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IN THE SUPREME COURT OF THE

STATE OF FLORIDA

STATE OF FLORIDA, ex rel., JOSE GARCIA-PEDROSA, as City Attorney of the City of Miami of the State of Florida,	:	
Petitioner,	:	
vs.	:	CASE NO.
FLORIDA LITERARY DISTRIBUTING CORPORATION, a Florida corporation, et al.,	:	
Respondents.	:	

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in Petitioner's Brief on Jurisdiction as true and accurate.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL THAT, IN A PROCEEDING FOR INJUNCTIVE RELIEF WHERE THERE IS NO RIGHT TO A JURY TRIAL, THE PLAINTIFF MUST ELICIT EXPERT TESTIMONY DEFINING CONTEMPORARY COMMUNITY STANDARDS OF OBSCENITY, DOES NOT CONFLICT WITH MARKS v. STATE, 262 So.2d 479 (Fla. 3d DCA 1972); MITCHUM v. STATE, 251 So.2d 298 (Fla. 1st DCA 1971); and COLLINS v. STATE BEVERAGE DEPT., 239 So.2d 613 (Fla. 1st DCA 1970)

In its Brief, Petitioner has improvidently phrased the issue as: "Whether the decision of the Third District conflicts with Marks v. State, 262 So.2d 479 (Fla. 3d DCA 1972); Mitchum v. State, 251 So.2d 298 (Fla. 1st DCA 1971); Collins v. State Beverage Dept., 293 So.2d 613 (Fla. 1st DCA 1970) as to whether a municipality must present expert testimony to prove that the material is obscene." (Petitioner's Brief, pgs. 3-4). (emphasis added). This is not accurate. In its Opinion, the Third District did not decide that expert testimony is required on the issue of obscenity vel non, but only that in a proceeding for injunctive relief where the issue is obcenity vel non, where there is no right to a jury trial, the plaintiff must elicit testimony

defining contemporary community standards of obscenity. (A.28-30). The decision of the Third District Court of Appeal does not conflict with the cases cited by Petitioner. Accordingly, this Court should decline to exercise jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv).

Initially, it should be noted that Petitioner relies, inter alia, on Marks v. State, 262 So.2d 479 (Fla. 3d DCA 1972), which itself cites the earlier two decisions of the First District Court of Appeal also relied on by Petitioner. Although Marks is a decision of the Third District Court of Appeal, following issuance of the Opinion in this case by the Third District on January 2, 1985 (A.28), Respondent failed to move for rehearing en banc "... on the ground that such consideration is necessary to maintain uniformity in the court's decisions." See, Fla.R.App.P. 9.331(c)(1). The very purpose of the aforesaid Rule is to first allow a District Court of Appeal the opportunity to rule on questions concerning uniformity of its own decisions and to implement Art. V, Section 3(b)(3) of the Florida Constitution, which confers jurisdiction on this Court to review decisions of District Courts of Appeal "... that expressly and directly [conflict] with a decision of another District Court of Appeal ..." (emphasis added). Having failed to move for rehearing en banc alleging conflict between Marks and the decision in this case, Petitioner should now be precluded from seeking to invoke the jurisdiction of this Court under Fla.R.App.P. 9.030(a)(2)(A)(iv) on the basis of conflict with the Marks decision.

In any event, the decision of the Third District in this case does not conflict, but rather is fully compatible with, Marks. The District Court relied on, inter alia, Golden Dolphin No. 2, Inc. v. State, Division of Alcoholic Beverages & Tobacco, 403 So.2d 1372 (Fla. 5th DCA 1981) (hereinafter "Golden Dolphin") for the proposition that in a non-criminal proceeding to determine obscenity vel non, where there is no right to trial by jury, the plaintiff has an affirmative obligation to elicit testimony defining contemporary community standards of obscenity. (A.28-29). Golden Dolphin clearly applies in such non-criminal situations (such as the instant case) where there is no right to a trial by jury. On its face, Marks was a criminal case in which the Defendant therein obviously waived his right to trial by jury, thereby allowing the trial court to determine the issues of fact. Marks at 480. The Marks case thereby falls within the exception, expressly enunciated in Golden Dolphin, that "if the defendant waives his right to a jury and is tried by a judge, it is logically arguable that such defendant cannot complain that the judge is unrepresentative of the community." Golden Dolphin at 1374. Accordingly, there is no incompatibility whatsoever between Marks and Golden Dolphin, which was relied on by the District Court.

Mitchum v. State, 251 So.2d 298 (Fla. 1st DCA 1971) and Collins v. State Beverage Dept., 239 So.2d 613 (Fla. 1st DCA 1970), do not provide a basis for the exercise of this Court's jurisdiction. First, both cases (which

espouse the concept of "autoptical" obscenity) precede the landmark decision of the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), which established constitutional standards for the determination of obscenity (including the concept of "contemporary community standards") and, therefore, retain little practical viability. Secondly, both cases appear to deal with the issue of whether expert testimony is required on the ultimate issue of obscenity vel non. Respondent made no such claim in the court below nor, as noted previously, did the District Court's Opinion in any way conclude that expert testimony on the issue of obscenity vel non is required. Accordingly, Mitchum and Collins do not provide a basis for the exercise of "conflict" jurisdiction by this Court.

CONCLUSION

For the reasons and on the basis of the law and other authorities set forth herein, Respondent respectfully requests this Honorable Court to decline to exercise discretionary jurisdiction in this cause.

Respectfully submitted,

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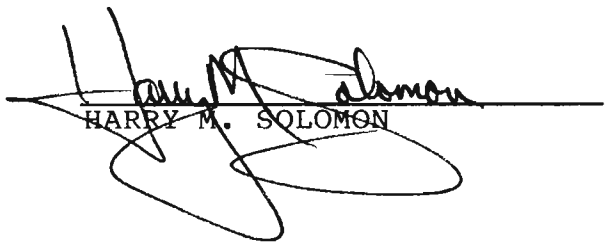
HARRY M. SOLOMON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed, postage pre-paid, this 14 day of February, 1985 to Gisela Cardonne, Esq. Assistant City Attorney, City Attorney's Office, 169 E. Flagler Street, Suite 1101, Miami, Florida 33131.



HARRY M. SOLOMON