IN THE SUPREME COURT OF FLORIDA

TOMMY LYNN STALL, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. 74,020
TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA and CMH ENTERPRISES, INC. Petitioners, v. STATE OF FLORIDA, Respondent.	Case No. 74,390

Discretionary Review of Decision of the
District Court of Appeal, Second District

BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae Video Software Dealers Association ("VSDA") is an international trade association for the home video industry. Its members are in the business of selling and renting video software -- generally in the form of cassettes -- for replay and viewing in the home. VSDA's regular membership consists of approximately 4,600 retailers and wholesalers, representing over 20,000 retail video stores. In addition, VSDA has an associate membership that

includes the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

Sale and rental of video cassettes for home viewing is a large and rapidly growing industry. Video cassettes have become a highly desirable and socially acceptable form of expression that gives individual consumers freedom to choose whatever they decide is suitable for viewing in the privacy of their homes. VSDA believes that the American people should be permitted to exercise this important personal freedom to the fullest. Each individual human being should be free to receive words or pictures of his or her own choosing, subject only to narrowly tailored governmental restrictions that are firmly grounded upon a compelling state interest.

The decision of the court below would leave personal freedom of thought and expression circumscribed by the prohibitions of an outdated obscenity law that violates basic principles of personal privacy -- principles that were incorporated in the Florida constitution by popular vote in 1980. VSDA thus believes that the decision is erroneous and files this brief as amicus curiae in support of the petitioners urging that it be reversed.

STATEMENT OF THE CASE AND OF THE FACTS

These consolidated appeals arise from a forty-seven count prosecution charging petitioners with numerous offenses under the Florida obscenity statute, Fla. Stat. Ann. § 877.011, and one offense under the Florida RICO statute. The predicate acts alleged for the RICO count are the alleged obscenity offenses. Most of the works that are alleged to be obscene in the instant case are "video tapes intended for use on home VCR players." Circuit Court Order of Dismissal, p.1.

The trial court, the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, dismissed the information because, inter alia, insofar as the information is based upon works offered for sale or rental and intended for home use, the conduct alleged is protected under the Florida privacy amendment. The court summarized its ruling on this point as follow:

> Article I, Section 23 of the Florida Constitution extends the right of privacy from the Federal Constitution articulated in Stanley, supra, protecting private possession of adult sexually explicit materials, to allow consenting adults to acquire and view such materials without regard to whether those materials might be violative of F.S. 847.011.

Circuit Court Order of Dismissal, p. 12.

On appeal, the District Court of Appeal, Second District, reversed. State v. Long, 544 So. 2d 219 (Fla. 2d DCA 1989). With respect to the trial court's holding under

the Florida privacy amendment, the court of appeals reasoned as follows:

> We . . . need not decide whether the state established, or even whether the trial court gave the state an adequate opportunity to establish, a compelling state interest. Although a compelling state interest is the appropriate standard for assessing a claim of an unconstitutional intrusion of one's right of privacy, before this right attaches and the standard can be applied, a reasonable expectation of privacy must exist. . . . We find that the appellees' customers do not have a reasonable expectation of privacy while acquiring obscene materials at a public commercial establishment . . . .

Id., at 222-223.

This Court accepted jurisdiction of these cases on October 10, 1989.

SUMMARY OF ARGUMENT

The Florida obscenity law intrudes into an area of personal decisionmaking that is protected by the Florida privacy amendment of 1980. The right of adults to decide what books to read and what films to watch in the privacy of their own homes is a basic right of personal autonomy. As the Supreme Court of Hawaii recently held, this right necessitates "a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless." State v. Kam, 748 F.2d 372, 380 (Haw. 1988). Since the State has shown no compelling state interest that can be said to be furthered by the Florida obscenity statute insofar as that statute prohibits adults

from acquiring video cassettes for viewing in their homes, that statute is unconstitutional under the privacy amendment of **1980.**

ARGUMENT

THE FLORIDA OBSCENITY STATUTE IS UNCONSTITUTIONAL UNDER ARTICLE 1, SECTION **23** OF THE FLORIDA CONSTITUTION BECAUSE IT IS A GOVERNMENTAL INTRUSION INTO THE PRIVATE LIVES OF NATURAL PERSONS THAT SERVES NO COMPELLING STATE INTEREST

Article 1, Section **23** of the Florida Constitution protects the private lives of natural persons from intrusion by the government. That section, which was ratified on November **4, 1980,** reads in pertinent part as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

Two important principles have emerged from the decisions of this Court under the **1980** amendment. First, "the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal constitution." In re T.W., **14** F.L.W. **531, 532** (Fla. Oct. **27, 1989);** Winfield v. Division of Pari-Mutuel Wagering **477** So.2d **544, 548** (Fla. **1985).** Second, governmental intrusions into the private lives of natural persons are constitutionally permissible only if they satisfy a "highly stringent standard," which was stated by this Court in Winfield as follows:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d at 547; ~~see also~~ In re T.W., 14 F.L.W. at 533.

The Florida obscenity statute has never been measured against a compelling state interest standard. Decisions upholding the constitutionality of that statute -- like decisions upholding the constitutionality of obscenity laws generally -- have followed the reasoning of the United States Supreme Court in Roth v. United States, 354 U.S. 476 (1957) that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Id. at 484; Tracey v. State, 130 So. 2d 605, 607 (Fla. 1961). As Professor Schauer, in his landmark treatise, has pointed out --

> [T]he Roth case remains the cornerstone of American obscenity law. By excluding obscenity, however defined, from the definition of speech, the Supreme Court established the theoretical basis for the continuing validity of obscenity laws without the necessity of entering the debate as to the effects of obscenity and without the necessity of modifying obscenity law to meet other changes in First Amendment theory.

F. Schauer, The Law of Obscenity (1979) at 39 (footnote omitted).

The 1980 privacy amendment to the Florida constitution requires that the Florida obscenity law be subjected to a constitutional test that has not been employed under the First Amendment to determine the constitutionality of obscenity laws. Because the obscenity law is a governmental intrusion into the private lives of natural persons, it can survive only if the State can demonstrate that the law "serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d at 547. The Florida obscenity law cannot satisfy this "highly stringent standard," In re T.W., 14 F.L.W. at 533, because it serves no interest that is sufficiently compelling to justify its intrusion into private lives.

A. Personal Decisionmaking As to What Books to Read and What Films to Watch Is An Important Part of the Private Lives of Natural Persons.

This Court has held that personal decisionmaking in areas that are central to the individual's well-being is protected by the Florida privacy amendment. See In re T.W., 14 F.L.W. 532 (1989) (woman's decision whether to continue her pregnancy); Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989) (refusal of blood transfusion that is necessary to sustain life). See also Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. 2d DCA), review denied, 492 So. 2d 1331 (Fla. 1986) (removal of nasogastric feeding tube from adult in

permanent vegetative state); In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984) (removal of life support system from brain-dead infant).

The court below overlooked this line of decisions in holding that the Florida obscenity law "does not infringe upon the privacy rights of the appellees' customers." State v. Long, 544 So. 2d 219, 223 (Fla. 2d DCA 1989). The court's holding is based upon a conclusion that no right of privacy is present because of its finding that "appellees' customers do not have a reasonable expectation of privacy while acquiring obscene materials at a public commercial establishment." Id. at 222-223.

The privacy interest in the instant case, however, is not the right to obtain video films in privacy -- a right that, contrary to the court below, has been recognized and recently given protection by federal law (18 U.S.C. § 2710) -- but the right of each person to decide for himself which books or films are appropriate to "satisfy his intellectual and emotional needs." Stanley v. Georgia, 394 U.S. 557, 565 (1969). This right is a part of "the essential concept of privacy [that] is deeply rooted in our nation's political and philosophical heritage." In re T.W., 14 F.L.W. at 532. That concept -- which this Court has held gives meaning to the 1980 privacy amendment -- was given perhaps its clearest articulation in the writings of Justice Brandeis, particularly in the following passage from his

dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

Id. at 478.

The freedom of speech clause in the First Amendment to the United States Constitution has been construed by the Supreme Court to preserve inviolate the individual's autonomy to decide what to read or observe in his own home -- even though the individual may choose to read or observe works that the Court has held beyond the protection afforded by that clause. Stanley v. Georgia, 394 U.S. 557 (1969). The ability of an individual to read whatever books or watch whatever films he chooses in order to "satisfy his intellectual and emotional needs in the privacy of his own home," id. at 563, thus is recognized as an important area of personal decisionmaking.

The State of Hawaii has adopted a constitutional privacy provision that is not materially different from Article 1, Section 23 of the Florida Constitution, as construed by this Court. The Hawaii provision declares that "[t]he right of the people to privacy is recognized and shall

not be infringed without the showing of a compelling state interest." Haw. Const. Art. I, S 6. The drafters of that provision explained its scope as follows:

> It gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy.

Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 at 674 (1980).

The Supreme Court of Hawaii, in State v. Kam, 748 P.2d 372 (Haw. 1988), reviewing a conviction of two adult bookstore clerks for selling obscene publications, addressed virtually the same question that is presented to this Court in the instant case -- whether the obscenity law violates a State constitutional privacy clause. The Supreme Court of Hawaii held the obscenity law unconstitutional. A crucial element in the court's reasoning was its conclusion that the "highly personal and intimate affairs of [a person's] life" that are protected under the privacy provision include the "personal decision ... to read or view pornographic material in the privacy of one's own home." State v. Kam, 748 P.2d at 378.

There is no reason to construe the Florida privacy amendment any narrower than the Hawaii provision. Decisions concerning the books or films that a person reads or watches are certainly within the area of personal decisionmaking that this Court has held are integral to the private lives of

natural persons under the Florida privacy amendment. It would mean nothing to recognize the "significance of man's spiritual nature, of his feelings and of his intellect," Olmstead v. United States, 277 U.S. at 478, or to protect persons "in their beliefs, their thoughts, their emotions and their sensations", id., if decisions concerning the words and pictures that a person may see are subject to governmental control. Accordingly, personal decisionmaking concerning these matters is a privacy interest protected by the Florida privacy provision.

B. The Florida Obscenity Statute Intrudes Upon Personal Decisionmaking As to What Books to Read and What Films to Watch.

The Florida obscenity law is a governmental intrusion into personal decisionmaking as to what books to read and what films to watch for the simple reason that it effectively takes the decisionmaking ability away from the individual. The obscenity law makes it a crime for anyone to supply an entire category of books and films to those who have a constitutional privacy right to read and watch them. The obscenity law thus intrudes into an area of personal decisionmaking in precisely the same fashion as a law that would prohibit physicians from performing abortions on minors without parental consent, a law that would require hospitals to provide blood transfusions necessary to sustain life or a law that would make it a crime to remove a life support

system from a brain dead infant. Each of these laws, while arguably leaving intact a theoretical privacy right to decide the personal matter in question, intrudes upon that right by prohibiting the cooperation of those needed to implement the decision, and each of these laws has been held unconstitutional under the Florida privacy provision. See In re T.W., 14 F.L.W. 531 (1989); Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984). These judicial holdings firmly establish that the government cannot constitutionally forbid the supply of an item or service needed for personal decisionmaking that is protected under the 1980 privacy amendment as part of a person's private life.

That principle governs the instant case. Personal decisionmaking concerning what books to read and films to watch in the privacy of the home is unconstitutionally circumscribed by the obscenity law forbidding all sale or rental of certain categories of works. As the Hawaii Supreme Court reasoned, "[s]ince a person has the right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless." State v. Kam, 748 P.2d at 380.

The court below, in reaching a contrary conclusion, appears to have relied to some extent upon decisions that have held that constitutional provisions protecting freedom

of expression are not offended by laws banning obscenity. State v. Long, 544 So. 2d at 222-223 (Fla. 2d DCA 1989). Those decisions, however, are beside the point.[1/] First, they were not decided under a compelling state interest standard, the standard that governs the instant cases. Second, freedom of expression clauses, in both the First Amendment to the United States Constitution and the Florida Constitution, protect individual privacy, but privacy is not their central concern. Those clauses were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957).

1/ The holdings of the United States Supreme Court to the effect that a person has no constitutional right to obtain materials that he has a constitutional right to read and possess have been roundly -- and persuasively -- criticized. See e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 86 (1973) (Brennan, J., dissenting); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting); United States v. Reidel, 402 U.S. 351, 360 (1971) (Marshall, J., dissenting). These criticisms were voiced most recently by Justice Stevens as follows in his dissenting opinion in Pope v. Illinois, 481 U.S. 497 (1987):

> The Court has adopted a restrictive reading of Stanley, opining that it has no implications to the criminalization of the sale or distribution of obscenity...But such a crabbed approach offends the overarching First Amendment principles discussed in Stanley, almost as much as it insults the citizenry by declaring its right to read and possess material which it may not legally obtain.

Id. at 518 (citations omitted).

In contrast to the constitutional protections of freedom of expression, the central purpose of the **1980** privacy amendment to the Florida constitution is to protect the private lives of individuals from governmental intrusion. The "unfettered exchange of ideas for the bringing about of political and social changes," Roth v. United States, **354** U.S. at **484,** may be viewed as only peripherally affected by laws that prohibit persons from acquiring sexually explicit works, especially if those works are regarded as having no serious political value. The privacy right to decide what to read and watch at home, however, is directly affected -- and seriously violated -- by such laws. Holdings by the United States Supreme Court, or this Court, under the free expression provisions of either the federal or state constitutions thus do not control the outcome of the instant case. It is the Florida privacy amendment that directly protects the area of decisionmaking that the obscenity laws restrict.

C. The Florida Obscenity Statute Does Not Serve a Compelling State Interest By the Least Intrusive Means.

An offense under the Florida obscenity law -- like obscenity offenses generally -- contains no element that requires the government to establish harm or injury. A work is "obscene" and thus prohibited based upon (1) its appeal to the prurient interest, (2) its offensiveness and **(3)** its lack

of serious literary, artistic, political or scientific value. Fla. Stat. Ann. § 877.001(7) (West Supp. 1989). The statutory description of the works prohibited does not disclose any interests that are intended to be furthered. If the ultimate purpose of obscenity laws is to elevate literary taste by preventing the publication of works that have no serious value, then obscenity laws can hardly be deemed to serve an interest that the State has any compulsion to address.

In order to sustain the obscenity law under the 1980 privacy amendment, the State must point to some serious public evil that obscene works would cause or at least contribute to. In fact, there is no such evil. The late Professor Harry Kalven, Jr., in his perceptive analysis of a whole range of First Amendment issues, identified the "possible evils of obscenity" as follows:

> If we put the problem of the child audience to one side, the possible evils of obscenity are at most four: (i) The material will move the audience to anti-social sexual action; (ii) the material will offend the sensibilities of many in the audience; (iii) the material will advocate or endorse improper doctrines of sexual behavior; and (iv) the material will inflame the imagination and excite, albeit privately, a sexual response from the body.

H. Kalven, A Worthy Tradition (1988) at 33. As Professor Kalven went on to observe, "these purported evils quickly reduce to a single one." Id.

> The first, although still voiced by occasional politicians and "decency" lobbies,

> lacks scientific support. The second may pose a problem for captive audiences, but obscenity regulation has been largely aimed at willing, indeed all too willing, audiences. The third, thematic obscenity, falls within the consensus regarding false doctrine; unsound ideas about *sex*, like unsound ideas about anything else, present an evil which we agree not to use the law to reduce.
>
> So we are left with the evil of exciting the sexual fantasies of adults....The question is whether this state interest is sufficient, in the case of consenting adults, to justify the solemn intervention of the law.

Id. at **33-34**

Neither the United States Supreme Court nor this Court has ever taken up this question. Since its **1957** decision in Roth v. United States, **354** U.S. **476**, the Supreme Court of the United States has held that obscenity is not protected by the First Amendment of the United States Constitution. The Roth holding, however, was based not upon any analysis of the supposed evils of obscenity or the interests that obscenity laws are supposed to further, but on purely historical considerations.2/

Although restrictions on other forms of speech are subject to a compelling state interest analysis,3/ neither

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2/ The Supreme Court of Oregon has recently taken issue with the United States Supreme Court's reading of the history of obscenity laws, as set forth in the Roth opinion, and has held obscenity laws unconstitutional under the free expression clause of the Oregon Bill of Rights adopted in **1857**. State v. Henry, **302** Or. 510, **732** P.2d **9** (Or. 1987).

3/ Erznoznick v. City of Jacksonville, 422 U.S. **205 (1975)** (striking down statute forbidding the showing of (continued..)

the United States Supreme Court nor the Florida courts have ever required that restrictions aimed solely at obscene materials be subject to a compelling interest analysis. Paris Adult Theatre I v. Slaton, 413 U.S. 48 (1973) (only legitimate interest required); United States v. Orito, 413 U.S. 139 (1973). And the Florida courts have not required a showing of any substantial interest in holding that obscenity is subject to regulation by the state. City of Miami v. Florida Literary Distrib., 486 So. 2d 569 (Fla.), Cert. Denied, 479 U.S. 872 (1986); Bowden v. State, 402 So. 2d 1173 (Fla. 1981); Sardiello v. State, 394 So. 2d 1016 (Fla. 1981); Ladoga Canning Corp. v. McKenzie, 370 So. 2d 1137 (Fla. 1979); First Amendment Found. of Florida v. State, 364 So. 2d 450 (Fla. 1978); State v. Kraham, 360 So. 2d 393 (Fla. 1978); Johnson v. State, 351 So. 2d 10 (Fla. 1978), appeal dismissed, 440 U.S. 941 (1979); Bucolo V. State, 303 So. 2d 329 (Fla. 1974); State v. Papp, 298 So. 2d 374 (Fla. 1974); State ex rel. Gerstein v. Walvick Theater Corp., 298 So. 2d 406 (Fla. 1974); State v. Aiuppa, 298 So. 2d 391 (Fla.), appeal dismissed, 419 U.S. 1081 (1974); Jones v. State, 293 So. 2d 33 (Fla. 1974); Rhodes v. State, 283 So. 2d 283 (Fla.

3/(...continued)
nonobscene nude movies at drive-in theaters because state could not show statute was necessary to serve a compelling interest); Cohen v. California, 403 U.S. 15 (1971) (profanity which is not obscene could not be restricted; Butler v. State of Michigan, 352 U.S. 380 (1957) (statute prohibiting sale of lewd materials not justified by compelling state interest).

1973); Mitchem v. State ex rel. Schuab, 250 So. 2d 883 (Fla. 1971); May v. Harper, 250 So. 2d 880 (Fla. 1971); State v. Reese, 222 So. 2d 732 (Fla. 1969); Tracey v. State, 130 So. 2d 605 (Fla. 1961).

The question framed by Professor Kalven -- whether "exciting the sexual fantasies of adults ... is sufficient, in the case of consenting adults, to justify the solemn intervention of the law" (Kalven, op cit. supra at 33) -- is squarely before this Court in the instant case. This case does not call into question the regulation of offensive public displays of sexually explicit materials, the showing of such materials to a captive audience or the sale of pornography to minors. The question is whether the state can show a compelling interest that is served by depriving consenting adults of the ability to acquire books and films that they wish to read or watch in the privacy of their homes. No such interest has been demonstrated. As Kalven concluded, because of the "absence of any compelling state interest in policing the sexual fantasies of adults" (Kalven, op. cit. supra at 53), not even the "narrowest concession to censorship" can be justified for consenting adults. Accordingly, under the Florida privacy amendment that was added to the Florida Constitution in 1980, the Florida obscenity law must be held unconstitutional.