IN THE SUPREME COURT OF FLORIDA

LAVERNE BOWDEN, **

Petitioner, **

vs. **

STATE OF FLORIDA, **

Respondent. **

57,670

CASE NO. ~~55,962~~

FILED

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SID J. WHITE
CLERK SUPREME COURT

By _____ Chief Deputy Clerk

WILLIAM RUSH WILLIAMS, **

Petitioner, **

vs. **

STATE OF FLORIDA, **

Respondent. **

CASE NO. ~~57,669~~

APPELLANTS' CONSOLIDATED BRIEF

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PRELIMINARY STATEMENT

Petitioners were defendants in the Circuit Court in and for Duval County, Florida. Both petitioners will be referred to as "Appellants". All references to the Record on Appeal will be by Appeal Docket number and page number, i.e., R(1) 1 showing item number in brackets and page number standing free.

STATEMENT OF THE CASE

Appellants argue that F.S. §943.46 et seq. [The Florida Rico Act] is facially unconstitutional under the Constitution of the United States and the Constitution and Laws of the State of Florida.

Appellants further argue that F.S. §943.46 et seq. supra is unconstitutional as applied in that the predicate crimes forming the basis of this prosecution under the Florida Rico Acts arise under F.S. §847 et seq. [The Florida Obscenity Acts], all in violation of the Constitution of the United States and the Constitution and Laws of Florida.

STATEMENT OF THE FACTS

Both Appellants were chraged in a two count indictment alleging that they engaged in and conspired to engage in a violation of F.S. §943.46 et seq. and F.S. §847 et seq. R(6) 31-690.

Appellants filed motions to dismiss alleging certain United States and Florida Constitutional infirmities R(7-8-9-11) 691-703-709 712; all of which were denied on March 29, 1979 R(12) 714.

Appellants entered pleas of nolo contendere before the Honorable Ralph U. Nimmons, Judge Circuit Court in and for Duval County, Florida R(13) 715 and were placed on probation and fined by Judge Nimmons R(14) 766 with the agreed stipulation that Appellants would be allowed to attack the Constitutionality of the Rico statute, particularly as applied to the predicate crime of obscenity R(14) 766. The Supreme Court of Florida consolidated the Appeals R(29) 799, both Appellants having exercised their right to appeal R(17-18) 789-790.

ARGUMENT I

ARGUMENT AND CITATION OF AUTHORITY

THE FLORIDA RICO STATUTE DEFINES A RACKETEERING CRIME SO VAGUE, OVERBOARD AND UNFAIR, PARTICULARLY WHEN APPLIED IN A CONTEXT OF FREE SPEECH, PRESS AND ASSOCIATION THAT IT MUST BE HELD UNCONSTITUTIONAL

The Florida RICO legislation condemning "racketeers" who brush against "enterprises" carries "the vice of vagueness". Interstate Circuit v. City of Dallas, 390 U.S. 676, 684, 88 S.Ct. 1298 (1968). A careful analysis of the statutory elements reveals a bizarre "racketeer" crime comparable to the "gangster" crime invalidated by a unanimous Supreme Court in Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Further, the predicate crime here involves obscenity, a field of regulation presumptively protected by our guarantees of free speech and press. Finally, one part of the obscenity definition, which substitutes subjective notions of pandering for objective evaluation of the work in question, itself suffers from vagueness.

The Florida Courts have never hesitated to strike down statutes and ordinances found to be void for vagueness. See Brown v. State, 358 So.2d 16 (Fla. 1978) (profane and vulgar and indecent language in the presence of others); State v. Nesshow, 343 So.2d 605 (Fla. 1977) (one "who is guilty of malpractice in office not otherwise expecially provided"); Steffens v. State ex rel. Lugo, 343 So.2d 90 (Fla. 3rd DCA.

1977) (Municipal ordinances prohibiting topless dancing); State v. Winters, 346 So.2d 901 (Fla. 1977) ("negligent treatment of children"); D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977) (accepting gifts "that would cause a reasonably prudent person to be influenced in the discharge of official duties"); State v. Dinsmore, 308 So.2d 32 (Fla. 1975) (requiring specified officers or employees of named political subdivisions to file a sworn statement disclosing their interest in any business which is subject to regulations of or which has substantial business commitments from the governmental units); Cuccarelli v. The City of Key West, Fla., 321 So.2d 472 (Fla. 3rd DCA 1975) (ordinance which prohibited loitering which hindered or impeded or tended to inder or impede passage of pedestrians or vehicles); State v. Barquet, 262 So.2d 431 (Fla. 1972) (statutes prohibiting abortions except those "necessary to preserve the life of such mother"); World Fair Freaks and Attractions, Inc. v. George Hodges, Police Chief, North Bay Village, Florida, 267 So.2d 817 (Fla. 1972) (exhibitions for pay of any crippled or physically distorted, malformed or disfigured person); State v. Lopis, 257 So.2d 17 (Fla. 1971) (other employment which would impair his independence of judgment in performance of his regular public duties); Franklin v. State, 257 So.2d 21 (Fla. 1971) (anyone commiting the abominable and detestable crime against nature, either with mankind or beast); State v. Buchanan, 191 So.2d 33 (Fla. 1966) (prohibiting fees for child placement but allows

"reasonable charges or fees" for legal services); Lochlin v. Pridgeon, 30 So.2d 102 (Fla. 1947) (Public officer commiting act "not authorized by law").

While the Florida cases construing the void for vagueness doctrine may not be completely consistent, compare Moffett v. State, 340 So.2d 1155 Fla. 1977 ("no topless bathing") with Steffens v. State ex rel. Lugo, 343 So.2d 90 ("topless dancing permissible"), nevertheless, certain concepts run through all the Florida decisions whether striking down or upholding the particular enactments attacked.

These concepts are:

(1) Under the Florida constitution [Constitution, Art. II §3 F.S.A.] the Courts cannot legislate. State v. Egan, 287 So.2d 1 (Fla. 1973); Lochlin v. Pridgeon, 30 So.2d 102 (Fla. 1947).

(2) If reasonably possible the statute must be construed so as to uphold its constitutionality, Cheseborough v. State, 255 So.2d (Fla. 1971).

(3) "When construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the State" State v. Wershow, 343 So.2d 605-608. (Fla. 1977)

(4) Criminal statutes are to be strictly construed, State v. Buchanan, 191 So.2d 33 (Fla. 1966).

(5) Florida has a higher standard and a more precise definition of notice in the due process context than has been propounded by the United States Supreme Court in "void for vagueness" cases. Indeed, Florida has specifically rejected the United States Supreme Court's test that the statute must be so vague that "men of common intelligence must necessarily guess at its meaning!" Brock v. Hardie, 154 So. 690 (Fla. 1934), as quoted with approval in State v. Wershow, 343 So.2d 605-609 (Fla. 1977).

The true test in Florida, as set out in Wershow, supra, quoting with approval Brock v. Hardie, supra, is:

> . . .Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."
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> Such seems to be the test approved by the Supreme Court of the United States Citation of authorities as to what may be considered the exact meaning of the phrase "so vague that men of common intelligence must necessarily guess at its meaning, "so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.

> We must apply our own knowledge, with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or not in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not.
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> (Emphasis in original)

The Separation of Powers doctrine [Constitution, Art. II, Section 3, F.S.A.] supplies another facet in interpreting the void for vagueness doctrine in Florida that is missing in Federal Constitutional law. The Florida courts are much less likely to add by inference or to construe by implication than the federal courts, particularly in construing penal statutes. They [Florida courts] are reluctant to "legislate" so as to save the statute being attacked. See Brown v. State, 358 So.2d 16 (Fla. 1978). See generally, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L.Rev. 489 (1977).

The policy reasons behind the void-for-vagueness doctrine are well stated in Grayned v. City of Rockford, 408 U.S.104, 108-09, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972),

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws given the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent

> by not provididng fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms," Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."
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> (footnotes omitted)

See also, Hynes v. Mayor of Oradel, 425 U.S. 610, 620, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976).

Additionally, a related concept is the First Amendment overbreadth doctrine. A statute, through clear and precise, may, nevertheless, be overbroad if the words of the statute and the clear meaning derived therefrom reach constitutionally protected activities. Winters v. New York, 333 U.S. 507, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 272 (1972); United States v. Baranski, 484 F.2d 556 (7th Cir. 1973). In order to prevent any "chilling effects" on constitutionally protected areas, the courts are especially concerned with overbreadth in relation to statutes affecting First Amendment rights. See generally, note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

To understand precisely the awesome statutory crime being charged in the case at hand, a careful step-by-step analysis is necessary.

To begin with, the Florida RICO Act has created a new crime, §943.462(3), Fla. Stat., punishable as a first degree felony. The definitional elements of that "racketeering" crime are synthesized below:

THE FLORIDA RICO ACT

> It is unlawful for any person employed by or associated with any "enterprise", meaning absolutely any individual, legal entity, or group of individuals associated in fact,* to conduct or participate directly or indirectly in such enterprise through a "pattern of racketeering activity", meaning engaging in at least two interrelated incidents of racketeering

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*The full definition of "enterprise" under the Florida RICO Act is as follows:

> (3) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities.

§943.461(3), Fla. Stat.

conduct* or racketeering activity", meaning to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit, among other things**, any crime which is chargeable under those provisions of the Florida Statutes, Sections 847.011, 847.012, 847.013, 847.06, and 947.07, Florida Statutes, relating to obscene literature and profanity.***

Step two in the analysis is a similar exposition of the wholesale promotion crime created in §847.07:

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*The Act defines "pattern of racketeering activity" in full as follows:

> (4) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victime, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred within 5 years after a prior incident of racketeering conduct.

§943.461(4), Fla. Stat.

**§943.461(1), Fla. Stat. defines "racketeering activity" as above and then (a) lists 22 predicate crimes (including obscenity crimes) chargeable under Florida Statutes and (b) adopts by reference the predicate crimes or conduct listed in the federal RICO law. The federal act does not claim obscenity crimes as predicate racketeering activity. See 18 U.S.C. §1961(1).

***§946.461(a)(1)22., Fla. Stat.

WHOLESALE PROMOTION OF MATERIAL DEEMED OBSCENE

Any person is guilty of a third degree felony who knowingly "wholesale promotes" meaning to manufacture, issue, sell, provide, deliver, transfer, transmute, publish, distribute, circulate, or disseminate any obscene matter or performance or to offer or agree to do the same, with or without consideration, for purposes of resale or redistribution, or who in any manner knowingly hires, employs, uses, or permits any person to wholesale promote or assist in wholesale promoting any such "obscene material" meaning matter "of any description" if, (I) considered as a whole and applying community standards, (A) its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and (B) it is utterly without redeeming social value and (C) in addition, it goes substantially beyond customary limits of candor in describing or representing such matters or (II) in the alternative, the distribution of erotica which is not otherwise obscene, or the offer to do so, or the possession with the intent to do so, is a commercial exploitation

of erotica solely for the sake of their purient appeal.*

Finally, if we combine the RICO crime with the wholesale promotion predicate crime and boil down the terms, the actual charge emerges:

PATTERN OF RACKETEERING AND WHOLESALE PROMOTION CRIMES COMBINED AND CONDENSED

> It is unlawful for anyone associated with anyone or anything to participate indirectly in said anyone or anything through two or more interrelated incidents of such conduct or activity as knowingly [permitting anyone to assist in] offering to distribute any obscene matter without any consideration for purposes of further distribution.

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*In State v. Aiuppa, 298 So.2d 391 (Fla. 1974), part I of this definition of obscenity (§847.07(2), Fla. Stat.) was judicially construed by the Florida Supreme Court to conform with the minimum federal standards of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 (L.Ed.2d 419 (1973) and of Paris Adult Theater I v. Slayton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), except that the higher Florida statutory "value of the work" standard (i.e., §847.07(2)(b), Fla. St.) stated as part I(B) above) would continue to govern at least until the Legislature changed it. Part B of the definition (§847.07(3), (Fla. Stat.) was not passed upon by the Court in Aiuppa. Id at 393.

This distillation represents extreme formulation of the statutory framework being pressed against the defendants.* We submit that this composite crime is bizarrely unconstitutional. One is reminded of the "gangster crime" voided by the Supreme Court in Lanzetta v. New Jersey, 306 U.S. 451, 452 &. n. 1, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The statute condemned there provided:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathiser in any labor dispute.

In RICO the "racketeer" actor is "associated with" an "enterprise", a legal fiction meaning anyone or anything. Under the New Jersey law the "gangster" actor had to be a "member" of any "gang consisting of two or more persons" and to be "known" as such. New Jersey wins. To be a "known member" of a "gang" is less vague than being "associated with"

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*The bracketed language states one statutory alternative way of commiting wholesale promotion. We have bracketed it merely because these elements are not tracked in the indictment. Whether this is part of the State's theory, we do not know.

a catch-all RICO enterprise".* Both statutes have predicate crimes. In RICO, of course, there are two or more as yet ordinarily unproven offenses picked from a long list which, in Florida, includes some misdemeanors. Compare §943.461(1)(9)22, Fla. Stat., with §847.011(1)(a), Fla. Stat. Under the New Jersey law convictions were required, three disorderly conduct convictions or any crime. Again, New Jersey gave clearer warning (although of an unlimited list of predicate crimes). But Florida wins on penalty. "Racketeers" get 30 years; "gangsters" 20.

The vice in each statute is the nebulous link between the malefactor and the forbidden group. Neither statute requires the actor to have any criminal knowledge of or intent toward the group. For "Gangsters" the entire nexus is membership, which implies knowledge and, in the case of an informal association like a gang, some participation. For "racketeer", the nexus hangs on two phrases. "Associated with" is utter weasel language. "Participates indirectly in" is no better. Even without the adverb, "participates" is ambiguous. With such an open-ended modifier, and given such an open-ended "enterprise", the phrase does nothing. This nexus is a void

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*Furthermore, RICO sweeps more broadly than the New Jersey statute since it criminalizes "anyone" rather than just persons "not engaged in a lawful occupation."

itself. In any event, enormous vagueness, indefiniteness, uncertainty, and potential overbreadth lurk here. Presumably one can, through two predicate acts, "participate directly" in "anyone or anything" without ever knowing that the behavior had some ill-defined relationship to such an ill-defined group. The membership link in Lanzetta is at least strong.

The case at hand is much more compelling than Lanzetta. The predicate crimes here are presumptively protected by our Constitution. Regulation of obscenity requires more precision and specifity than ordinarily demanded. And, to make matters worse, the obscenity statute itself suffers from an intolerably vague alternative definition of obscenity. Matter not otherwise obscene can be deemed obscene if the factfinder is convinced of pandering motives. Such subjective variable standards are the final kiss of vagueness.

Florida Court's have had a number of occasions to quote United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). E.g., State ex rel. Lee v. Buchanan, 191 So.2d 33, 37 (Fla. 1966; State v. Llopis, 257 So.2d 17, 19 (Fla. 1971). In Reese, supra, the Supreme Court declared:

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained

> and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserve power of the States and the people.

See also, Brown v. State, 358 So.2d (Fla. 1978). In passing RICO and tying it to a pattern of predicate offenses including obscenity, the Legislature has cast an undefined net large enough to endanger free speech, press and association. This Court should declare that, under our Constitutions, the means are inappropriate to the end sought.

ARGUMENT II

SINCE THE FLORIDA RICO ACT ATTEMPTS TO IMPOSE STRICT CRIMINAL LIABILITY WITHOUT REQUIRING CRIMINAL INTENT OR KNOWLEDGE, AND PARTICULARLY SINCE IT SEEKS TO SO PREDICATE ITS SANCTIONS UPON PRESUMPTIVELY PROTECTED ACTIVITIES OF FREE SPEECH, PRESS AND ASSOCIATION, THE ACT IS FACIALLY UNCONSTITUTIONAL, PARTICULARLY WHEN HITCHED TO PROSECUTION OF PROMOTING ALLEGED OBSCENITY.

The Florida RICO Act imposes strict criminal liability upon any person who stumbles within the ambit of Section 943.462(3), Florida Statutes (1977). Subsection (3), upon which this prosecution is premised, flatly makes it unlawful for any person associated with an "enterprise" to participate directly or indirectly in such enterprise -- without demanding any proof of criminal intent, i.e., mens rea, or criminal knowledge, i.e., scienter. Under this law, the prohibited association with the "enterprise" can be entirely innocent or even unknowing. The participation, directly or indirectly, in the "enterprise" itself can occur without any intent whatsoever that the condemned anti-social behavior (the two or more incidents of racketeering conduct) relate to any "enterprise". Indeed, it can occur without any knowledge that there is an "enterprise". Nor is there any requirement that the "enterprise" itself be a criminal enterprise. The liability for crossing the path of such an "enterprise", however, is strict -- and severe.

Moreover, the omission of all mental elements of responsibility in subsection (3) must be viewed as a deliberate choice of action by the Legislature. Subsection (1) of the same section expressly makes it unlawful for any person who has "with criminal intent" received proceeds derived from racketeering to use or invest them in acquiring real property or in establishing or operating any enterprise. §943.462(1), Fla. Stat. (1977). The contrasting omission of such language of culpability in the remaining three subsections demonstrates the deliberate legislative choice to impose strict liability in them. Indeed the entire section was enacted at the same time and the use of the words "with criminal intent" in subsection (1) was not accidental. Rather, it was a specific Florida amendment of the language of the Federal RICO Act which served as the model for this legislation. See 18 U.S.C. §1962(a). Despite this amendment of the section, no element of intent or knowledge is expressed in subsection (3) and therefore, the contrary is plainly implied. Finally, no historical gloss of required mental state can be inferred since the legislation is a departure from common law and creates new crimes. Cf., Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

The departure from our Anglo-American traditions of fairness is sobering. We cannot improve upon Mr. Justice Jackson's statement in Morissette v. United States, supra:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengence as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized.
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> 342 U.S. at 250-51
> (footnotes omitted).

The case before this Court is one of the first impression. A bold new statute seeks to condemn "racketeering" as malum prohibitum to be fiercely punished on the basis of strict liability. Sixty year's imprisonment can be achieved by heaping a conspiracy count on a substantive count. Now that law is harnessed to prosecuting alleged wholesale promotion of obscenity. Thus, a book dealer who trades within the shadow of the First Amendment can be jailed as a "racketeer" for, in effect, life, if he should commit two obscenity violations which are viewed as indirect

participation in a catch-all "enterprise" -- even though he has absolutely no criminal intent to participate in any way in any enterprise, even though he is totally ignorant of any enterprise, and even though the enterprise itself is entirely innocent of any and all crime. We ask, whatever became of due process and freedom of speech, press and association?

The peculiar nature of the predicate crimes makes a world of difference here. Alleged obscenity is presumptively protected by the First Amendment. E.g., State v. Samuels, No. 78-29, CF., Div. T, 4th Cir., Duval Co., Fla., May 5, 1978. And, the First Amendment bars the imposition of strict criminal liability herein. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

In Smith The Supreme Court reversed the conviction of a bookseller obtained under an ordinance which--without any requirement of scienter--held him strictly liable for the books in his shop. The Supreme Court expressed the problem in these terms:

> California here imposed a strict or absolute criminal responsibility on appellant not to have obscene books in his shop. 'The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500. Still, it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter--though even where no freedom-of-expression question is involved, there is precedent in this Court that this

> power is not without limitation. See Lambert v. California, 355 U.S. 225. But the question here is as to the validity of this ordinance's elimination of the scienter requirement--an elimination which may tend to work a substantial restriction on the freedom of speech and of the press. Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom on expression, by making the individual the more reluctant to exercise it.
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> 361 U.S. at 150-51.

The Court went on to discuss constitutional principles now commonly referred to as the "chilling effect", the First Amendment overbreadth doctrine, First Amendment standing, and the void-for-vagueness doctrine. Then it turned to a significant example implicating freedom of association:

> Very much to the point here, where the question is the elimination of the mental element in an offense, is this Court's holding in Wieman v. Updegraff, 344 U.S. 183. There in an oath as to past freedom from membership in subversive organizations, exacted by a State as a qualification for public employment, was held to violate the Constitution in that it made no distinction between members who had, and those who had not, known of the organization's character. The Court said of the elimination of scienter in this context: 'To thus inhibit individual freedom of movement is to stifle the flow of democratic expession and controversy at one of its chief sources." Id. 344 U.S. at 191.
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> 361 U.S. at 151-52
> (emphasis added)

Smith is "[v]ery much to the point here." The application of RICO to obscenity through unknowing association with an enterprise damages the Constitution in incalculable ways. And, Smith is still good law. E.g., Hamling v. United States, 418 U.S. 87, 119-23, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

The RICO statute which makes it flatly "unlawful for any person employed by, or associated with, any enterprise [meaning, among other things, "any association, or group of individuals associated in fact", §943.461(3), Fla. Stat.] to conduct or participate, directly or indirectly, in such enterprise...." §943.462(3), Fla. Stat. This is a direct imposition of strict liability on the First Amendment right of association. The Supreme Court's decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," Kusper v. Pontikes, 414 U.S. 51, 57, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), that is "closely allied to freedom of speech, and a right which, like free speech, lies at the foundation of a free society". Shelton v. Tucker, 364 U.S. 479, 486, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). The elimination of scienter in matters dealing with First Amendment freedoms of speech and associaction, as Smith v. California recognized, "stifle[s] the flow of democratic expression and controversy at one of its chief sources." Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215 97 L.Ed.2d 216 (1952).

The social worth of the association is not at issue. The right to receive information and ideas regardless of their social worth is fundamental to our free society, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), and it is irrelevant whether these ideas are conventional or shared by the majority. Kingsley International Picture Corp. v. Regents of University of State of New York, 360 U.S. 684, 79 S.Ct. 1362, 13 L.Ed.2d 1512 (1959). The question before this court is whether our constitutional right of association can be threatened by a statute which imposes strict criminal liability by eliminating the vital element of mens rea and scienter.

This conspicuous deliberate omission of intent from the charging statute denies defendants the specificity required when a government is attempting to regulate an area of fundamental rights. Of course, the State can argue for regulating an area such as "racketeering", but a State's interest . . . however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the . . . First Amendment." Wisconsin v. Yoder, 406 U.S. 205, 214, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The rights of association have consistently been upheld as overriding various claimed governmental interests. See NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (19670.

The predicate crime charged herein compounds the problem. Obscenity is a unique predicate in that it is the only included area that involves behavior presumptively protected by the First Amendment. And, the Constitution demands more "sensitive tools" than the Legislature has furnished:

> ...[T]he line between speech unconditionally guaranteed and speech which may be legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitmate speech calls for . . . sensitive tools. . . ." Speiser v. Randall, 357 U.S. 513, 525. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.
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> Marcus v. Property Search Warrant, 367 U.S. 717, 731, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) (footnote omitted.)

The State's inclusion of obscenity in the RICO net is an exercise of the State's power to regulate obscenity. This State regulation of obscenity must "conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity by a dim and uncertain line." Bantam Books v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1964). By the refusal of the Legislature to include the elements of scienter and mens rea, it has shirked this constitutionally imposed obligation. Rather, the Legislature has bludgeoned speech, press and association by the heavy-handed application of strict RICO liability here.

The pronounced difference between obscenity and the other predicate crimes listed under RICO is suggested by the Court where, in the context of a pattern of clear and continuous harrassment by the government, it said:

> The courts have consistently recognized that bookstores, theaters and other establishments presumptively under the protection of the First Amendment are not to be subjected to "police raids" or "closed down" and "padlocked" as common nuisances, such as premises used for gambling, prostitution, or other unlawful activities.
>
> 440 F.Supp. at 944
> (emphasis is original)
> (citations omitted)

If this Court were to deem the present statute valid without the existence of the requisite elements of mens rea and scienter, it would be categorizing obscenity with cases totally alien to the protection of First Amendment rights. A brief overview of those cases in which the court has dispensed with mens rea and scienter would indicate that the overwhelming public interest involved outweighted constitutional safeguards. No such public interest exists in the present case that could not be adequately served by requiring protection for the defendants as well as the State. Exceptions to the requirements are within areas involving activities affecting public health, safety and welfare. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). They are primarily dealing with so-called "regulatory" crime statutes. These laws, in

the main, either impose petty penalties, see Tenement House Department v. McDevitt, 215 N.Y. 160, 109 N.E. 88 (1915), or reach only those on whom a high standard of care has been imposed. United States v. Park, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). See United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922).

The present statute is within neither of the preceding categories. It imposes no misdemeanor penalty, but rather a first degree felony (as well as a civil penalty which includes forfeiture). Additionally, RICO does not fit the category of legislation which imposes strict liability because of the public interest, as in the area of food distributors. In Dotterweich v. United States, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943), the Court looked to the purposes of the statute which imposed strict liability on food distributors, and noted that they "touch phases of the lives and health of the people, which, in the circumstances of modern industrialism, are largely beyond self-protection." Nonetheless, even in these areas of great public interest, the courts in Park and Dotterweich specified that the statute was to reach only those in a position of responsibility. The RICO statute on the other hand, makes no such distinction between those in a position of responsibility and those who might be unaware, although associcated with, the activities of an enterprise. Cf., United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

The state's ability to convict without proof of knowledge or intent has been limited to those areas where the penalties are light and there is overwhelming public interest. To apply this doctrine to the present case, which involves First Amendment rights and a severe penalty, would be wholly contrary to fundamental principles of our law--however high the social objectives of RICO and regulating obscenity may be. The alleged wholesale promotion enterprise cannot be such a threat to public safety and welfare that all our fundamental principles of law must be discarded.

To punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because ignorant and unintended conduct does not mark the actor as one who needs to be subjected to the stigma of a criminal conviction, in this case, as a "racketeer", without being morally blameworthy as one. Consequently, on either a preventive or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea. See Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct. Rev. 107 (1962).*

The constitutional defect in the statutory scheme cannot be patched by judicial construction, In Cohen v. State, 125 So.2d 560, 562-63 (Fla. 1961) the Court was able to construe the obscenity statute there to include the element of scienter and thus to uphold the validity of the statute. In the case at hand, however, the Legislature plainly chose to exclude all considerations of criminal intent from Subsection (3) of the

RICO crimes section. Therefore, judicial reconstruction would not only invade the province of the Lesislative generally but also directly "frustrate the true legislative intent." Brown v. State, 358 So.2d 16, 20 (Fla. 1978). Additionally, there is no statutory language to support a judicial interpretation adding new elements. See id. The appropriate judicial course is simply to invalidate the RICO statute--at least as hitched to prosecution of obscenity--and to leave the rewriting to the legislative branch where "more sensitive tools" can be fashioned for regulation of this Constitutionally safeguarded field. Id. at 21.

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*Incidentally, the knowledge and intent which should be required to establish a violation of RICO cannot be satisfied by merely providing the element of knowledge required by the predicate statute prohibiting wholesale promotion of obscenity. See United States v. Pope, 561 F.2d 663 (6th Cir. 1977); United States v. Fine, 413 F.Supp. 728 (W.D.Wis. 1976). The knowledge essential to the wholesale promotion of obscenity is limited to the obscene nature of the promoted materials or performances. Knowledge and intent under RICO, however, should focus upon the relationship of the actor to the enterprise.

ARGUMENT III

THE APPLICABLE STATUTE WHICH DEFINES AS OBSCENE EROTIC MATTER WHICH IS NOT OTHERWISE OBSCENE MERELY BECAUSE IT HAS BEEN COMMERCIALIZED MISREADS GINZBURG V. UNITED STATES, VIOLATES THE OBJECTIVE STANDARDS OF MILLER V. CALIFORNIA AND INFRINGES UPON FREEDOM OF SPEECH AND PRESS.

The definition of obscenity contained in §847.07(3), Florida Statutes (1977), violates the standards of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L Ed 2d 419 (1973), in that the statute imposes liability without regard to the obscenity of the materials. In Miller, the Supreme Court expressly limited and confined the permissible scope of state statutes designed to regulate obscene materials to exclude prosecution for sale of erotic materials "unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law . . ." 413 U.S. at 27. But in §847.07(3), the Legislature defines as obscene erotic materials which are "not otherwise obscene" merely because they are commercialized for the sake of their appeal to the prurient interest. This definition not only violates the concrete standards of Miller but also converts rules of evidence pertaining to pandering into a dangerous new variable definition for obscenity and, further, punishes commercial speech which is protected under our Constitutions, e.g., Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L Ed 2d 346 (1976).

In Miller v. California, supra, the Court noted "the somewhat tortured history" of its obscenity decisions, 413 U.S. at 20, and the "variety of views among the members of the Court unmatched in any other course of constitutional adjudiciation". Id. at 22. Its undertaking, however, was "to formulate standards more concrete than those in the past", id. at 20, and thus to limit and "confine" regulation to works which depict or describe sexual conduct specifically defined by the applicable state law. Id. at 24. Indeed, Mr. Chief Justice Burger heralded the decision in these terms: "But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." 413 U.S. at 29.

In replacing standards such as those articulated in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L Ed 2d 1498 (1957) and in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L Ed 2d 1 (1966), the Miller Court stated:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as

> a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, political, or scientific value." 413 U.S. at 23-24 (footnote omitted).

The Court further explained the basic guideline necessitating specific definition of the censored sexual conduct, giving concrete examples:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.
>
> 413 U.S. at 25.

See also, Jenkins v. Georgia, 418 U.S. 153, 160-61, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). Thus, according to Miller, the basic test of obscenity is the work itself.

In Section 847.07(2), Florida Statutes (1977), the test of obscenity is also the material itself and the statutory definition therein passed constitutional muster in State v. Aiuppa, 298 So.2d 391 (Fla. 1974). But the next subsection of the same section rejects such objective tests and posits an amorphous subjective standard as an alternative definition:

> "Material not otherwise obscene may be deemed obscene under this section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal." §847.07(3), Fla. Stat. (1977).

This is the antithesis of Miller.

Under this alternative standard otherwise constitutionally protected "erotica"*/ are deemed hard core pornography merely because a distributor sells them for their sex appeal. This "pandering" standard ignores the physical content of the work and its literary, artistic, political and scientific value to unleash a subjective chase for the true motive of the purveyor. Thus, such literary works as "Fanny Hill", see Memoirs v. Massachusetts, supra, and such motion pictures as "Carnal Knowledge", see Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L Ed 2d 646 (1974) are again open to censorship.

Because of the statute's focus on "commercial expoitation" authors, producers, and distributors interested in making a living will have to worry about titles and merchandising as much as about physical content. An otherwise constitutionally protected book treating of sexual love in a sensuous manner may be banned if it is entitled "The Joy of Sex". An otherwise constitutionally protected move having an erotic theme may become contraband if a theater marquee proclaims it "XXX rated". But cf. Erzonznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L Ed 2d 125 (1975). The examples can be multiplied without end. Sex appeal is an American way of advertising.

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*/ Webster's Third International Dictionary 722 (unabridged ed. 1971) defines "erotica" as "literary or artistic items having an erotic theme: esp: books treating of sexual love in a sensuous or voluptuous manner . . ."

The salient lanugage of §847.07(3), Fla. Stat. appears to have been lifted from the opinion of the United States Supreme Court in Ginzburg v. United States, 383 U.S. 467, 86 S.Ct. 942, 16 L Ed 2d 31 (1966). There the Court said that in reviewing Ralph Ginzburg's conviction for mailing obscene matters "we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal". 383 U.S. at 466 (footnote omitted). This language, snatched out of context, has unfortunately been engrafted upon the Florida Statutes.

Ginzburg actually held that in applying the now abandoned Roth standards, 383 U.S. at 465, 471, 474, evidence of pandering is "relevant in determining the ultimate question of obscenity", id. at 470, under the Roth test, id. at 470-471, if it is "presented as an aid to determining the question of obscenity", id. at 465-66, in "close cases", id. at 474, and thus "serves to resolve . . . ambiguity and doubt". Id. at 470. The Florida statutory definition rejected all of this qualifying language as well as the Court's most salient caveat:

> We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test. No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. Rather, the fact that each of these publi-

> cations was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of consitutionally protected matter.

383 U.S. at 474-75 (Emphasis added) (footnotes omitted). In other words, the Legislature misread Ginzburg by converting a rule of evidence into a new substantive definition as to what may be deemed obscene. Subsequent United States Supreme Court decisions bear out the significance of this crucial distinction.

In Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L Ed 2d 590 (1974), the trial occurred under Memoirs v. Massachusetts standards and the jury was instructed that in applying the test it could, "if it found the case to be close, also consider whether the materials had been pandered . . ." 418 U.S. at 130. The Supreme Court upheld the ensuing conviction on the basis of Ginzburg which was summarized as holding "that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied." Id. (emphasis added). Similarly, in Splawn v. California, 431 U.S. 595, 97 S.Ct. 1987, 52 L Ed 2d 606 (1977), the Court upheld a conviction in which the jury had been instructed pursuant to an evidence statute not creating a substantive offense, 431 U.S. at 600, that commercial exploitation for the sake of prurient appeal might be considered in determining the question whether the social importance

claimed for the material in question was real or just pretense and thus that (under the Memoirs test) the material was utterly without redeeming social importance. Id. at 597-98. These cases confirm that the Florida Legislature misapprended Ginzburg and hence devised an improper constitutional definition of obscenity which is not moored to any concrete test. Accordingly, the statute must be stricken as violative of the state and federal Constitutions and the indictment obtained thereunder dismissed. See Brown v. State, 358 So.2d 16 (Fla. 1978).

We do not stop here. Section 847.07(3) not only misinterprets Ginzburg but also wars with Miller v. California, supra. Since the statute was enacted, approved and filed by June 7, 1973, Ch. 73-120, Laws of Florida (1973), two weeks before the Supreme Court's landmark decision, the Legislature cannot be blamed. Nonetheless, Miller is persuasive that the Florida Courts, particularly in interpreting our State's own Constitution, should renounce (or carefully limit) Ginzburg.

The virtue of Miller v. California is the attempt to establish objective standards of obscenity overcoming the inherent difficulties of vagueness and overbreath in regulating such a subject. Although the Miller case involved a mass campaign of mailing unsolicited, highly pornographic, illustrated advertisements thrust by aggressive sales action upon "unwilling receipients", 413 U.S. at 18, the new standards announced by the Court ignored the inevitable temptation to condemn such

blatant pandering. Instead, the Court elected to give a concrete definition of obscenity. The Court delcared what it had done with a promise that §847.07(3) shatters:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commerical activities may bring prosecution.

413 U.S. at 27 (citations omitted).

It is ironic that Miller v. California standards ignore pandering but that §847.07(3) standards ignore Miller v. California.

It is more than ironic. It is a bad policy which sets loose every censor to probe the motives of every bookseller, which condemns works which are not obscene, and which then imposes upon our Courts the duty to enforce freedom of speech and press under hopelessly subjective standards.

We now are aware that commercial speech fully qualifies for constitutional protection. E.g., Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 765, 96 S.Ct. 1817, 48 L Ed 2d 346 (1976). In view of this and in view of the wisdom we find in Miller v. California, the Ginzburg principle of "variable obscenity", see Schauer, The Law of Obscenity 45 (1976), should not be tolerated any further. This Court is not free to write a new statute for the Legislature but, we respectfully submit, it is duty-bound to strike down the unconstitutional one now before it. See Brown v. State, 358

So.2d 16 (Fla. 1978); Stamler v. Willis, 415 F.2d 1365, 1369-70 (7th Cir. 1969), cert. denied, 399 U.S. 929, 90 S.Ct. 2331, 26 L Ed 2d 796 (1970). As the Court reminded us in Stamler, "[t]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government." Id.

CONCLUSION

For all of the above reasons Appellants would ask this Court to declare the Florida Rico Statute unconstitutional or in the alternative unconstitutional as applied in this indictment and prosecution.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing APPELLANTS CONSOLIDATED BRIEF has been deposited in the United States mail with proper postage thereon correctly addressed to Honorable Jim Smith, Attorney General of the State of Florida, The Capital Building, Tallahassee, Florida 32301.

This the 28th day of December, 1979.

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