O/a 11-5-85

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.

FLORIDA LITERARY DISTRIBUTING CORPORATION, a Florida corporation, et al.,

Respondents.

CASE NO. 66,573

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS continued

STATEMENT OF THE CASE AND FACTS

Respondent accepts the "Statement of the Facts and Case" found in Petitioner's Brief on The Merits (inadvertently styled City of Miami's Brief on Jurisdiction) insofar as it sets forth matters found in the Record of the Courts below. However, the reference by Petitioner to the Directory of Florida Judges, 1985 (Petitioner's Brief, page 1) is improper, in that this information was never presented to, or considered by, any of the courts below, is absolutely outside the Record, and is irrelevant to the facts at issue herein, and the history of this case.[1]/

SUMMARY OF THE ARGUMENT

In Florida Literary Distributing Corp. v. State, 460 So.2d 1028, 1029 (Fla. 3d DCA 1985), the District Court of Appeal, citing Golden Dolphin No. 2, Inc. v. State, Division of Alcoholic Beverages & Tobacco, 403 So.2d 1372 (Fla. 5th DCA 1981), held that in a civil proceeding for injunctive relief, where the ultimate issue to be determined is obscenity vel non "[t]he presentation of expert testimony defining contemporary community standards is essential where no right to a jury trial exists." The holdings of the Fifth District Court of Appeal in Golden Dolphin and the Third District Court of Appeal in Florida Literary are attempts to

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1/ The correct citation of the Opinion of the Third District Court of Appeal is 460 So.2d 1028 (Fla. 3d DCA 1985).

apply the "contemporary community standards" aspect of the landmark decision of the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), which emphasizes the importance of a jury trial to a fair determination of community standards, to civil cases where no right to a jury trial exists. The holdings of the Third District in Florida Literary, and the Fifth District in Golden Dolphin, recognize the fact that while an accurate determination of contemporary community standards inheres in a jury's verdict, since the jury is in effect a cross-section of the community, there is no effective means of ensuring that a judge, sitting as an individual trier of fact, can determine and apply contemporary community standards. Nor, in the absence of any rules or standard to guide the trier of fact, can an appellate court undertake meaningful appellate review of the lower court's actions and assess whether the lower court "... has properly identified the relevant community standards ...". Florida Literary Distributing Corp. at 1029, quoting United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 n.7 (9th Cir. 1977).

The basis of Petitioner's position before this Court is the unsupportable assertion that sitting judges are somehow automatically equipped to ascertain the community standards of the areas in which they sit and apply those

standards. This assertion is, on its face, both illogical and unsound and was rejected by the Fifth District in the Golden Dolphin case and by the Third District in this case. Acceptance of Petitioner's arguments by this Court would result in there being virtually no standard for determining and applying the contemporary community standard aspect of Miller v. California in a civil non-jury setting, and would lead to vagueness and uncertainty in the law. Such a holding would also be contrary to legislative intent, since the Florida Legislature has adopted the Miller test in Florida. Fla. Stat. 847.011(11). The Florida cases relied upon by Petitioner for reversal are decisions of District Courts of Appeal (including the Third District) which all preceded the decision of the United States Supreme Court in Miller v. California. Those cases, which embrace the concept of "autoptical obscenity", retain little or no viability in light of Miller.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT IN A PROCEEDING FOR INJUNCTIVE RELIEF, WHERE THE ULTIMATE ISSUE IS OBSCENITY VEL NON, AND WHERE THERE IS NO RIGHT TO A JURY TRIAL, THE PLAINTIFF MUST ELICIT, AS PART OF ITS BURDEN OF PROOF, EXPERT TESTIMONY DEFINING CONTEMPORARY COMMUNITY STANDARDS OF OBSCENITY

In the 1973 case of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, the United States Supreme Court defined the test for obscenity as follows:

> 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 prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (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, artistic, political, or scientific value.
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> 413 U.S. at 24, 93 S.Ct. 2615.

The Miller test for obscenity, which sets forth minimum constitutional requirements, has been adopted in Florida. Rhodes v. State, 283 So.2d 351 (Fla. 1973). See, also, Section 847.011(11) Florida Statutes.

In commenting on the rationale behind the "contemporary community standards" aspect of the test for obscenity

(i.e. subparagraph (a) of the Miller test), the Supreme Court later noted:

> As the Court made clear in Mishkin v. New York, 383 U.S., at 508-509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one. See Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311. Cf. the now discredited test in Regina v. Hicklin, [1868] L.R. 3 Q.B. 360. We hold that the requirement that the jury evaluate the materials with reference to 'contemporary standards of the State of California' serves this protective purpose and is constitutionally adequate. (Footnote omitted).

Id. 413 U.S. 33-34, 93 S.Ct. at 2620.

It is therefore clear that, in promulgating a minimum constitutional test for obscenity, the Supreme Court emphasized the requirement of a jury, in order to insure that a determination of the obscenity vel non of the materials in question be in fact determined by "the average person, applying contemporary community standards". Miller v. California, 413 U.S. 24, 93 S.Ct. at 2615. See, also, Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311 (1957).

In the two actions for injunctive relief in the courts below, Respondent had no right to a trial by jury. For Adults Only, Inc. v. Gerstein, 257 So.2d 912 (Fla. 3d DCA 1972), disapproved on other grounds; Ladoga Canning Corp. v. McKenzie, 370 So.2d 1137, 1140 (Fla. 1979); see, also, Florida Literary Distributing Corp. v. State, 460 So.2d 1028, 1029 (Fla. 3d DCA 1985) (Jorgenson, J. concurring). For this

reason, Respondent argued, and the District Court of Appeal agreed, that in a non-criminal, non-jury proceeding for injunctive relief, in order for Petitioner to have met its burden of showing its entitlement to relief by a preponderance of the evidence, it was incumbent upon Petitioner to affirmatively submit to the trier of fact evidence of the contemporary community standards of Dade County, Florida.

In its Brief on the Merits submitted to this Court (Petitioner's Brief, pgs. 4-6), Petitioner relies on several previous cases from the Third and First District Courts of Appeal, including 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., 239 So.2d 613 (Fla. 1st DCA 1970). Petitioner complains that the District Court "never addressed or distinguished" these cases. (Petitioner's Brief, p.4). 2/ Significantly, virtually every State case relied upon by Petitioner for reversal precedes the landmark ruling by the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). In view of the holding of Miller, which underscores the importance of a jury to an appropriate determination of contemporary commun-

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2/ Putting aside, for the moment, the substantive applicability of these cases, at least insofar as Petitioner's references to previous cases of the Third District Court of Appeal are concerned (Marks v. State, 262 So.2d 479 [Fla. 3d DCA 1972], Art Theatre, Inc. v. State, 260 So.2d 267 [Fla. 3d DCA 1972]), United Theatre of Florida, Inc. v. State, 259 So.2d 210 [Fla. 3d DCA 1972] vacated on other grounds 419 U.S. 1028, 95 S.Ct. 510 (1974))(Petitioner's Brief, pgs. 4-6), any sympathy for this position should be tempered by Petitioner's failure to comply with the requirements of Fla.R.App.9.331(c)(1), pertaining to rehearings en banc.

ity standards, the cases relied on by Petitioner, which espouse the concept of "autoptical" obscenity, have become legal anachronisms. 3/

Nor are the principles set forth in Mitchum v. State, 251 So.2d 298 (Fla. 1st DCA 1971) and Collins v. State Beverage Department, 239 So.2d 613 (Fla. 1st DCA 1970) (also pre-Miller cases), applicable to this case. Respondent has never contended, nor did the District Court of Appeal hold, that expert testimony is required on the ultimate issue of obscenity vel non. Rather, it is Respondent's contention, espoused by the District Court of Appeal, that in an action to determine obscenity vel non, where there is no right to a jury trial, expert testimony is required on one aspect of the test for obscenity, to-wit: contemporary community standards. The basis of the District Court's holding is the rather logical conclusion that while a proper application of contemporary community standards inheres in a jury verdict (since a jury is a crosssection of the community), it is impossible to determine whether an individual trier of fact (such as a judge) possesses the same ability to discern those standards. If the nature of contemporary community standards consisted of nothing more than the personal opinion of each trier of fact in the State of Florida, which is Petitioner's position underlying its entire presentation in this case, the

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3/ Additionally, Marks v. State, 262 So.2d 479 (Fla. 3d DCA 1972) was a criminal case in which the right to trial by jury was obviously waived. Cf. Golden Dolphin No. 2, Inc. v. State, Division of Alcoholic Beverages & Tobacco, 403 So.2d 1372, 1374 (Fla. 5th DCA 1981).

"standard" would in fact be no standard at all. The "law" would be no law at all, but, rather, anarchy. 4/

In reaching its decision in this case, the District Court of Appeal relied on Golden Dolphin No. 2, Inc. v. State of Florida, Division of Alcoholic Beverages & Tobacco, 403 So.2d 1372 (Fla. 5th DCA 1981). Golden Dolphin is the only Florida case involving a civil action for injunctive relief, whether there was no right to a trial by jury, to be decided following the decision of the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). The Golden Dolphin case involved a proceeding to revoke a beverage license brought by the Division of Alcoholic Beverages & Tobacco.

4/ The District Court of Appeal appropriately noted that:

> While it may be said that the trier of fact will know obscenity when he sees it (to paraphrase Justice Stewart's concurrence in Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), how exactly can an appellate court determine if he has properly identified the relevant community standards? See concurrence in part and dissent in part of Justice Stevens in Marks v. United States, 430 U.S. 188, 198 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).
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> Florida Literary Distributing Corp. v. State at 1029, quoting United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 n.7 (9th Cir. 1977).

Respondent takes strong exception (as did the District Court of Appeal) to the unsupportable assertion by Petitioner that contemporary community standards are "... certainly within the knowledge of a sitting Circuit Court Judge ..." (Petitioner's Brief, p.7).

The Golden Dolphin had been charged, inter alia, with allowing one of its employees to perform an obscene show. The case was heard administratively by a hearing officer who, at the conclusion of the evidence, found that the Golden Dolphin had committed the conduct alleged. On appeal, the Golden Dolphin argued "... that since there was no evidence submitted to the hearing officer as to the contemporary community standards of the area, there was insufficient evidence to support a finding that the dance was obscene." Id. at 1374.

In agreeing with the contention of the Golden Dolphin that there was insufficient evidence to support the hearing officer's finding of obscenity due to a failure to affirmatively elicit testimony of contemporary community standards, the District Court of Appeal held:

> Both the United States Supreme Court and the Florida Legislature have declared that a decision as to whether something is obscene must be made with regard to community standards. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Section 847.011(11), Florida Statutes (1977).
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> The decision as to what are the community standards must come from either the prior knowledge of the trier of fact or through knowledgeable witnesses. United States v. 2,200 Paper Back Books, 565 F.2d 566 (9th Cir. 1977). This decision usually arises in the context of a criminal trial where the defendant exercises his right to a jury trial. The jury is supposed to be a cross-section of the community and thus knowledgeable of the community standards. Therefore, independent testimony is not necessary to enable a jury to judge the obscenity of material which has been placed into evidence. Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). However, such independent testimony may be presented if a party so desires.

> If a 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. But if that judge affirmatively asserts his incapacity to discern community standards in the absence of evidence thereof, then it would be incumbent upon the state to present such evidence at trial. See United States v. 2,200 Paper Back Books, 565 F.2d 566 (9th Cir. 1977).
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> In the case at hand, the proceeding was a civil administrative hearing and, therefore, there was no right to a jury trial. Robins v. Florida Real Estate Commission, 162 So.2d 535 (FLa. 3d DCA 1964); 1 Fla. Jur. 2d Administrative Law § 64 (1977). No opportunity for a jury trial was provided. Instead, the Golden Dolphin was tried by a hearing officer, and no evidence was presented on the subject of contemporary community standards. With the case in this posture, the Division failed to prove that the show was obscene.
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> Id.

The rationale of Golden Dolphin is clearly applicable to the instant case. In this case, as in Golden Dolphin, there was no right to a jury trial to ensure compliance with the Miller requirement that a determination of obscenity be made by "the average person, applying contemporary community standards". Since counsel for Respondent had virtually no way of ascertaining whether the judges in these cases were in fact "the average person"; whether they were able to hypothesize the views of the so-called average person; or whether they were aware of the current contemporary community standards of Dade County, Florida, Respondent's

counsel was not able to engage in effective cross-examination and defend his client's position against the relief sought. Indeed, while in a criminal setting, counsel has the right to participate in the selection of a jury, in cases such as this one, counsel may neither select the judge, nor cross-examine what is in the judge's mind! [5]

Contrary to Petitioner's assertion (Petitioner's Brief, p.9), Golden Dolphin does not stand for the proposition that evidence of contemporary community standards must only be elicited by a plaintiff if there is an affirmative assertion by the trier of fact of his inability to discern those standards. A careful reading of the Golden Dolphin opinion makes it clear that in a non-criminal proceeding for injunctive relief where the ultimate issue is obscenity vel non, and where there is no right to a jury trial, such an

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[5] In its Brief on the Merits, Petitioner alleges that the two trial judges involved in these cases "... [were] aware of the standards which prevail in Dade County. There was no attempt by respondents to show otherwise." (Petitioner's Brief, p.10). This is a misrepresentation of the Record. Indeed, Judge Levy expressly declined Respondent's counsel's request to indicate whether he had sufficient knowledge of the contemporary community standards of Dade County, Florida to be able to determine the issue of the obscenity vel non of the publications in question. (Tr. II, 53-61). Judge Levy informed counsel for Respondent that the first time this fact would be divulged to counsel would be in the final judgment. (Tr. II, 53-61). Judge Levy's position in this matter is a perfect example of what is likely to result in the courts of this State if this Court accepts Petitioner's position and allows each individual trier of fact to arbitrarily determine, without any standard, and without any possibility for meaningful appellate review, the concept of contemporary community standards.

affirmative assertion of inability to discern community standards is not required. Nowhere in the majority opinion in Golden Dolphin is it stated that the hearing officer in that case indicated his inability to discern community standards. Secondly, the very basis of the dissent by Judge Sharp was that there had been no showing by the trier of fact or the defense that there was unawareness by the former of the applicable community standards. Id. at 1374- 1375. Accordingly, Golden Dolphin stands for the proposition that in a non-criminal, non-jury setting, the plaintiff has an affirmative obligation to elicit, as an element of his burden of proof and as a matter of law, testimony establishing the contemporary community standards of the area, in order to allow the trier of fact to determine whether the materials in question are obscene within the meaning of those standards. The decision of the Fifth District Court of Appeal in Golden Dolphin is legally sound and was correctly adopted and implemented by the Third District Court of Appeal in this case.

In its Brief on the Merits, Petitioner relies heavily, in support of its assertion that it met its burden of proof in the lower court, on the testimony of the police officers "... that they believed the materials to be obscene ..." (Petitioner's Brief, p.7), even though "... their testi-

mony was not introduced as that of experts ..." (Petitioner's Brief, p.8). [6]/

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973) sets forth the constitutional test for obscenity which has been adopted by the Legislature of the State of Florida. Fla. Stat. 847.011 (11). Insofar as the test focuses on, and includes, the concept of contemporary community standards, the United States Supreme Court has stressed the requirement of a jury. Id. 413 U.S. 33-34, 93 S.Ct. at 2620. The decision of the Court in Golden Dolphin implements and applies the contemporary community standard aspect of the Miller test in a civil action where there is no right to a jury trial,

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[6]/ Only one police officer, Officer Cheney, testified on this subject. (Tr.I, 9-10; Tr.II, 11-20). This testimony was vociferously objected to by counsel for Respondent in both proceedings. (Tr.I, 9-10; Tr.II, 11-20). If the testimony was not being offered as expert testimony, it is clear that the witness, having neither been qualified nor offered as an expert, had no right to offer an opinion on the issue of obscenity vel non, or upon any issue to be determined, for that matter. Cf. Fla. Stat. 90.701, 90.702. This was among other things, the basis for counsel's objections before the lower court. (Tr.I, 9-10; Tr.II, 11-20). The testimony was improper as having called for the conclusion of a lay witness and was improperly considered. Cf. Felton v. City of Pensacola, 200 So.2d 842 (Fla. 1st DCA 1967) ("... procedure used ... in which the police officer merely used his 'own good judgment' in determining whether the publications were obscene, clearly contravened the guarantee of freedom of speech and the press in the First Amendment to the United States Constitution and the guarantee of due process of law in the Fourteenth Amendment." Id. at 845 holding (affirming finding of obscenity) reversed on other grounds Felton v. City of Pensacola, 390 U.S. 340, 88 S.Ct. 1098 (1968)). In any event, this "testimony" of Officer Cheney, who at the time of the hearing in the first action, had worked in this field for one year and four months (Tr.I, 11) and at the time of the second action, for one year and six months (Tr.II, 20) was hardly competent on the subject of contemporary community standards, or any other aspect of the issue of obscenity vel non, to satisfy Petitioner's burden of proof.

and effectuates the intention of the Florida Legislature. Petitioner's position before this Court pays only lip service to that test, because it invites each judge to determine the nature of contemporary community standards in a given community with no guidance at all, nor any means of reviewing the appropriateness and legality of the lower court's rulings. Such a position invites only vagueness and chaos in the law, and should not be an acceptable standard to this Court in defining and implementing the law of this State. Accordingly, the decision of the Third District Court of Appeal, which likewise applies Miller and Fla. Stat. 847.011(11) by requiring "[t]he presentation of expert testimony defining contemporary community standards ... in cases where no right to a jury trial exists" (Florida Literary Distributing Corp. at 1029, citing Golden Dolphin) is sound both in logic and in law and should be affirmed. 7/

7/ To hold otherwise would be tantamount to judicially crafting a new category of fact which a trial judge may "judicially notice". "Contemporary community standards" in contested litigation are clearly facts subject to sharp dispute, and difficult to determine. Cf. Fla. Stat. §90.202(12).

CONCLUSION

For the reasons and on the basis of the law and other authorities set forth herein, Respondent respectfully requests this Honorable Court to affirm the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was mailed, postage prepaid, this 12th day of July, 1985 to Gisela Cardonne, Esq. Deputy City Attorney, City of Miami Law Department, 169 E. Flagler Street, Suite 1101, Miami, Florida 33131.

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HARRY M. SOLOMON