can minors stop for a snack

while going to or coming from work? Compare Bullock v. City of Dallas, 281 S.E.2d 613, 615 (Ga. 1981); In Re Mosier, 394 N.E.2d 368, 373 (Ohio Ct. Com. Pleas 1978). What about gassing up the car? Stopping to pick up a hitchhiker; to ask directions; to rescue a wounded animal? Ducking in some place to escape the rain? Sitting down to rest during a walk home? If a minor witnesses a crime, can she use a pay phone to call the police? Unless two minors live together, one cannot give the other a ride to or from work: Unless both live along the same direct route, the driver must "detour" for the other and, even if they live on the same route, the driver must "stop" for the other. If we try to eliminate such absurdities by reading into this exception (despite its plain language) a proviso that some quick detours or stops are allowed, how do we define "some" and "quick"?

"Shortest path of travel" refers to actual distance rather than fastest time; does this mean minors must avoid longer but faster expressways and stay on regular streets that comprise the shortest path, even though they take longer and go through dangerous neighborhoods? If the shortest path on foot is through an alley swarm-

ing with hoodlums, must the minor plunge ahead into the darkness? Can a minor ride a public bus to or from work that is not an express bus that runs directly to and from his home?

(c) "Motor vehicle ... interstate travel" -- Does this mean that, at the time the minor is stopped, she can trace an unbroken route back to a state border? Suppose an out-of-state minor goes to Orlando for a week and drives to Tampa one evening, or comes to Tampa, checks into a motel, then goes out to eat; is she engaged in interstate travel at those times?

And what of intrastate travel? Must minors driving from Bartow to Clearwater go around Tampa? Must minors riding on intrastate buses, trains, or planes that go through Tampa transfer off before they reach the city's borders?<sup>9</sup>

(d) "Errand ... direct route" -- Funk and Wagnall's Dictionary defines errand as "a trip made to carry a message or perform some task, usually for someone else."

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<sup>9</sup> The lack of an exception for intrastate travel means that juveniles who live in Tampa cannot leave the city to engage in activities not within an exception, even though such activities are lawful in the location where they occur, if their leaving or returning occurs during curfew hours.

Would a parent telling one minor to take another to a movie qualify? How about "go down to the corner and talk to your friends"? Does "usually for someone else" mean the errand must be for the benefit of the parent? If so, what qualifies as such a benefit? If indirect parental benefits qualify, would a parent's telling a juvenile to "go have fun with your friends" be allowed if the parent benefits from such errands by vicariously experiencing the minor's pleasure or by feeling the pride of knowing the child is growing up and can handle more responsibility?

How specific must the errand be? "Go buy a newspaper at the corner rack" is one thing; "find the runaway cat" is another. Indeed, "find the runaway cat" is not a valid errand; the direct route proviso requires that the errand have a fixed final destination. Errands that may involve some degree of discretion regarding their accomplishment are not allowed.

Would an errand to "go buy milk" allow a longer trip to the grocery store (where milk is cheaper) or must the minor go to a closer convenience store and pay the higher price? If the note simply says "go buy milk" and

does not "direct" the minor to either store, is it sufficient, given that this exception requires both approval and direction? Compare Schleifer, 159 F.3d at 867 (Michael, J., dissenting).

(e) "**Emergency**" -- Does "serious bodily injury" include small cuts, dog bites, stomach cramps, headaches, indigestion, minor burns? What qualifies as "requiring immediate action"? All of these things could be, or could become, serious. Must minors obtain the medical knowledge needed to make such judgments?

How about such things as: a female needing sanitary pads; taking a walk to get away from a family dispute; a disabled car; a friend stranded in the rain or a bad location; a relative just taken to the hospital; an elderly neighbor who just heard strange noises at her door; a distraught friend whose boyfriend just dumped her? These things could also become serious: family disputes may become violent; stranded friends or elderly neighbors could be attacked; broken-hearted friends may be suicidal.

(f) "**Recreational activity ... direct route**" -- This type of exception is part of the "innocent activities"

exception courts require; many cases have struck down curfews because they lacked one.<sup>10</sup> But the Tampa exception is riddled with flaws.

Does "official" modify only "school" or does it also include "religious [and] organized recreational activity"? If it does, what distinguishes the official from the unofficial? Compare Hynes, 425 U.S. at 621. What is a "similar entity"? Compare id. Are private, for-profit businesses "similar entities" that can "sanction" permissible activities? Or does "similar entity" mean "similar to a government, religious or charitable organization," thus indicating that only public or non-profit organizations would qualify?<sup>11</sup> Does the "similar entity"

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<sup>10</sup> E.g., Nunez, 114 F.3d at 939, 948; Johnson v. City of Opelousas, 658 F.2d 1065, 1074 (5th Cir. 1981); Waters v. Barry, 711 F. Supp. 1125, 1134-35 (D.C.C. 1989); Allen, 524 A.2d at 481; City of Wadsworth v. Owens, 536 N.E.2d 67, 69 (Ohio Mun. Ct. 1987); In Re Mosier, 394 N.E.2d at 373.

<sup>11</sup> Compare Betancourt v. Town of West New York, 769 A. 2d 1065, 1070-71 (N.J. Sup. Ct. 2000); State v. J.D., 937 P.2d 630, 635-36 (Wash. App. 1997).

If the difference in language between sections 6 and 7 of the curfew means that minors cannot lawfully be on "business [or] other establishment" premises for any purpose during curfew, then such entities cannot be a "similar entity." This conclusion also follows from a comparison of the Tampa curfew with the similar curfew at issue in Pred. 665 So. 2d at 252. This curfew contains both an "organized recreational activity" exception virtually identical to Tampa's and an additional exception for "specific activity at a public or semi-public place which is open to the general public . . . ." Dade Co. Ord. 94-1, secs. 5(f) and (i). The interpretation of similar exceptions in Hutchins, 188 F.3d at 545, Schleifer, 159 F.3d at 854,

or "organization" have to have some legal existence both before and after the particular "recreational activity" (e.g., incorporation) or can such an entity come into existence informally for the sole purpose of "sanctioning" that event? If a group of neighbors organize a block party to celebrate a birthday, does this qualify?

What is "organized recreational activity" and what does it mean to say such activity is "sanctioned" and "supervised by adults"? What does it mean to say the "organization takes responsibility for the juvenile as an invitee"? Does this refer to tort principles regarding liability for injuries?<sup>12</sup> An obligation to provide some type of policing? Sufficient funds or insurance to respond to tort claims?

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and Outb, 11 F.3d at 495 -- all of which seem to read this exception as excluding private businesses -- confirms this conclusion.

However, reading "similar entity" as excluding private entities raises equal protection problems of its own. See Rollins v. State, 354 So. 2d 61, 64 (Fla. 1978); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1039-40 (5th Cir. 1981), reversed in part on other grounds, 455 U.S. 283 (1982); Cleveland v. Trzebuckowski, 709 N.E.2d 1148, 1153-55 (Ohio 1999); Callaway v. City of Edmond, 791 P.2d 104, 106-07 (Okla. Crim. App. 1990).

Further, excluding business entities from this exception renders the curfew overbroad because the exception does not sufficiently allow minors to engage in constitutionally protected innocent activities. See cases cited in footnote 10, above.

<sup>12</sup> Such tort principles apply automatically as a matter of law. This exception seems to require some voluntary assumption of an additional "responsibility for the juvenile" by the entity.



The direct route proviso causes further problems. It prohibits two minors who do not live in the same house from going to and from such activities in the same car. Compare In Re Mosier, 394 N.E.2d at 373. If they walked together, one could not walk the other home, unless they live along the same direct route.

(g) "Swale or sidewalk" -- There is no requirement that the neighbor's complaint be "legitimate," in any sense; thus, the legality of a minor's standing on a public sidewalk in front of a neighbor's home is contingent on the whims of the neighbor. If the neighbor is a large apartment building, is a complaint by any resident sufficient? Does "residence" refer to the place where the minor lives or can a minor studying or staying overnight at a friend's home stand on the friend's sidewalk?

The minor need not first be told of the complaint (and be given a chance to move off the sidewalk) before being arrested; a minor can be arrested even though unaware of the complaint.

If a minor must get off a neighbor's sidewalk if the neighbor complains, when (if at all) is she allowed to return to the sidewalk? Compare Morales, 527 U.S. at 59.

(h) "Exercising First Amendment rights" -- This exception "trad[es] vagueness for overbreadth." Laurence H. Tribe, American Constitutional Law, sec. 12-29 (2d ed. 1988); Schleifer, 159 F.3d at 871-74 (Michael, J., dissenting).

Further, does "First Amendment rights" refer to the rights themselves, or does it include the application of any state interests that may override those rights? If the former, this exception renders the curfew virtually useless; if the latter, the exception excepts nothing.

To prove this, start with the following hypothetical law: "It is unlawful to talk to or listen to any person in public during curfew hours." Since this law is content-neutral, it is valid only if it is a permissible time, place, and manner regulation. But clearly it is not.

Now consider the same law limited to minors.<sup>13</sup> This would be valid if the state has legitimate interests with respect to minors which do not apply to adults.

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<sup>13</sup> The hypothetical is not ridiculous; this is, in part, what curfews do. While curfews expressly outlaw only "mere presence," their effect is to outlaw any public nighttime activities not within an exception. To the extent that two minors talking on the street are not excepted, curfews outlaw such conduct.

Although limits on minors' speech during curfew hours cannot be justified on the ground that they are engaged in speech, they may be justified by the state's interest in keeping minors off the street. But if the state has an interest in keeping minors off the street, then the state can do so regardless of what type of speech-related activity the minor is engaged in.

Thus, if "First Amendment rights" refers only to the rights themselves, then minors have the right to stand on a corner and talk or listen to others.<sup>14</sup> But, with this reading, the exception swallows the curfew. Any minor who is talking or listening to another during curfew hours is exercising First Amendment rights; only those minors who are alone could be prosecuted (unless that minor is on the way to or from a place where he plans to talk or listen to others which, as a "necessary precursor," is also a First Amendment right. Nunez, 114 F.3d at 950). A solitary minor listening to music, dancing, or watching a movie would also be exercising a First Amendment right. Compare Ward v. Rock Against

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<sup>14</sup> Compare Bullock v. City of Dallas, 281 S.E.2d 613 (Ga. 1981); River Dell Education Association v. River Dell Board of Education, 300 A.2d 361 (N.J. Sup. Ct. 1973).

Racism, 491 U.S. 781 (1989); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Jenkins v. Georgia, 418 U.S. 153 (1974).<sup>15</sup>

But reading "First Amendment rights" as meaning the rights as restricted by a valid state interest renders this exception nugatory. Under this reading, minors have no First Amendment rights during curfew hours because the state has valid nonspeech-related interests in preventing such activities.<sup>16</sup>

Do we resolve this dilemma by concluding that "First

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<sup>15</sup> The problem with the curfew's "establishment" liability section comes into play here. That section prohibits a minor's presence on establishment premises for any purpose during curfew. TCC 14-26, sec. 7. But what if the minor is exercising First Amendment rights at the time?

<sup>16</sup>To conclude otherwise is to concede that either: 1) The state's interest in keeping minors off the street at night is contingent upon the nature of the activity they engage in; or 2) minors have some rights with respect to some curfew activities that trump the state's interest in keeping them off the street. The curfew cases agree that the state has legitimate interests in keeping minors off the street, but no court has approved a blanket curfew that allows virtually no exceptions. Cases that invalidate juvenile curfews do so on the ground that, because a curfew has too few exceptions, it is not sufficiently tailored to promote the state's interests; the courts essentially agree that, to be valid, curfews must allow significant exceptions.

But this only further complicates the question here. If: 1) "First Amendment rights" includes, not only the rights but any countervailing state interests; and 2) the state has, not a blanket interest in keeping all minors off the street regardless of what they are doing, but only a limited interest in keeping some minors off the street in some circumstances, where does these leave in attempting to define "First Amendment rights"?

Amendment rights" includes only certain types of speech? Listening to speeches at a political rally is protected, sitting in a car talking to friends is not;<sup>17</sup> where in the First Amendment do we find the basis for drawing such lines? If only "important" speech is included, how do we define "important"?<sup>18</sup>

Further problems come into focus by considering the following hypothetical: A young man is seen on the street during curfew hours wearing a shirt with "F--- The Curfew" printed on the back. When questioned by the police, he says "I know my rights. I ain't gotta tell you squat. This curfew sucks. Get lost, pig."

This young man is clearly "exercising First Amendment rights," at least when the police officer encounters him.<sup>19</sup> But this pushes us into even more difficult waters.

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<sup>17</sup> The lack of any "direct route" proviso in this exception militates against reading this exception as being limited to "organized" First Amendment activities. The lack of any such proviso indicates the legislature intended a free-floating exception, not limited to organized activities.

<sup>18</sup> Compare Tribe, supra, secs. 12-13, 12-18.

<sup>19</sup> See City of Houston v. Hill, 482 U.S. 451 (1987); Cohen v. California, 403 U.S. 15 (1971); White v. State, 330 So. 2d 3 (Fla. 1976)(collecting cases).

Consider Cohen. If wearing a jacket with "F--- The Draft" printed on the back is protected, can the curfew be avoided by simply wearing clothing that expresses dissatisfaction with the curfew? How about clothes that express sentiments about a favorite band or high school, or political or sexual sentiments, or a favorite clothes designer? Pieces of an army uniform, campaign buttons, black armbands, or patches that express particular views?<sup>20</sup> Tattoos? Dressing in an outrageous manner (spiked hair, oversize pants falling off butt, baseball cap cocked at "go to hell" angle) in order to "freak out the squares" and convey a message of rejection of middle class conformity and values?<sup>21</sup>

We have introduced the problem of symbolic speech. Conduct is symbolic speech if it is "sufficiently imbued with elements of communication," which means the actor "inten[ded] to convey a particular message ... and in

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<sup>20</sup> See Smith v. Goguen, 415 U.S. 566 (1974); Schacht v. United States, 398 U.S. 58 (1970); Tinker v. Des Moines Community School District, 393 U.S. 503 (1969); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

<sup>21</sup> See Iota XI Chapter v. George Mason, 993 F.2d 386 (4th Cir. 1992); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971); Robin Cheryl Miller, Validity of Regulation by Public-School Authorities as to Clothes or Personal Appearance of Pupils, 58 A.L.R. 5th 1, secs. 11(b), 33(b), 40(b), 42(b), 50(b), and 55 (1997).

the surrounding circumstances the likelihood is great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 409-11 (1974). But if wearing a shirt that protests the curfew is protected, wouldn't simply being in public for that purpose also be protected? Are such questions answered by determining whether the protest is "genuine"? If so, how do we determine this?

But this question answers itself. If a minor is out during curfew (and is not within an exception), he clearly does not like the curfew. By going out he is saying (symbolically, by his very presence) that he believes the curfew is unjust and he should be allowed out despite what the state thinks; is this not a valid political protest statement? What is the constitutional difference between his act and the acts of those who protested segregated facilities by sitting at lunch counters or riding buses?<sup>22</sup> This does not hinge on the amount of media coverage of the event. See Spence, 418 U.S. at 409. Would the validity of such actions turn on

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<sup>22</sup> Compare Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2454 (2000); Brown v. Louisiana, 383 U.S. 131 (1966); Garner v. Louisiana, 368 U.S. 157, 202 (1961)(Harlan, J., concurring).

whether the juvenile's presence in public was motivated solely (primarily?) by his desire to protest the curfew?<sup>23</sup> Compare Cohen, 403 U.S. at 19, n.3.

And, if minors are within this exception only if they are "genuinely" exercising First Amendment rights, are minors attending a political rally or church service violating the curfew if they are there for "sham" purposes (e.g., to "cruise chicks" or "hang around") rather than to actively participate in the event?

"First Amendment rights" cannot be defined with any precision; this exception provides no guidance as to its intended scope.

It is true the First Amendment does not allow one to break the law. The truism is irrelevant. The curfew outlaws a minor's presence in public only if she is not exercising First Amendment rights at the time, so if things like talking to friends, listening to radios, and wearing certain clothing are First Amendment activities, then there is no curfew violation.

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<sup>23</sup> These problems cannot be solved by reading into this exception a proviso that allows protests on other subjects but excludes protests of the curfew. Such content-based discrimination is invalid. R.A.V. v. City of St. Paul, 505 U.S. 377 (1991).



(j) "**Homeless**" -- If a minor runs away from home, is she homeless if her parents are willing to take her back? If she has friends she could stay with but prefers life on the street? Does homelessness require some minimum length of time to be established, or can it occur instantly and on a temporary basis?

How many times must one stay in one place to make it a "usual place of abode"? Whatever the length of time, must it be continuous or can it be interrupted by stays at other places? Must the minor always (most of time?) stay at the same place, or is some movement to other places allowed? Assuming we can determine a "usual place," is the minor excepted from the curfew only when in this place, or does the exception follow her around the city?

(k) "**When City Council ... authorizes**" -- This exception provides no guidance regarding what type of events it covers; who may be a sponsor; how one applies; and when and on what basis will City Council decide whether to authorize the event. Further, what if the unauthorized event involves an exercise of First Amendment rights? Such standardless discretion is unconstitu-

tional.<sup>24</sup>

### C. CONCLUSION

The Tampa curfew is riddled with vagueness problems. Every crucial phrase is subject to broad interpretation. The possibilities for discriminatory enforcement are enormous.<sup>25</sup>

For curfews are not intended to be strictly applied.<sup>26</sup> Like vagrancy and loitering laws, curfews are intended to be discriminatorily enforced. Curfews are not really aimed at prohibiting what they expressly prohibit. Rather, they are meant to give police a reason to detain perceived troublemakers when there is no other reason to do so. See Nunez, 114 F.3d at 949; Outb, 11

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<sup>24</sup> S.W. v. State, 431 So. 2d 339 (Fla. 2d DCA 1983); New Jersey Freedom Organization v. City of New Brunswick, 7 F. Supp. 2d 499, 512-13 (D.N.J. 1997); Brown, 611 A.2d at 610, modified on other grounds, Ashton; In Re Mosier, 394 N.E.2d at 377.

<sup>25</sup> For examples of how curfews are often enforced in practice, see Cuda v. State, 687 So. 2d 274, 276 (Fla. 5th DCA 1997); Schleifer, 159 F.3d at 873 (Michael, J., dissenting); Hodgkins, 2000 WL 892964, at \*2-6; Peckman v. City of Wichita, 2000 WL 1294422, at \*2 (D. Kan. Aug 15, 2000); Matter of Appeal in Maricopa County, 887 P.2d 599, 602, 612 (Ariz. App. 1994); Brown, 611 A.2d at 601-03, modified on other grounds, Ashton, 660 A.2d at 453 and nn. 5-6; Betancourt, 769 A.2d at 1067; City of Milwaukee v. K.F., 426 N.W.2d 329, 331-32, 340-41 (Wisc. 1988).

<sup>26</sup> Consider the case of a five year old who wandered out an unlocked back door late at night. Surely, this child would not be prosecuted. Yet the child violated the curfew.

F.3d at 494, n.8. If curfews were meant to be strictly enforced, police would spend most of their time during curfew hours detaining "suspected juveniles" for the purpose of "verifying" their age and their reason for being out. Every car and intrastate bus, train, and plane containing suspected juveniles would be stopped; every suspected juvenile in the company of an adult would be detained, to determine if the adult is a proper "parent." When a law provides such enormous enforcement discretion, it is "hardly a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases." Papachristou, 405 U.S. at 167, n. 10; Nunez, 114 F.3d at 948.

## **II. THE TAMPA CURFEW FAILS THE STRICT SCRUTINY TEST**

### **A. STATE INTERESTS**

The Tampa curfew's stated purposes, TCC 14-26, sec. 1, are similar to the factors noted in Bellotti. Since curfew cases invariably cite the Bellotti factors, we must examine them closely.

#### **1. The Bellotti Factors**

The three Bellotti factors are: "[Minors'] peculiar

vulnerability ...; their inability to make critical decisions in an informed and mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634.

The "concern with the vulnerability of children is demonstrated in [the Court's] decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the state." Id. As an example the Court cited the juvenile court system, in which some minors' rights equal adults but others do not. "With respect to many of these claims, ... the child's right is virtually coextensive with that of an adult[, but] the State is entitled to adjust its legal system to account for children's vulnerability and their needs for concern, sympathy, and paternal attention." Id. at 634-35.

With respect to poor decision-making, the Court said greater regulation of minors may be allowed because minors "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Id. at 635. As examples, the Court noted child labor laws and laws outlawing the sale of

pornographic materials to minors. Id. at 636-37.

As to "the importance of the parental role", the Court said:

The state commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that "[t]he child is not the mere creature of the state . . . ."

[The parenting] process, in large part, is beyond the competence of impersonal political institutions. . . .

[T]here are many competing theories about the most effective way for parents to [raise] their children . . . . [C]entral to many of these theories . . . is the belief that the parental role implies a substantial measure of authority over one's children.

[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity . . . . [T]he State can "properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility."

Id. at 638-39 (emphasis partially added)(citations omitted).

## **2. The Bellotti Factors in Florida Law**

Under the Florida state constitutional privacy

right, the state cannot "intervene in parental decision-making absent significant harm to the child threatened by or resulting from those decisions." Von Eiff, 720 So. 2d at 514. The state cannot intervene merely to promote a child's best interests; a best interest test is insufficient because it "permits the [s]tate to substitute its own views regarding how a child should be raised for those of the parent [and] involves the [state] in second-guessing parental decisions." Id. at 516.

This Court has recognized that the state has an interest in "protect[ing] the immature minor and preserv[ing] the family unit." In Re T.W., 551 So. 2d 1186, 1194 (Fla. 1989). However, "neither of these interests is sufficiently compelling ... to override Florida's privacy amendment." Id. In Re T.W. seems to reject the Bellotti factors, at least with respect to the law at issue there (which required parental consent for a minor's abortion). But the Court has recognized the poor decision-making factor as justification for greater regulation of minors' sexual activities. E.g., J.A.S., 705 So. 2d 1381, 1385-87 (Fla. 1998).

Thus, this Court recognizes that "Bellotti does not

set forth reasons that always justify greater restrictions on minors ...; rather, Bellotti sets forth factors for determining whether the [state] has a greater justification for restricting minors than adults in the manner at issue." Nunez, 114 F.3d at 946. When determining if greater regulation of minors is allowed by the Florida Constitution, we cannot simply invoke Bellotti as a talisman. Rather, we must analyze the nature of the activity (and the parental authority) restricted by the challenged law, to determine if the state has compelling interests with respect to that activity which justify the greater regulation.

### **3. The Bellotti Factors in Juvenile Curfew Cases**

Although the state interests served by juvenile curfews are generally phrased in terms of the Bellotti factors, the cases conflict regarding both what those factors mean and whether those factors justify greater regulation of minors in this context.

**a. Peculiar Vulnerability** -- Bellotti viewed "peculiar vulnerability" as justifying the denial of minors' fundamental procedural rights. 443 U.S. at 634-35. Curfew cases often use the phrase to refer to mi-

nors' vulnerability to commit, or to be victimized by, crime. E.g., Schleifer, 159 F.3d at 851. However, this is not a valid reason for treating minors differently from adults; the state has the same interest here regardless of the age of the criminal or the victim. If the state has a special interest in preventing juvenile crime because minors are more likely to make the bad decisions that lead to crime, this factor is part of the poor decision-making branch of Bellotti. Similarly, as to vulnerability to victimization, adults face the same dangers at night. Although minors may be more vulnerable because they are "smaller, weaker, and less capable of taking care of themselves[,] similar concerns [would] justify barring the elderly or physically impaired from the streets [or] exclude women or members of particular racial groups from certain areas." City of Panora v. Simmons, 445 N.W.2d 363, 372 (Iowa 1989)(Lavorato, J., dissenting). This factor also belongs under the poor decision-making factor: If minors are peculiarly vulnerable to victimization at night, it is because they may make poor decisions that will endanger them.

Thus, "peculiar vulnerability" does not justify



treating minors different from adults in the curfew context.

**b. Poor Decision-making** -- Curfew cases also apply the poor decision-making factor in different ways. Some say this factor does not justify curfews because "the decision to stay inside or roam at night [is] not [a] profound decision [that] ineluctably lead[s] to nighttime violence; in all but the exceptional case, nocturnal activities, even by juveniles, will not have 'serious consequences.'" Waters, 711 F. Supp. at 1137. Some say it is "anomalous to permit minors to express their view on divisive public issues [and] obtain abortions without parental consent, ... but to deny them the right to decide, within the bounds of parental judgment, whether [to go out at night]." Johnson, 658 F.2d at 1073. Some note that whether a decision is critical hinges on what one intends to do while out. Id.; Allen, 524 A.2d at 486.

Other courts say this factor justifies curfews because "streets may have a more volatile and less wholesome character at night [and] children face a series of dangerous and potentially life-shaping deci-

sions." Schleifer, 159 F.3d at 849. "[T]emptations may arise during curfew hours which could end in serious consequences for a juvenile," Maricopa County, 887 P.2d at 607; "a child's immaturity may lead to a decision to commit [crimes]." People in Interest of J.M., 768 P.2d 219, 223 (Col. 1989).

However, "temptations may arise" and "a child's immaturity may lead to [criminal conduct]" during the day as well. One court responded to this argument as follows:

The problem with accepting this rationale ... is that whether to commit a crime is not the decision specifically dealt with by a curfew. Far from addressing a precisely delineated set of activities that require children to make critical choices, a curfew prohibits all activities -- even non-disruptive and nonharmful ones -- in public during certain hours.... Properly drafted criminal statues prohibiting [specific crimes] more specifically, and probably more effectively, deter and prevent criminal activity.

Brown, 611 A.2d at 609, modified on other grounds, Ash-ton.

The poor decision-making factor refers to "critical" decisions "with potentially serious consequences."

Bellotti, 443 U.S. at 634-35. Curfews inhibit a wide

range of minors' decisions, starting with the initial decision to go out and including further decisions regarding such things as where to go, what to do, and who to do it with. Whether a particular decision is being poorly made or may lead to serious harm depends on many factors. It is impossible to make blanket statements about the minors' decisions affected by curfews. Further, there is no proof that poor decision-making increases at night.

**c. Importance of the Parental Role** -- The curfew cases also disagree regarding the "parental role" Bellotti factor. Some conclude curfews violate parental rights because they usurp parental authority over curfew activities. E.g., Nunez, 114 F.3d at 952. Others disagree, asserting curfews either: 1) promote parental rights by assisting parents who want the curfew; or 2) compel parents to accept authority they otherwise would not accept. E.g., Hutchins, 188 F.3d at 545-46.

The effect of curfews on the parental role depends on the individual parent. Curfews are welcomed by those who agree with the state regarding proper curfew activities; those who disagree view curfews as infringing

their authority. Factors common to both groups include love for their children and a careful consideration about what curfew-time activities to allow. They may disagree on what is appropriate for their children; but all are acting in good faith, trying to do right for their kids.

There is a third group of parents here: Those who no longer give a damn and thus make no effort to control their children's activities. Curfews are presumably intended to require this group to impose parental authority that presently does not exist.

When Bellotti referred to "the importance of the parental role," it had in mind laws that "support[] th[at] role" by "requiring parental consent to or involvement in important decisions by minors." 443 U.S. at 638-39. Bellotti emphasized "state deference to parental control" and concluded the parenting process "in large part, is beyond the competence of impersonal political institutions." Id. at 638-39.

The question of when the state may regulate minors more than adults "is a vexing one, perhaps not susceptible of precise answer." Carey v. Population Services

Intern., 431 U.S. 678, 692 (1977). Restrictions on minors are justified on various grounds. Some regulations are based on the unassailable premise that some activities (e.g., alcohol or tobacco use, oppressive child labor) are not for minors under any circumstances, and thus no reasonable parent would allow such activities (and, with respect to those that do, the state has an interest, indeed a duty, to intervene). Laws that reinforce parental authority in such areas are valid; this is what Bellotti had in mind.

The validity of such laws does not authorize state interference in areas where reasonable parents may disagree on proper child-rearing. See discussion in footnote 1, above. When Bellotti talks of the state interest in "support[ing] the parental role," it is referring to laws that are indisputably consistent with what reasonable parents would want for their children. It was not referring to laws that conflict with reasonable parents' views, in order to enforce the "statist notion" that the state should intervene "[s]imply because the decision of a parent ... involves risks ...." Parham, 443 U.S. at 603.

## B. NARROW TAILORING AND LEAST RESTRICTIVE MEANS

To satisfy the narrow tailoring requirement, the state "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real ... and that the regulation will in fact alleviate those harms in a direct and material way." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994).

The cases have reached varying conclusions on whether a given curfew is sufficiently tailored to survive constitutional attack. It is clear that a blanket curfew with few exceptions is invalid; such a curfew will not pass the rational relation test. See In Re Spagnoletti, 702 N.E.2d 917, 920 (Ohio App. 1997). This is because the state interests in keeping minors off the street at night do not apply equally in all cases. In some cases, rights of minors and parents overcome state interests because: 1) some curfew activities are too important to be flatly restricted based on a generalized interest; or 2) some curfew activities do not sufficiently implicate the state's interests to justify keeping minors off the street. Further, a curfew must have a

solid innocent activities exception to be valid. See cases cited in footnote 10, above.

The cases upholding curfews rely on crime statistics and the curfew's exceptions to prove the requisite tailoring. E.g., Hutchins, 188 F.3d at 542-45. However, these cases often conclude curfews promote the state interest in preventing crime and victimization, without recognizing that similar statistics and reasoning would justify an adult curfew (and a juvenile curfew during the day). Id. Further, these cases adopt an apocalyptic view of the current state of the city-at-night. They note "gangs" and "drug dealers" as if the entire city is overrun with such menace, and they seem to believe that these problems only arise at night. E.g., Schleifer, 159 F.3d at 849. They overlook the facts that: 1) not all areas of the city suffer under such war-zone conditions; 2) these same problems exist during the day; 3) all minors are not equally susceptible to such influences; 4) curfews outlaw a wide range of activities in which such influences may not be present; and 5) curfews allow some activities where such influences may be present. These cases also assume that all reasonable parents must

agree with the state's parental plan, which allows them to conclude that curfews "support" parental authority and to wave off the objections of parents who disagree. E.g., id. at 851.

The cases that conclude curfews are not sufficiently tailored find the curfew's exceptions too narrow, primarily because they do not allow "many legitimate activities, with or without parental permission, ... that may not expose minors' special vulnerability." Nunez, 114 F.3d at 948. These cases say curfews subject minors "to virtual house arrest each night without differentiating either among those juveniles likely to embroil themselves in mischief, or among those activities most likely to produce harm"; further, curfews apply to all minors even though "the number of ... innocent juveniles far exceeds the number ... who [commit] nighttime crime." Waters, 711 F. Supp. at 1136, 1139.

With respect to the use of statistics, these cases assert "proving broad sociological propositions by statistics is a dubious business." Hutchins, 188 F.3d at 567, n. 32 (Rogers, J., concurring and dissenting). They find the statistics unconvincing because, although sta-



tistics may prove "a general juvenile crime problem," they do not establish where the crime occurs, who is inclined to commit it, or the surrounding circumstances. Id. at 566. Nor do they prove that curfews are "a particularly effective means of achieving [crime] reduction." Nunez, 114 F.3d at 948.

These cases also conclude the restrictions on parental rights are unjustified. They reject the assumption that parental authority "has dissolved in many areas of th[e] city," Waters, 711 F. Supp. at 1137, and note that curfews apply "even where the parent is exercising reasonable control or supervision." McCollester v. City of Keene, 586 F. Supp. 1381, 1386 (D.N.H. 1982). Noting curfews prevent parents from "allow[ing] their children to function independently at night, which ... is part of the process of growing up", Nunez, 114 F.3d at 953, these courts reject the idea that the state "knows better than the parent what is necessary for the proper upbringing of the child." Brown, 611 A.2d at 609, modified on other grounds, Ashton.

These cases also reject the "further justification that [curfews] ha[ve] the additional beneficial deter-

rent effect of permitting police officers to get juveniles off the streets before crimes are committed" because "the Supreme Court has sharply critiqued this type of rationale . . . ." Nunez, 114 F.3d at 948. They reject the idea that curfews can be justified on "bare assumptions about the demographics of crime and conventional wisdom," or on the grounds of "efficacy." Hutchins, 188 F.3d at 570 (Rogers, J., concurring and dissenting). These courts say curfews' minor penalties will not deter minors inclined to crime; rather, curfews deter only "those already inclined to obey the law." Waters, 711 F. Supp. at 1139. They believe that the state's compelling interest in crime prevention can be served in a less restrictive manner by simply arresting minors who commit crime. Id. It has also been suggested that curfews could be imposed on an individual basis, "on juvenile offenders once the court determines the offenders have shown an inability to conduct themselves properly in public." Simmons, 445 N.W.2d at 373 (Lavorato, J., dissenting).

### **C. CONCLUSION**

The Tampa curfew fails the strict scrutiny test

because it is not narrowly tailored to promote the state's interests in preventing poor decisions by minors or supporting parents.

As to poor decision-making, the curfew does not target those minors and activities when that is a significant risk. It is hard to see how a curfew could do so, given the variety of factors and decisions at issue. Tampa's solution was to lay down a laundry list of excepted activities. This does not address the problem.

There is no reason to believe minors in public during curfew hours are more likely to make poor decisions when they are not within an exception than when they are within one (such as attending an approved "recreational activity" or engaging in First Amendment activities).<sup>27</sup> Indeed, to the extent such approved activities attract congregations of minors, and congregations increase the possibility of peer pressure and mob mentality, these activities increase the potential for poor decisions. Drug dealers and similar riff-raff are likely

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<sup>27</sup> Compare Prince v. Massachusetts, 321 U.S. 169-70 (1944). The curfew's First Amendment exception allows minors to engage in precisely those activities that Prince said were so dangerous that the state could forbid them. Id.

to be attracted to these gatherings; it is after all "where the action is."

The Tampa curfew's limited innocent activities exception also shows the curfew is not narrowly tailored. As discussed earlier, exception 4(f) does not include business enterprises as "similar entities." This means that such activities as movies, concerts, bowling, miniature golf, plays, operas, and dances are not allowed. Restaurants, coffee houses and the like are also off limits. As noted in footnote 10 above, there is not even a rational basis (much less a compelling interest) for prohibiting such activities at private businesses while allowing similar activities at state-approved locations (as listed in TCC 14-26, sec. 4(f)).

This brings us to that teenage tradition of "hanging out." Some say the true purpose of curfews is to prevent such activities, which are derisively labeled as "aimless roaming" or "undirected activity." E.g., *Outb*, 11 F.3d at 494, n.8. The State makes this argument in its brief. IB, p. 22. However, aside from the obvious vagueness problem in defining such phrases, these activities do not implicate the poor decision-making factor to any

greater extent than the activities allowed by the curfew's exceptions.

Phrases such as aimless roaming are meaningless, unless we are talking about someone who is staggering drunk or has just been whacked in the head with a crowbar. The "aim" of standing on the corner and talking to friends is to socialize with friends. When courts use phrases like aimless roaming, they really mean activity the state deems "[un]necessary and worth[less]." Schleifer, 159 F.3d at 855. But it is the parents' job to decide what activities are necessary and worthwhile for their children. Further, at least with adults, hanging out has some constitutional value in itself. Morales, 527 U.S. at 53-55; Papachristou, 405 U.S. at 163-65. Further, this denigration of hanging out overlooks the reality of that activity.

Hanging out is an integral part of growing up. It is an assertion of independence. It is how minors learn to relate to peers and the outside world without adult oversight. True, hanging out may lead to improper actions; but this is true regardless of the time of day, and there is no evidence that hanging out will lead to

poor decisions more often than "non-hanging out" (as implicitly defined by the curfew's exceptions).

Thus, even if the Tampa curfew can be said to only outlaw hanging out, hanging out does not necessarily lead to poor decisions with serious consequences. And, since hanging out cannot be defined, it is impossible to determine what types of hanging out will lead to such decisions. The Tampa curfew makes no attempt to do so; it is not narrowly tailored to promote the state interest in preventing poor decisions by minors.<sup>28</sup>

Nor is the curfew narrowly tailored to promote the parental support interest. The curfew applies equally to parents who believe they are better able than the state to decide what is best for their children, and it has no general "parental approval" exception which allows activities not within an exception. The curfew makes no attempt to restrict parental decisions only in circumstances where "significant harm to the child [is]

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<sup>28</sup> Indeed, if one wished to focus on minors who are prone to making poor critical decisions, one might start with those who have gotten married (particularly if, as is often the case, that marriage is of the "shotgun" variety, a fact that only further illustrates a minor's poor decision-making skills). Of course, married minors are exempted from the curfew.

threatened by or result[s] from those decisions." Von Eiff, 720 So. 2d at 524. Most of the exceptions (including significant ones such as employment, recreational activities, and First Amendment rights) allow minors out even if parents object. The curfew both infringes on the authority of parents who wish to give their children more freedom than the state deems proper, and fails to support the authority of parents who think the curfew is too liberal. Rather than being narrowly tailored to provide support to parents who want it, the curfew is a Procrustean effort to cram all juveniles into a state-formulated mold.

Nor is the curfew narrowly tailored to compel "lost control" parents to accept responsibility. The curfew makes no attempt to target such parents; further, it allows parents to avoid all responsibility by simply notifying the police that their children are out "over the[ir] objection." TCC 14-26, sec. 6(a).

Thus, the curfew is both overinclusive and underinclusive.<sup>29</sup> Underinclusiveness is also shown by the

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<sup>29</sup> As to "underinclusiveness," compare Morales, 527 U.S. at 63; Erznoznik v. Jacksonville, 422 U.S. 205, 214-15 (1975); State v. Globe Communications Corp., 648 So. 2d 110 (Fla. 1994); In Re T.W.,

exception for minors who are the most vulnerable to being victimized or pressured into committing crime: those who are "homeless [or] use[] a public ... place as [a] usual place of abode." TCC 14-26, sec. 4(j).

The curfew is riddled with absurdities. For openers, "[i]ncarceration for up to [60] days appears to be at odds with the purpose of protecting minors ...." American Civil Liberties Union v. City of Albuquerque, 992 P.2d 866, 873 (N.M. 1999).<sup>30</sup> Other absurdities were discussed in the vagueness section, above. There are more. Minors can hang around all night in their front yard or sidewalk or a neighbor's sidewalk; but let them stray a few feet further into the street, or go two doors down or across the street, and they are in violation. Why would such minuscule movements determine whether minors are subject to commit crimes or be victimized? And why would the fact that a neighbor complained about a minor standing on her sidewalk increase

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551 So. 2d at 1195; Ivey v. Bacardi Imports Co., Inc., 541 So. 2d 1129, 1139 (Fla. 1989).

<sup>30</sup> The State asserts "the penalty for a first curfew violation is a warning." IB, p. 23. Although not free from doubt, it appears this is inaccurate. TCC 1-6(a) and 14-26, secs. 3, 5(d)-(f), and 8. The penalties listed in section 1-6 include 60 days in jail, six months probation, and a \$500.00 fine.



such risks? Minors cannot go out with a 20-year-old sibling or friend (or a dozen 20-year-olds) because 20-year-olds do not qualify as a "parent," even if they are pre-law students at Harvard, Marine commandos, priests, or policemen. However, a 21-year-old drug dealer may be an authorized companion, as may a registered sexual predator, a professional car thief, an alcoholic or drug addict, a habitual traffic offender, or a homicidal maniac with a hair-trigger temper. Parents can send their children on foot on long, late-night errands through high-crime neighborhoods; but they cannot allow them to hang out in a park across the street from their house, even if they live in a privately-policed gated community where crime is something read about in the newspaper. Minors may work alone at robbery-prone occupations like delivering pizzas or working in convenience stores, but they cannot go to such places for a snack, even in large groups. "Skinhead" juveniles can protest Martin Luther King's birthday by parading through a black neighborhood in full KKK regalia, but a group of honor students coming from a chess club meeting cannot hang out and chat in front of a police station.

More generally, it can be noted that the obvious assumption behind both the "parental authorization" exception and the "errand-with-note-from-Mommy" exception is that parents can be counted on to "do the right thing" in these contexts. But if parents can be trusted in these circumstances, why can't they be trusted to decide that their kids can be out in circumstances the curfew does not permit?

Further, there are less restrictive alternatives available here.

With respect to the poor decision-making interest, curfews can target those persons, places, and activities in which poor decision-making on critical matters is a significant risk. The easiest way to target such persons is to focus on minors who have already committed crimes. It is harder to target minors who are more likely to be victimized, assuming there is some significant difference between this group and the group likely to commit crimes; presumably, there is much overlap here, particularly for minors hanging out in high-crime areas. But this problem can be handled by focusing the curfew on those areas.

Trying to target activities when poor decision-making is likely is harder; indeed, it is impossible to create such a list with pure logic. But if, in a given city, there is a history of problems at particular events, the curfew could target those events.

The curfew could also be better targeted at the parental support interest. As noted earlier, this interest has two subparts: enhancing the authority of parents who agree with the curfew and compelling "lost control" parents to re-exert some authority. The first problem with the curfew is that many parents fall into neither group; to them, a curfew is nothing more than Big Brother sticking his nose into family business. Our constitutional system presumes parents act in their children's best interests and prohibits state interference with parental decisions until it is shown that presumption does not apply in a particular case. Given these principles, a curfew without a general "parental approval" exception will not survive constitutional challenge. With respect to those parents who want the state's help, a voluntary curfew is appropriate. Such a curfew would not need exceptions; parents would simply

notify the police that the child was out without permission and authorize the police to pick him up.

With respect to "lost control" parents, the curfew is not targeted at such parents, unless we assume the parents of every minor out in non-exception circumstances have lost control. Further, the curfew is woefully inadequate to deal with this problem. Arresting minors for curfew violations is not going to help parents reestablish control that was lost over the years by internal family stresses no curfew can cure. Compare Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976). Further, section 6(a) of the curfew allows parents to avoid all responsibility.

It is true that the curfew may be the gateway through which such parents and minors are brought into the system. But, given that this lack of control does not occur instantaneously (but rather over some period of time), one would expect that children of "lost control" parents will probably already be familiar to the system. Indeed, if children of "lost control" parents are not making poor decisions, then the state has no interest in intervening.

In other words, the state has an interest in trying to compel "lost control" parents to re-establish some authority only if their children are being damaged by the lack of authority. Children being damaged are those making poor critical decisions due to a lack of parental guidance. We identify "lost control" parents by the bad decisions their children make.<sup>31</sup>

The Tampa curfew does not pass the strict scrutiny test. It is not narrowly tailored to promote the state's

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<sup>31</sup> Here again we see the overlap in the "poor decision-making" and "parental support" interests.

"Protecting minors" and "supporting parents" are grand ideals. "But to note that these interests are compelling in the abstract is not to scrutinize the [state's] assertions as applied to [a particular] case." Action for Childrens' Television, 58 F.3d at 678 (Edwards, C.J., dissenting).

These interests may be "irreconcilably in conflict" in some cases. Id. This occurs in cases in which the state restriction "assume[s] not only that parents agree with the [state], but that parents supervise their children in some uniform manner." Id. The state cannot "assume[] that parents are unavailable or inept at the task of parenting, and essentially establish[] itself as the final arbiter of [the proper way to raise children]":

When the [state] does intervene in the rearing of children contrary to parents' preferences, it is usually in response to some significant breakdown within the family unit.

[F]acilitating parental control means allowing parents to run the household in the manner they choose . . . . While the [state's] interest in protecting the well-being of children is undoubtedly compelling, when it conflicts with parental preferences[, the state must] show some evidence of harm. . . .

Id. at 679 (emphasis added).

Thus, the state cannot simply invoke by rote "protecting minors" and "supporting parents" as justifications for a curfew.

interests in supporting parental authority by insuring their participation in critical decisions regarding matters that affect their children's well-being. The curfew drastically restricts the rights of innocent minors and parents throughout the city, without regard to whether they have done, or ever will do, anything wrong. It is a blunderbuss solution to a problem that requires more a discerning marksmanship.

#### **D. THE STATE'S ARGUMENT**

The State first identifies the compelling interest at issue as being "protecting minors from the dangers of public places at night." IB, p. 10. However, this same interest applies equally to adults and thus cannot be used to justify greater regulation of minors. The State then seems to concede that the real interest here -- the one that would justify greater regulation of minors -- is the poor decision-making factor. IB, pp. 10-11. However, the State does not explain how the curfew is narrowly tailored to promote that interest. Rather, the State focuses on crime statistics and the curfew's ex-

ceptions.<sup>32</sup> Neither factor proves the required narrow tailoring.

The State asserts the statistics "clearly establish[] the necessary statistical support for the curfew" because they show "Tampa has a real problem with juvenile crime and victimization during the curfew hours." IB, p. 15. However, other than quoting the numbers, the State makes no attempt to prove this "real problem." The State overlooks several problems here.

First, since these statistics were not presented in the trial court, Respondent had no opportunity to challenge the statistics or present contrary evidence. Other than the statements on the statistic sheets themselves ("obtained from FDLE validated data"; "obtained from TPD records"), we have no idea who compiled the statistics, what "records" and "data" were consulted, what "vali-

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<sup>32</sup> It is not clear whether these statistics can properly be considered here. As the State concedes, "these statistics were never presented to the trial court" and the district court rejected the State's request to take judicial notice of them. IB, p. 16. The State's position seems to be that the statistics are nonetheless part of the appellate record in this Court. It is not clear whether they are. Rule 9.200(a)(1) defines "record" as "documents ... filed in the lower tribunal ...." See also First National Bank v. Hunt, 244 So. 2d 481 (Fla. 4th DCA 1971). In the interest of time, Respondent has not filed any motion to strike these statistics. Respondent does object to their being considered here, but will nonetheless address their alleged significance.

dated data" means, who "validated" it and on what basis, etc.

Second, these statistics are worthless because there is no context within which to interpret them. We do not know whether these figures are unusually high or unusually low. The statistics deal with arrests; we do not know how many of these arrests led to convictions (which, presumably, is how one should measure a crime problem). We do not know whether the criminal activity took place in areas covered by the curfew. Assuming some of the crimes occurred in such areas (admittedly a logical assumption), we do not know what the affected minors were doing when the crime occurred; they may have been within an exception at that time, in which case the curfew would not have had any effect on the statistics.

Third, the clerk's certificate asserts these statistics were "received and filed on July 18, 1996, during the public hearing before City Council regarding the adoption of Tampa's Juvenile Curfew Ordinance." IB, app., p.1. However, we have no idea whether anyone on the Council ever looked at the statistics; the statistics may have played no role in Council's decision to



adopt the curfew.

Finally, similar statistics could prove Tampa has "a real problem with juvenile crime and victimization during [non-]curfew hours," as well as "a real problem with [adult] crime and victimization during [all] hours." IB, p. 15. Crimes are committed in Tampa 24 hours a day, with minors and adults being both perpetrators and victims. If the occurrence of crime was all one needed to justify a curfew, the State could impose a 24 hour curfew on all citizens. The statistics do not prove that the curfew is narrowly tailored to prevent minors who are not within a curfew exception from making critical decisions in a poor manner during curfew hours.

As to the curfew's exceptions, the State asserts "all legitimate activities are exempted" from the curfew. IB, p. 19.<sup>33</sup> "Legitimate activities" apparently means "activities the state approves." The State makes no attempt to explain why non-exception activities are "[il]legitimate" or how the exemption of these "legitimate activities" will promote, in the least restrictive

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<sup>33</sup> The State asserts intrastate travel is exempted under the curfew. IB, p. 20. It is not.

manner, its interest in preventing minors from making poor decisions on critical matters. There is not even a rational basis for concluding minors are less likely to make such decisions when they are within an exception than when they are not.

The State ridicules the notion that a "parental consent" exception is required:

Such an exception is not required since the exception would swallow the curfew. [Allowing parental consent to override the [curfew] would ignore the fact that minors have a special vulnerability to the dangers of the streets at night. A minor's victimization, who is not pursuing a legitimate activity and is unsupervised in the streets at night, would not be prevented simply because he tells his assailant that he has a note from his parent.

IB, p. 21.

By "swallow the curfew," the State apparently means that, given their druthers, parents would allow their children to stay out during curfew in numerous circumstances which the state forbids; if parental consent paralleled the curfew's exceptions, a parental consent exception would not swallow the curfew (indeed, it would be superfluous). The State's position here conflicts with its assertions that the curfew is "only a minimal

intrusion into parents' rights," IB, p. 26, because "all legitimate activities are exempted ...." IB, p. 19. The State must believe that, if "all legitimate activities are exempted," then those parents whose consent to unauthorized activities would "swallow the curfew" must want to allow their children to engage in "illegitimate" activities; otherwise, their children would already be within an exception. The State is arguing that parents consenting to unapproved activities must necessarily be "ignor[ing] the fact that minors have a special vulnerability to the dangers of the streets at night." IB, p. 21. The empirical support for this proposition is unclear. Nor is it clear why parents can be trusted to decide when their children can run errands, and who constitutes a proper over-21 substitute parent (both of which the curfew allows), but parents cannot be trusted to decide when their children should be allowed to engage in disapproved activities.

As to the potential for victimization, presumably the State believes such victimization would be prevented if the minor had a note authorizing an errand, as allowed by the curfew exception; otherwise, this same

sarcasm could be used to show the irrationality of that exception. Indeed, this same sarcasm undercuts all the curfew's exceptions: "You can't victimize me, Mr. Criminal, because I'm within an exception authorized by the Tampa City Council" is not likely to deter Mr. Criminal.

The State also asserts the curfew "only ... restricts ... aimless roaming ...." IB, p. 22. This is accurate only if we assume that any minor out during curfew doing anything other than what the state thinks proper must be aimlessly roaming. The State makes no attempt to define aimless roaming (a phrase not appearing in the curfew itself).

The State asserts that, if a minor is out with a parent, "parental responsibility would be increased and the minor would not be subject to victimization by other adults or commit crimes." IB, p. 22. The basis for this sanguine conclusion is unclear. Ma Barker was a parent. The curfew includes as "parents" anyone over 21 given parental approval. This could include drug dealers and addicts, homicidal maniacs, etc. Children are often molested by adults who have gained access to the victim by winning the parents' trust; whatever other crimes

such predators might commit, there will be no curfew violation. Further, the curfew allows minors out in numerous circumstances without parental supervision.

The State asserts the curfew is "only a minimal intrusion" on parental rights because "the only aspect of parenting [the curfew] bears upon is the parents' right to allow minors to remain in public places, unaccompanied by a parent or other authorized adult, during [curfew] hours"; "[b]ecause of the broad exceptions ..., the parent retains the right to make decisions regarding his child in all other areas." IB, pp. 25-26. This argument is also flawed.

It is not accurate to say "the only aspect of parenting [the curfew] bears upon is the parents' right to allow minors to remain in public places, unaccompanied by a parent or other authorized adult, during [curfew] hours." The curfew prevents parents from allowing their children to do anything not approved by the state. The curfew does not outlaw only "remain[ing] in public places"; it outlaws all activities not listed in the curfew's exceptions. The curfew significantly restricts parents' right to determine when, and under what circum-

stances, their children should be allowed some degree of independence at night.

Similarly, "the parent retains the right to make decisions ... in all other areas" only if those "other areas" coincide with the state's parental plan. Parental decisions in "other areas" not within a curfew exception are outlawed.

The State asserts parents "may allow the minor to attend all activities by organized groups such as church groups, civic organizations, schools and amusement parks." IB, p. 26. It is not clear if this is accurate. Neither "civic organizations" nor "amusement parks" are specifically mentioned in the curfew. "Organized recreational activity" is mentioned, as is "similar entity," but neither phrase is defined. Further, "all activities" by such groups are not necessarily approved; rather, such activities must be "supervised by adults ... and sanctioned by Hillsborough County, Hillsborough County School Board, City of Tampa, a municipality, a charitable or religious organization or other similar entity, which ... takes responsibility for the juvenile as an invitee ...." TCC 14-26, sec. 4(f). These phrases are

not defined. The State does not suggest that such things as bowling, miniature golf, billiards, movies, plays, concerts, operas, coffeehouses, dances, etc., are generally authorized. Presumably, such things are not "legitimate activities," IB, p. 19, for minors (unlike, say, being homeless, attending a KKK rally, or being sent to an all night convenience store by your alcoholic father to buy orange juice to mix with vodka for his screwdrivers; all of which are allowed by the curfew).

#### CONCLUSION

The Tampa juvenile curfew is facially unconstitutional. The Second District's decision should be approved.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michael J. Neimand, 110 S. E. 6th Street, 10th floor, Ft. Lauderdale, FL 33301, (954) 712-4600, on this \_\_\_\_\_ day of March, 2003.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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APPENDIX

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