SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. SC02-2452

T. M., A. N., and D. N., Children,

Respondents.
______________________________________/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT OF FLORIDA

ANSWER BRIEF OF THE RESPONDENT
T. M.

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Preliminary Statement

The Petitioner, the STATE OF FLORIDA, will also be referred to herein as "the Petitioner" and "the State." The Respondent, T.M., a Child, will also be referred to as "T.M., " "the Respondent," and "the Child." The Brief of Petitioner on the Merits filed in this cause will be cited as Brief of Petitioner. The City of Pinellas Park will also be referred to herein as "Pinellas Park" and "the City."

Statement of the Case and the Facts

The Respondent, T. M., accepts and adopts the Statement of the Case and Facts appearing in the Brief of Petitioner at 2-7, with the following three exceptions. First, the Respondent disagrees with the argumentative assertion made by the Petitioner that the State "provided statistics which established that the Juvenile Curfew Ordinance furthered the compelling governmental interest." Brief of Petitioner, 4. Second, the Petitioner inadvertently states that the Second District Court of Appeal "affirmed the trial court and found that the juvenile curfew ordinance was constitutional" when in fact the District Court reversed the trial court. Brief of Petitioner, 6. Third, in response to the Petitioner's statement that this Court "agreed with the State that the appropriate standard of review is strict scrutiny" (Brief of Petitioner, 6), the Respondent would clarify that in their arguments before this Court, both the Respondent and the State agreed that strict scrutiny is the correct standard of review, and the Court observed that "the State, represented by the Office of the Attorney General, conceded in its answer brief and affirmatively maintained at oral argument that strict scrutiny should apply to the ordinance in question." T.M. v. State, 784 So.2d 442, 444 (Fla. 2001).

Summary of the Argument

The Court has previously ruled in the present case that juvenile curfew ordinances are subject to strict scrutiny. Although the rights of juveniles are not always coextensive with those of adults, fundamental rights of privacy and movement are implicated by the curfew ordinance. In applying strict scrutiny to this juvenile curfew ordinance, the rights of juveniles and adults should be treated equally, because under the curfew ordinance the rights and responsibilities of a child and her parent are inextricably intertwined.

Under strict scrutiny, the State is required to show that the means used to accomplish a compelling government interest are narrowly tailored and are the least intrusive means. In this regard, the Pinellas Park curfew ordinance fails in at least four respects. First, the ordinance does not provide an exception to allow a parent to give explicit consent or direction to a child to engage in legitimate activities not specifically excepted by the ordinance. Second, the ordinance does not provide for an enforcement procedure by which law enforcement officers would make a prescribed inquiry into the juvenile's activities to ascertain whether any of the exceptions would apply. Third, the ordinance imposes strict criminal liability upon any person defined as the parent for a violation of the ordinance by a child and creates a mandatory rebuttable presumption. Fourth, the ordinance

imposes criminal sanctions on both the child and parent. Because these means are not narrowly tailored to the purpose of the ordinance, the ordinance is unconstitutional.

In response to the State's argument that a compelling interest exists, the Respondent would note that the statistical justification for a compelling interest occurred after the ordinance had been in existence for several months, and that apart from some general averments in the ordinance prologue, the need for this curfew ordinance was not adequately established. Similarly, these statistics do not establish that the ordinance uses the least intrusive means to accomplish its stated purpose. Further, an examination of the means used would show that the ordinance does not pass strict scrutiny.

For these reasons, the Pinellas Park curfew ordinance is unconstitutional. The decision of the Circuit Court of the Sixth Circuit and the opinion of the Second District Court of Appeal finding the Pinellas Park juvenile curfew ordinance to be unconstitutional should be upheld.

Argument

Issue (Restated)

THE PINELLAS PARK JUVENILE CURFEW ORDINANCE IS UNCONSTITUTIONAL.

In answer to the first certified question of the District Court of Appeal for the Second District, as set out at State v. T.M., A.N. and D.N., 761 So.2d 1140, 1150 (Fla. 2d DCA 2000), this Court has found that strict scrutiny is the correct standard of review to determine the constitutionality of a juvenile curfew ordinance. See T.M. v. State, 784 So.2d 442, 444 (Fla. 2001). On the second certified question, the Court remanded this case to have the Second District Court of Appeal subject the Pinellas Park juvenile curfew ordinance, Pinellas Park, Fla., Code § 16.124, to strict scrutiny to determine its constitutionality. Id. The District Court of Appeal had previously stated:

> We acknowledge that our decision turns largely on the appropriate level of scrutiny used to review the ordinance. If this court applied strict scrutiny, it is likely that not all aspects of the ordinance would pass constitutional muster.

State v. T.M., A.N. and D.N., 761 So.2d at 1150. Subsequently, in applying strict scrutiny, the District Court of Appeal found the Pinellas Park juvenile curfew

ordinance to be unconstitutional. State v. T.M., 27 Fla. L. Weekly D1863 (Fla. 2d DCA 8/16/02).

In approaching the issue of the ordinance's constitutionality, a brief review of the strict scrutiny test is required. The Respondent then wishes to direct the Court's attention to those aspects of the Pinellas Park juvenile curfew ordinance which cause the ordinance to fail under strict scrutiny. Finally, the Respondent will address and counter the State's arguments that the Pinellas Park juvenile curfew ordinance is required by a compelling government interest and that the ordinance fulfills this compelling interest through the least restrictive means by the narrow tailoring of the ordinance.

The Application of Strict Scrutiny

Strict scrutiny applies either where a suspect classification is created or where a fundamental right is affected, in which case a compelling state interest is required. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 90 S.Ct. 1278, 36 L.Ed.2d 16 (1973). In the case of juveniles, age is not a suspect classification. Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Therefore, in the present case, strict scrutiny applies because there is a restriction on juvenile conduct and this restriction affects a fundamental right,

namely, the right of a juvenile to be in or travel through a public place. See Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 831, 31 L.Ed.2d 40 (1970); Wyche v. State, 619 So.2d 231, 234-235 (Fla. 1993). See also W.J.W. v. State, 356 So.2d 48, 50 (Fla. 1st DCA 1978) (a curfew ordinance which prohibits walking at night and other lawful activities in public places "is an arbitrary invasion of the inherent personal liberties of all citizens.") Further, strict scrutiny applies because of the fundamental right of privacy, shared by both the child and the parent, particularly in the right of the parent to raise the child and the concomitant right of the child to be raised by the parent. Fla. Const. art. I, sec. 23; see also Bellotti v. Baird, 443 U.S. 622, 638, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) and Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed.2d 645 (1944). Clearly, under the terms of the curfew ordinance which compels the child to obey the parent and imposes penalties on the parent for the conduct of the child, the interests, rights, responsibilities and liabilities of the child and the parent are intertwined and coextensive.

Strict scrutiny of a regulation which affects fundamental rights places the burden of proof on the government to show that the regulation serves a compelling state interest and that the regulation is narrowly tailored and accomplishes its goals through the use of the least intrusive means. See Plyler v. Doe, 457 U.S. 202, 217,

102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982); Beagle v. Beagle, 678 So.2d 1271, 1276 (Fla. 1996). Although the rights of juveniles are not always co-extensive to the rights of adults, the actual operation of applying strict scrutiny should be the same for both, since minors, as well as adults, are protected by the Constitution and possess constitutional rights. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed2d 788 (1976). A child, merely on account of minority, is not beyond the protection of the Constitution, and whatever might be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. See In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967); Bellotti v. Baird, 443 U.S. at 633, 99 S.Ct. at 3043, 61 L.Ed.2d 797 (1979). Freedom of speech and association, and Florida's recognized right of privacy, are among the rights shared and exercised by children and adults. See U.S. Const., amend. I; Fla. Const.art. I, sec. 23; Wyche v. State, 619 So.2d at 234; B.B. v. State, 659 So.2d 256, 258 (Fla. 1995); In re T.W., 551 So.2d at 1193 (Fla. 1989). Of equal significance in this case is the right shared by children and adults to travel through or be in a public place; even "nightwalking" is an activity which the United States Supreme Court considers to be normally innocent by modern standards. See Papachristou v. City of Jacksonville, 405 U.S. at 163; see also Wyche v. State, supra.

These rights and freedoms of juveniles to speak, associate, assemble, travel, remain in a public place, and enjoy privacy, although not always co-extensive to those of adults, are easily denigrated and restricted when construed in a limited context. It might be argued that no juvenile has the fundamental right to engage in "the aimless roaming of the streets at night," and that an ordinance which prohibits such activity, for that reason alone, passes strict scrutiny. Yet the curfew ordinance in the instant case is not restricted to stereotyped instances of public loitering in suspicious places, but also prohibits a juvenile during certain hours from a wide range of innocuous and legal activities, such as eating in a restaurant with a 20 year-old sibling, sitting in a movie theater with friends watching a film that ends after 11:00 p.m., staying up with a sick relative at a hospital, walking the family dog around the block, and taking the garbage out at the apartment complex where the juvenile's residence is located, all with the consent and even the direction of the child's parent. These are not strained hypothetical imaginings, because the curfew ordinance in fact reaches only legal conduct, illegal conduct obviously being the subject of other criminal laws.

The State may argue that such provisions as the exception for "the exercise of rights protected under the First Amendment" in the curfew ordinance adequately protect all of the fundamental rights of juveniles and that the existence of such

exceptions rescues the curfew ordinance despite strict scrutiny. Pinellas Park, Fla., Code § 16-124(E)3. Yet the First Amendment is not the sole reserve of all fundamental rights, such as the right "to be let alone and free from governmental intrusion." Fla. Const., art. I, sec. 23. Further, the curfew ordinance takes a restrictive and orthodox view of the venue for the exercise of First Amendment rights – "e.g., religious services, governmental meetings, political party meetings." The mere enumeration of some constitutional rights while ignoring others does not cause the ordinance to be narrowly tailored. Further, the requirement of a compelling state interest is not established by the rhetoric of the ordinance itself in its statement of intent but rather by demonstrating an actual need for the ordinance.

It is the position of the Respondent that the Pinellas Park juvenile curfew ordinance fails under the means test of strict scrutiny in at least the following four respects: (1) the ordinance does not provide an exception to allow a parent to give explicit consent or direction to a child to engage in legitimate activities not specifically excepted by the ordinance; (2) the ordinance does not provide for an enforcement procedure by which law enforcement officers would make a prescribed inquiry into the juvenile's activities to ascertain whether any of the exceptions would apply; (3) the ordinance imposes strict criminal liability upon the parent for a violation of the ordinance by a child; (4) the ordinance imposes

criminal sanctions on both the child and parent. Strict scrutiny of each of these four defects demonstrates that the Pinellas Park juvenile curfew ordinance is unconstitutional.

Lack of a Parental Consent Exception

In its various exceptions, nowhere does the ordinance permit a parent to direct a child under the age of 18 to perform a task or attend a function in an establishment or public place unless that task or function is specifically excluded from the ordinance. A wide number of such tasks and functions are not included in the prescribed exceptions. These may include going to a nearby store to buy groceries for tomorrow's breakfast, eating a late dinner at a restaurant, taking out the garbage off the residential premises, or being in a hospital out of concern for a relative. None of these acts would likely expose the child to any increased danger or compel the child to criminal behavior regardless of the time of night.

Such parental directions could take the form of an oral command or a written note. Allowing such an exception in the Pinellas Park juvenile curfew ordinance would not only grant inclusion to a range of legitimate activity that is now criminalized, but would also promote a purported intent of the ordinance, which is to enhance parental control. Such an exception does not, however, appear in the

ordinance. Such an exception is recognized and is workable, as it appears in other juvenile curfew ordinances reviewed in other cases. See, e.g., Hutchins v. District of Columbia, 188 F.3d 531 (D.C.Cir. 1999); Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993); Ramos v. Town of Vernon, 48 F.Supp. 176 (D.Conn. 1999).

By failing to have an exception to allow for parental consent of a juvenile's presence in a public place or establishment, the Pinellas Park curfew ordinance penalizes a large number of legitimate and innocent activities and defeats its stated purpose of promoting and enhancing parental direction. As such, the lack of this exception demonstrates that the ordinance is not narrowly tailored to meet its declared interest. The ordinance is therefore unconstitutional under strict scrutiny.

Lack of an Enforcement Procedure

The Pinellas Park juvenile curfew ordinance also fails under strict scrutiny because it does not establish any procedure by which the ordinance is to be enforced by the police. A prescribed procedure is essential given the wide range of exceptions which permit a juvenile to be abroad during curfew hours. This procedure would provide a method by which a police officer would inquire into the applicability of any of the exceptions, either of the juvenile or the juvenile's parent. Along with the concern for erratic and arbitrary enforcement of the ordinance is the

failure of the ordinance to assure that law enforcement uses the least intrusive means in implementing the ordinance.

The State in its arguments dismissed this concern with assurances that a police officer must ascertain whether a juvenile falls within one of the exceptions before probable cause for an arrest can be established. This means that the officer is accorded the discretion to determine if an accompanying adult over the age of 21 is authorized by the minor's parent, if the minor's errand is in fact an emergency, if the minor's activity that she is traveling to or from involves the exercise of rights protected under the First Amendment of the United States Constitution, whether the sponsoring organization of an activity is a legitimate religious or civic organization, and whether the minor's travel is interstate in nature or, if intrastate, whether it is both bona fide and with the consent of the parent. Most significantly, it is left to the officer to determine if the minor is remaining "unnecessarily in a particular place." Pinellas Park, Fla., Code § 16-124(C)6. The State argues that it is safe to presume that a police officer will make such an inquiry without any particular direction from the ordinance.

Lack of procedure for inquiry into the conduct of a subject is not fatal to most criminal statutes where exceptions and defenses are limited and the officer’s only concern is to establish probable cause for arrest. Here, however, the

fundamental rights of both the child and the parent are implicated and the inquiry must be concordantly more extensive. There is then a danger that the extensive inquiry would become unduly intrusive unless a method or procedure for investigation is instituted by the ordinance. The lack of such a procedure in the ordinance means that the government's interest is not being fulfilled by least intrusive means. As such, the ordinance is unconstitutional under strict scrutiny.

Strict Criminal Liability of the Parent and the Mandatory Rebuttable Presumption

Juveniles are not the only individuals subject to the curfew ordinance. The ordinance charges parents with the "legal duty and responsibility to insure that the juvenile does not violate any provisions of this Juvenile Curfew Ordinance." Pinellas Park, Fla., Code § 16-124(F)1. A "parent" as defined by the ordinance is a person who has legal custody of a juvenile including a natural or adoptive parent, a guardian, a person standing in loco parentis, or any adult over 21 having care or control of a juvenile with the permission of any of these persons. Pinellas Park, Fla., Code § 16-124(C)4. This means that there can be more than one parent and that the "parent" can be an unrelated person who could be charged along with the natural parents for a violation. A violation of the curfew ordinance by a juvenile establishes a prima facie case against the parent which can be rebutted only if the

parent or parents, prior to any violation of the curfew ordinance by the juvenile, notifies local law enforcement that the juvenile is missing from the parent's residence or if the parent, despite reasonable care and diligence, does not have knowledge that the juvenile would violate the ordinance. Pinellas Park, Fla., Code § 16-124(F)1. A parent violating the curfew ordinance also faces a $500.00 fine, six months of incarceration, or both. Pinellas Park, Fla., Code § 16-124(F)2.

In short, a violation of the ordinance by a child automatically incriminates any number of persons who come within the ordinance's definition of a "parent." To defend themselves, the parents are forced to produce evidence of two narrowly defined affirmative defenses, both of which involve demonstrating an adverse relationship between the parent and the child which would serve to damage that relationship. This in turn repudiates the stated purpose of the ordinance, to promote and enhance parental control.

Except in cases of conspiracy or solicitation, or where the State proceeds on a principal theory, an ordinance that causes one individual to be prima facie criminally liable for the conduct of another should be repugnant to common considerations of fairness and due process. Further, by making a violation by the juvenile prima facie evidence that the juvenile's parent has violated such legal duty and responsibility, the ordinance creates a "mandatory rebuttable presumption" that

requires the trier of fact to presume an element of the crime upon proof of a basic or evidentiary fact unless the defendant comes forward with evidence to rebut that element. See Marcolini v. State, 673 So.2d 3, 4 (Fla. 1996); Brake v. State, 746 So.2d 527, 529 (Fla. 2d DCA 1999). A mandatory rebuttable presumption violates a defendant's due process rights by relieving the State of the burden of persuasion. See id. Because the ordinance attempts to accomplish its purpose by violating due process, it is clear that the ordinance is not narrowly tailored and does not use the least intrusive means. Here, the justification for this scheme is that the parent is often made responsible for the conduct of the child, such as in instances of truancy, costs of care, and payment of restitution. See, e.g., Fla. Stat. § 232.19(7); Fla. Stat. § 985.215(6); Fla. Stat. § 985.231. Nonetheless, an ordinance which automatically makes any adult meeting the definition of "parent" to be subject to criminal penalties absent proof of two narrowly defined affirmative defenses, in violation of due process, does not fulfill the stated compelling interest of the government by the least intrusive means.

Criminal Penalties on the Child and Parent for Violation

The State in its brief concedes that the criminal penalty imposed upon the juvenile by the ordinance for a second or subsequent violation is not narrowly

tailored to meet the purpose of the ordinance, which is to protect juveniles. Brief of Petitioner, 26-28. The State does not directly address the criminal penalty imposed on parents for a violation of the ordinance by the child, but notes that a criminal penalty is imposed on the parent who fails to have a child attend school. State's Supplemental Brief, 27. Again this criminal penalty against both the child and the parent is an example that the juvenile curfew ordinance is not narrowly tailored to its stated purpose, which is to promote and enhance parental control. Pinellas Park, Fla., Code § 16-124(B)2. Obviously, unlike acts of truancy where the parent's failure to act is established, affirmative parental direction of a child's legitimate activities during curfew hours is not promoted and enhanced if the parent charged with directing the child is jailed away from the child. No compelling government interest is served by incarcerating either the child or the parent. The State and the Respondent recognize and agree that the penalty portion of the ordinance as applied to the child is not narrowly tailored to the compelling interest, and the Respondent would extend this reasoning to the penalty on the parent as well.

The various juvenile curfew ordinances upheld by the decisions of other courts in fact did not impose criminal penalties but rather civil fines. See, e.g., Hutchins v. District of Columbia, supra; Nunez v. City of San Diego, 114 F.3d 935

(9th Cir. 1997); Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993). These cases were not required to apply the requirement of least restrictive means to the severity of the penalty. Still, the penalty imposed can prevent the ordinance from being narrowly tailored. It should also be noted that Florida's model juvenile curfew law calls only for civil penalties on both children and parents. Fla. Stat. §§ 877.20 through 877.25.

The State argues that the penalty provisions can be severed from the rest of the ordinance to render the ordinance constitutional. The Respondent agrees that such severance of penalty provisions is permitted, but in doing so does not waive the argument that other aspects of this ordinance render it unconstitutional under strict scrutiny. Severance of the penalty provision alone would not restore constitutionality to the ordinance.

Response to the State's Argument Concerning the Compelling State Interest

The State argues that the government's interest in protecting juveniles from both criminal victimization and the temptation to commit crime is a compelling interest which is met by the Pinellas Park juvenile curfew ordinance. In support of this, the State argues that the rights of minors should be treated differently from the rights of adults and that therefore greater restrictions can be placed on minors than

on adults in order both to find and meet a compelling state interest. Brief of Petitioner, 12. The State cites Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), for this premise, and attempts to apply the three-part test of Bellotti to this ordinance. In fact, Bellotti does not supply a justification for easing the requirements of strict scrutiny in the review of this ordinance. Further, the State in this argument attempts to separate the rights of the child from the rights of the parent when in fact this ordinance inextricably intertwines the rights of the child and parent by making both criminally liable for the same violation of the ordinance.

To this purpose, the State describes the test of Bellotti:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults; the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. Baird, 443 U.S. at 634. Yet the State applies a misinterpretation of these considerations. On the first point concerning the "peculiar vulnerability of children," the Supreme Court elucidated:

> The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against

> deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult.

Bellotti v. Baird, 443 U.S. at 634 (emphasis supplied). The Supreme Court is at least as concerned with the vulnerability of children to the excesses of the State as it is with the vulnerability of children to adults, each other, or the other influences of society. It is this vulnerability to the deprivations of liberty by the City curfew ordinance that the Child argued in the trial court.

On the second point, concerning the limits on the freedom of children to make critical decisions, the Court clarified that

> the Court has held that the State validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.

Bellotti v. Baird, 443 U.S. at 635 (emphasis supplied). This consideration in Bellotti was applied to the question of a minor having an abortion without parental consent, no doubt a critical decision with serious consequences. Such a decision cannot be equated to the determination between parent and child of which showing of a movie to attend or where to eat a midnight snack, and in limiting the freedom of the child to make a choice of relative unimportance and inconsequence, the

State's interest has a concordant invalidity.

Third, on the importance of the parental role in child rearing, the Supreme Court in Bellotti recognizes the need to prevent the State from interfering with parental rights in raising their children:

> Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. 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.

Bellotti v. Baird, 443 U.S. at 637 (emphasis supplied). The Pinellas Park curfew ordinance actually nullifies the control of parental consent by not making a exception for it. Indeed, apart from actual accompaniment by a parent or an approved adult over 21, parental consent is required only when the child is engaged on an emergency errand or "bona fide" intrastate travel, and parental consent is not a defense, either for the child or the parent, if the child's conduct does not come under one of the prescribed exceptions. Pinellas Park, Fla., Code § 16-124(E)1 - 9.

The three justifications of Bellotti v. Baird for not equating the rights of children with those of adults are not met by the Pinellas Park curfew ordinance. Restrictions on the freedoms of speech, association, assembly, and travel which

would be considered intolerable if imposed on an adult are equally intolerable when imposed upon a minor if the State cannot show a compelling state interest or at least "any significant state interest . . . that is not present in the case of an adult." Carey v. Population Services International, 431 U.S. 678, 693, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). Without a showing of such a state interest, by restricting the fundamental rights of both minors and their parents the Pinellas Park curfew ordinance fails to pass strict scrutiny.

With its interpretation of Bellotti as its premise, the State attempts to meet both the compelling interest requirement and the “narrowly tailored” requirement of the strict scrutiny test by presenting statistics on Pinellas Park police contacts with juveniles before and after implementation of the city’s curfew ordinance. Brief of Petitioner, 15-22. These statistics were in fact compiled several months after the ordinance went into effect and were not available when the ordinance was first drafted and passed. Further, these statistics, standing alone without comparison to other data, do not support the contentions in the ordinance that a “substantial portion of the crime in the community is committed by juveniles” or that there was “a steady and significant increase in crimes by and against juveniles.” Pinellas Park, Fla., Code § 16-124(B)1(b) and (c). For this reason, these statistics cannot support the State’s position that there existed a compelling

government interest at the time the ordinance was passed for a juvenile curfew.

Response to the State's Argument Concerning the Least Intrusive Means

Just as the State's statistics do not support the argument that a compelling government interest existed in stemming juvenile victimization and crime in Pinellas Park, neither do these statistics, by demonstrating a numeric "bottom line" result, permit the conclusion that the least restrictive means are being used or that the ordinance is narrowly tailored. Even clear and ample proof that the compelling interest is being fulfilled is not the test to determine whether the means used are narrowly tailored or are the least intrusive means to meet the compelling interest. On the contrary, the government's compelling interest could be fully satisfied and statistically verified with sweeping draconian measures, but this would not establish that the means used were narrowly tailored. To say an ordinance "works" begs the least-intrusive-means question. As for the exceptions contained in the ordinance, allowing any number of broad exceptions to exclude certain defined conduct from the ordinance does not make the ordinance constitutional under strict scrutiny analysis if the ordinance fails to use the least intrusive means in meeting a compelling interest.

The State asserts that to be narrowly tailored, the juvenile curfew ordinance

must minimize "any burden on the minor's fundamental right to move about freely at night" and "must sufficiently exempt legitimate activities from its ambit." Brief of Petitioner, 22. The State makes the claim that because of the exceptions set out in the ordinance, "all legitimate activities are exempted" and therefore the ordinance is narrowly tailored to meet the compelling interest. Id. The State further contends that the ordinance "only regulates conduct and that conduct is the aimless roaming of the city streets during the curfew hours." Brief of Petitioner, 25. These assertions ignore the wide number of legitimate and safe activities that are not excluded by these exceptions. These legitimate activities would include watching a movie in a theater that goes past the start of curfew, shopping in a grocery store for tomorrow's breakfast, finishing a late dinner in a restaurant, sitting up with a sick relative in a hospital, or taking out the garbage to the back of a residential apartment complex, all with the explicit permission and even at the command of the parent. These and similar common instances that are not exempted from the ordinance demonstrate that the ordinance is not narrowly tailored because, among other deficits, it lacks an exception for parental consent or parental direction for the child to perform tasks or engage in activities outside of the enumerated exceptions.

If in fact the sole purpose of the Pinellas Park juvenile curfew ordinance is,

as the State propounds, "the aimless roaming of the city streets during the curfew hours," then a narrowly tailored ordinance would explicitly prohibit that activity. Instead, the ordinance criminalizes a wide range of legitimate activities and then carves out a few conventional exceptions proclaimed to be "narrowly tailored to effectively address the foregoing concerns" in anticipation of strict scrutiny. Pinellas Park, Fla., Code § 16-124(B)1(l). In some of these exceptions, the ordinance in fact allows juveniles to be on the city streets as long as their most recent past activity is specifically legitimized by the ordinance. See Pinellas Park, Fla., § 16-124(E)3, 4 and 5. One exception even allows "bona fide intrastate travel with the consent of the juvenile's parent," which presumably encompasses travel on the streets within the juvenile's own neighborhood, but the ordinance would still penalize the juvenile's otherwise legitimate presence at an establishment once that travel ended if the juvenile's activities did not come under an exception. Pinellas Park, Fla., Code § 16-124(E)7.

The State contends that a parental consent exception in the ordinance "would swallow the curfew," arguing that "a note from his parent" would not ward off an assailant. Brief of Petitioner, 24. This argument ignores the plain fact that none of the exceptions contained within the ordinance (e.g., traveling to or from a First Amendment activity, lawful employment, a sponsored function, or attending an

organized event) would prevent a juvenile from being assaulted. This argument also reveals the distrust inherent in the ordinance for the ability of parents to guide their children properly in a variety of legitimate and necessary activities, belying the intent of the ordinance "to promote and enhance parental control over juveniles." Pinellas Park, Fla., Code § 16-124(B)2.

In urging that the State is using the least intrusive means to meet its interest in protecting juveniles, the State argues that strict scrutiny analysis of juveniles' rights "differ from the strict scrutiny analysis of the same rights of adults." Brief of Petitioner, 11-12. The State quotes Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976), in support. It should be noted that in Planned Parenthood the Supreme Court did not alter its approach to analysis under the strict scrutiny standard of review in determining the rights of juveniles.

Finally, it should be noted that the State did not attempt to link the constitutionality of the Pinellas Park juvenile curfew ordinance with Sections 877.20 through 877.25 of the Florida Statutes, which set up a model juvenile curfew ordinance for municipalities to adopt. Because the state law was not adopted by Pinellas Park as required, the State would be prevented from arguing the validity of Sections 877.20 through 877.25 in an attempt to demonstrate the constitutionality of the Pinellas Park juvenile curfew ordinance under strict

scrutiny.

In all, the State has failed to meet its burden under strict scrutiny analysis to show that the Pinellas Park juvenile curfew ordinance is narrowly tailored to meet a compelling government interest through the least intrusive means. The ordinance should therefore be found to be unconstitutional.

Conclusion

Based upon the foregoing law and argument, the Respondent, T.M., a Child, requests this Honorable Court to find that the Pinellas Park juvenile curfew ordinance, Pinellas Park, Fla., Code § 16.124, is unconstitutional, and further requests the Court to affirm the decision of the Circuit Court of the Sixth Judicial Circuit and the opinion of the District Court of Appeal for the Second District finding the Pinellas Park curfew ordinance to be unconstitutional and dismissing the delinquency petition against the Respondent.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Michael J. Neimand, Esq., Office of the Attorney General, 110 S.E. 6th Street, 9th Floor, Ft. Lauderdale, FL 34618, this 8th day of January, 2003.

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Certificate of Compliance

I HEREBY CERTIFY that in compliance with Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2) this brief is submitted in Times New Roman 14-point font.

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