IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2288

THE STATE OF FLORIDA,

Petitioner,

vs.

J.P., a Child,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

THE TAMPA JUVENILE CURFEW ORDINANCE IS CONSTITUTIONAL.

In the initial appeal to the District Court, Respondent specifically contended that the Ordinance was unconstitutionally void for vagueness. Respondent alleged, as he did in the trial court, that generally the Ordinance's terms did not give fair notice of what conduct was forbidden and thus gave police unfettered discretion in enforcing the Ordinance. (R. 14-15). The District Court rejected Respondent's contention that the ordinance was unconstitutional and affirmed. *J.P. v. State*, 775 So.2d 324 (Fla 2d DCA 2000); *State v. T.M.*, 761 So.2d 1140 (Fla. 2d DCA 2000).

In *J.P. v State*, 775 So.2d 324 (Fla 2d DCA 2000), after stating that J.P. raised essentially the same arguments recently addressed by the Court in *State v. T.M.*, 761 So.2d 1140 (Fla. 2d DCA 2000), the District Court rejected Respondent's contention that the ordinance was unconstitutional and affirmed.

In *State v. T.M.*, 761 So.2d 1140 (Fla. 2d DCA 2000) the District Court rejected the vagueness challenge. In so doing the court held that the ordinance clearly defined who a juvenile is and what he or she can do. The District Court further held

that the terms of the ordinance are not such that they encourage arbitrary enforcement. Id., at 1148-49.

In the first appearance before this Court, the Court did not rule on the vagueness issue. *T.M. v. State*, 784 So.2d 442 (Fla. 2001). The Court simply agreed with the State that the ordinance was subject to strict scrutiny review and remanded T.M., and subsequently the instant case to determine if the ordinance withstands strict scrutiny.

On remand to the Second District, Respondent did not raise the vagueness issue. See Amended Initial Brief filed by Respondent in the District Court which is attached hereto in the appendix to this brief. Respondent has for the first time raised the vagueness issue in this discretionary proceeding. The issue raised is not as general as originally raised in the trial court. Rather, it is a detailed laundry list that alleges every phrase used in the ordinance is vague. Since Respondent failed to raise the detailed vagueness issue in the trial court and did not raise any vagueness claim in the District Court, the vagueness claim can not be raised for the first time on discretionary review. *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So.2d 494 (Fla. 1999).

As to the merits, the ordinance only vague in Respondent's fertile imagination. Respondent's brief clearly establishes

that he has stretched the ordinary meaning of common terms to allege vagueness. Thus, the State adopts the holding of the District Court when the vagueness issue was first addressed in *State v. T.M.* 761 So.2d 1140 (Fla. 2d DCA 2000). There the District Court held:

> The juveniles claim that the ordinance is unconstitutionally vague because a police officer must determine whether a juvenile falls within any of the exceptions to the ordinance before establishing probable cause for a written warning or an arrest. A law is vague when it either: (1) fails to give fair warning as to what conduct it requires or prescribes, or (2) encourages arbitrary and erratic enforcement. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). However, just because an ordinance is not precise or a model of clarity, that does not necessarily mean that a court will invalidate the ordinance. See L.B. v. State, 700 So.2d 370, 372-73 (Fla.1997).
>
> The subject ordinance clearly defines who a juvenile is and what he or she can do. The terms of the ordinance are not such that they encourage arbitrary enforcement. "That the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms could be questioned does not render [a] provision unconstitutionally vague." Hutchins, 188 F.3d at 546 (citing Terry v. Reno, 101 F.3d 1412, 1421 (D.C.Cir.1996)). Like the court in Hutchins, we agree that there may be marginal cases in which the courts must draw the distinction between protected and unprotected activities as they arise. See Hutchins, 188 F.3d at 546. However, such cases do not render the ordinance void for

vagueness. See id.

Id. at 1148-49.

The Respondent also contends that the Ordinance is vague because it gives to the offices the authority to determine when the Ordinance has been violated. This contention also is based on a misunderstanding of the Ordinance. An arrest is lawful only after the arresting officer ascertains that the individual is under the age of eighteen and he does not fall within one of the exceptions. At that time, the officer has probable cause to arrest the individual for violating the Ordinance. As such, the Ordinance does not suffer the complained of infirmity. *State v. Ecker*, 311 So.2d 104 (Fla. 1975). In *Ecker*, the Court was faced with the exact claim in relation to the loitering and prowling statute. In rejecting this contention, the Court held:

> The defendants contend that this statute authorizes police officers to use their unbridled discretion to arrest whomever they please. We disagree. This statute only authorizes an arrest where the person loitering or prowling does so under circumstances which threaten a breach of the peace or the public safety. While the statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional.
>
> We are not here dealing with the historical loitering and vagrancy statute that makes status a crime and gives uncontrolled discretion to the individual law enforcement officer to make the determination of what is

> a crime. As previously noted, the statute contains two elements: (1) loitering or prowling in a place at a time and in a manner not usual for lawabiding individuals, and (2) such loitering and prowling were under circumstances that threaten the public safety. Proof of both elements is essential in order to establish a violation of the statute. This statute comes into operation only when the surrounding circumstances suggest to a reasonable man some threat and concern for the public safety. These circumstances are not very different from those that the United States Supreme Court described as 'specific and articulable facts' in Terry v. Ohio, supra.
>
> Clearly, when these elements are established and the individual either refuses or fails to properly identify himself or flees when confronted by a law enforcement officer, the offense has been established.
>
> On the other hand, under circumstances where the elements are established but the accused, upon being confronted by a law enforcement officer, properly produces credible and reliable identification and complies with the orders of the law enforcement officer necessary to remove the threat to the public safety, or voluntarily offers a reasonable explanation for his presence that dispels the alarm and threat, then the charge under this statute can no longer properly be made.

Id. at 110

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court quash the decision of the District Court and find that Tampa's Juvenile Curfew Ordinance is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER** was furnished by U.S. mail to **RICHARD J. SANDERS**, Attorney for Respondent, Public Defender's Office, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, on this day of February, 2003.

_____
MICHAEL J. NEIMAND
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

_____

MICHAEL J. NEIMAND
Assistant Attorney General