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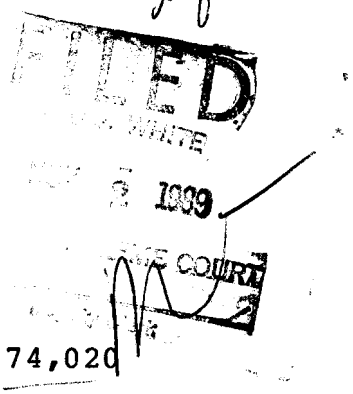

IN THE SUPREME COURT OF FLORIDA

TOMMIE LYNN STALL,

Petitioner,

vs. Case No. 74,020

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

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STATEMENT OF THE CASE

Ms. Stall and her co-defendants were charged in a 47-count information alleging RICO, hiring persons to distribute obscene materials, distribution of obscene movies, distribution of obscene magazines, distribution of obscene articles, possession of obscene movies with intent to sell or distribute, possession of obscene instruments with intent to sell or distribute, and possession of obscene magazines with intent to sell or distribute, in violation of section 847.011, Florida Statutes (1985); section 895.03, Florida Statutes (1985); and section 895.04, Florida Statutes (1985 and Supp. 1986). These activities allegedly occurred from September 12, 1985, to March 7, 1987 (R1-54). Several pretrial motions to dismiss were filed; and the trial court entered an order on January 8, 1988, granting the motion to dismiss (R57-221, 594-613). In its order the trial court declared section 847.011, Florida Statutes (1985), unconstitutional under both the United States and Florida Constitutions; found that the combined provisions of RICO and section 847.011, Florida Statutes (1985), have an unconstitutional chilling effect upon protected speech; and defined the reasonable man standard applicable to offenses involving obscene materials.

The State appealed this order to the Second District Court of Appeal on January 11, 1988; and the Second District Court of Appeal reversed the trial court on all three areas. Ms. Stall petitioned this court to review the Second District Court of

Appeal's order upholding the constitutionality of section 847.011, Florida Statutes (Supp. 1986) and section 895.02, Florida Statutes (1985) through section 895.04, Florida Statutes (1985). Review was granted on October 10, 1989.

STATEMENT OF THE FACTS

In support of their motions to dismiss, Petitioners in this case called two psychiatrists.[1]

Dr. Gary Michael watched five films which had been sent to him. He watched one in isolation, then two back to back, then the other two back to back later (R457). This covered a 5-to-7-day period (R458). Dr. Ainsworth stated a jury would not be able to watch 16 of these movies consecutively as they would experience burn-out. The more open-minded or liberal juror would become bored after the second film. The more conservative juror would experience disgust, anger, then numbness (R458, 459). Dr. Ainsworth indicated jurors would not find much value in these films. He further stated, however, that almost anybody would find parts of the films "patently offensive" or parts that "appeal to the prurient interest" (R460, 461). Furthermore, he stated there would be enough shocking things in the films that a Polk County jury would not be able to view the films objectively and a fair trial would be impossible (R461-462). In determining prurient interest, Dr. Ainsworth stated, as a physician, sexual activity is healthy as long as there was no physical injury to the parties. If there was destructive activity, that would be prurient. These movies, using that definition, did not appeal to prurient interest

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[1] The Statement of the Facts set forth by the Attorney General's office in the initial brief before the Second District Court of Appeal is basically complete. Undersigned counsel has basically resubmitted these same facts with a few minor changes or additions.

in the medical sense (R463). When questioned about psychological damage to the jurors from viewing the films, Dr. Ainsworth indicated persons with psychiatric histories and persons with strong religious histories or histories of depression would not be good candidates to view these films (R464). Dr. Ainsworth could not say if it was possible to eliminate such people from the jury noting that it was possible that a juror might try to cover up a psychological background that would interfere with that juror being fair and impartial (R464, 465). The doctor opined the defendants could get a fairer trial if the jurors had a long period of time over which to watch the numerous films (R465).

Dr. Ainsworth further testified that sexually explicit films are used in various forms of psychotherapy (R466). After defining artistic and literary value as a value which lives beyond the maker, the doctor indicated the films did not have traditional literary value, i.e., plot, story line, suspense, drama (R467-469). The witness stated the films had value in that they were an improvement over erotic movies of ten years ago. There was also a "kind of psychology lesson" in one of the movies (R469). Dr. Ainsworth's bottom-line opinion was it would be extremely difficult to seat a fair and impartial jury and extremely difficult for the jury to remain so after viewing 16 video tapes (R470).

On cross-examination, Dr. Ainsworth stated that for the most open-minded juror boredom would set in as the movies are repetitive. Some might observe scientific or artistic value at this stage, but others may turn themselves off and look at the

movies with glazed eyes. At that point they would not be seeing the movie at all (R471, 472). There really was no way, in the doctor's opinion, of knowing how a juror would react beforehand (R471, 472). Dr. Ainsworth stated an average, normal juror would be able to apply the standards for obscenity to these video tapes; however, there would be some exceptions with each film depending on the individual juror (R474).

Upon questioning by the court, Dr. Ainsworth indicated prospective jurors should be questioned concerning being offended by sexually explicit pictures. They should also be questioned on sexual attitudes, sexual crimes and religious beliefs (R474, 475). The questions should be designed to see if prospective jurors have prejudices on subjects covered in the films--for example, interracial sex (R475, 476).

When, asked by the prosecutor if the films appeal to one's prurient interest, Dr. Ainsworth answered by saying erotic interest. The doctor added he enjoyed one of the films; there were attractive, athletic actors. Dr. Ainsworth again stated he found some psychological factors in a film (R479-482). The witness several times changed prurient interest to sexual interest (R483). He stated the films do have scenes that would be shocking in isolation (R484). Dr. Ainsworth indicated a jury could be selected that would not be psychologically damaged by watching these movies (R486). The doctor stated it's possible to get a jury to apply the proper standards for obscenity if they did not have to watch so many tapes at one time (R487, 488).

Dr. Thomas McClane was also called by the defense. Dr. McClane testified he watched five (5) films over several days; this was due to time pressures and boredom (R490, 491). He stated it might be possible to seat a jury, but he had doubts (R492). The fact that the movies would be viewed in a group with strangers and both sexes would increase the discomfort factor (R493). The discomfort could be minimized by a more theater-like setting with the jurors separated by several seats (R494). The ideal would be to have several days between movies (R494). Dr. McClane identified three factors he believed would work against a fair trial: (1) the number of movies; (2) personal bias brought by each individual juror; and (3) problems involved with a mixed-sex-viewing of the films (R495). Dr. McClane also stated he did not believe there would be any psychological damage done to jurors who are reasonably normal psychologically by viewing these movies (R495, 496). The only practical way of screening potential jurors would be to ask the kind of pointed questions suggested by Dr. Ainsworth (R496). To the doctor's knowledge, none of these films had been used in psychotherapy, but similar type films are used for sexual counseling (R496, 497). The doctor stated these movies would appeal to prurient interest for someone who is obsessed with forms of sexuality (R497-499, 509, 520). The doctor testified some reasonable men and women could find artistic value in these films. Dr. McClane stated the defendants could possibly get a fair trial, but it would be difficult (R500, 517-518). In his opinion, however, he believed that the defendants probably could not receive

a fair trial (R501). On cross examination Dr. McClane stated that possible bias for or against the defendants might cancel out the prejudice, but this averaging out assumes the ideal truly representative jury--which is hardly ever achieved (R507, 508).

The State called as a witness, William George Rremper, a clinical psychologist practicing in Bartow (R524). Dr. Rremper viewed the five films within a week, two were viewed one day, a third two days later and then one each day subsequently (R525). Dr. Kremper also stated viewing the films in a darkened room would reduce self-consciousness (R537). The witness opined, in response to whether a jury viewing 16 sexual explicit films could enter a fair and impartial verdict, that the viewing of so many of these videos would tend to make what one believed to be uncommon more common, thus developing a more favorable bias for the defense (R526, 527). Dr. Hremper also stated there would be a certain segment of the population whose efforts to curtail such films would be strengthened by such viewing. Thus, it would be possible to get a fair trial (R527). In a typical jury-room setting, a juror would be self-conscious and anxious due to the type of materials being viewed and exposing one's reactions to the materials (R529, 530). The number of people traumatized from watching these films would be very small (R530). One of the questions potential jurors should be asked is how they feel about viewing hours of sexually explicit materials (R533-534). Additionally, they should be asked about past history of sexual abuse (R534-535). Prospective jurors should also be questioned concerning religious beliefs (R536). The

doctor stated films used in sexual therapy tend to be different from the ones involved here in that the former would display more caring, touching, etc. (R538). The film concerning incest would probably not be beneficial in a clinical setting and has the potential to be harmful. Those films showing sodomy could be used in a clinical setting (R539). When asked about serious artistic value, Dr. Kremper indicated the films had value to persons interested in eroticism but no moral value (R540-542). Although speculated that the average man would not find much in the way of artistic value (R544), he felt that the attractive participants made this a very highly individualized kind of judgment call (R540). The doctor further opined the average person would not have a prurient interest in the films, but many people would be offended (R544-547, 558, 559). The doctor did admit that an initially impartial juror may become biased after several days and several films (R550, 551).

On cross-examination, the doctor testified some individuals would be disgusted with parts of the films (R560). The potential would be there for prejudice against the makers, exhibitors, etc., of the movies (R560, 561). Dr. Kremper stated it is possible for a jury to set aside prejudices and fairly apply the obscenity standards, although it would be difficult (R562).

SUMMARY OF THE ARGUMENT

The following reasons justify the trial court's conclusion that Florida's obscenity statute and the RICO statute as it applies to obscenity is unconstitutional: (1) The statutes violate Florida's constitutional right to privacy. If one can possess obscene materials in one's own home, Florida has the right to protect the individual's right to acquire obscene materials; and the State has no compelling interests at stake to override that right. (2) The statute is vague in that it would apply to even "R" rated movies, the United States Supreme Court has been unable to set forth a bright line test of obscenity, and recent United States Supreme Court case law points out that the test for vagueness is the establishment of minimal guidelines to govern law enforcement--a test that Florida's statute does not meet. (3) Recent legislative changes in the statute have altered the standards to the obscenity test as set forth in United States Supreme Court decisions to the point where Florida's standards do not comply with the United States Supreme Court decisions. Florida's recent statute does not have the community standard in one of the prongs as required by United States Supreme Court decisions. This deletion is a fatal one to the statute. (4) The RICO statute reduces the level of scienter to that of strict liability in carrying obscene materials, and strict liability in place of actual knowledge of the content of obscene materials can never be the standard. (5) The excessive punishment that turns

a misdemeanor into a first-degree felony with mandatory prison time as required by the guidelines violates the cruel and unusual punishment provisions of the Eighth Amendment, United States Constitution. (6) Last but not least, a combination of the low level of scienter, the excessive punishment and the vague test all combine to have a chilling effect on the First Amendment inasmuch as it results in self-censorship,

The State also attacked the reasonable man ruling made by the trial court. If this case goes to trial, the petitioners have a right to call experts and lay persons to assist the jury in determining whether a work, as a whole, has a literary, artistic, scientific or political value to the reasonable man, Such testimony is necessary in that the average juror would not have such knowledge in all of these areas. Placing the burden on the State to prove that a work has no value is proper inasmuch as we are dealing with an objective standard. This burden is necessary in order to prevent an arbitrary enforcement of the law.

ARGUMENT

ISSUE I

DID THE SECOND DISTRICT COURT OF APPEAL ERR IN DECLARING SECTION 847.011, FLORIDA STATUTE, CONSTITUTIONAL?

Before Petitioner TOMMIE L. STALL begins her argument on this issue and the subsequent issues, it is to be noted that extensive motions with supporting case law were filed by Co-Petitioners' counsel in this case. These motions were adopted by Ms. Stall (R366) and she continues to so adopt these motions for the purpose of this brief. In addition, Ms. Stall adopts any and all arguments made by counsel for the co-petitioners in this case in their initial brief as they may apply to her case.

A. The Right to Privacy.

The State initially argued to the trial court and Second District Court of Appeal that the Petitioners--including Ms. Stall--haveno standing to claim the right to privacy as set forth in Article I, section 23, of the Florida Constitution. The Second District Court of Appeal considered the issue and held that the Petitioners did have standing:

> We recognize that constitutional rights are personal in nature and generally may not be asserted vicariously. See Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830(1973); Sanstrom v. Leader, 370 So.2d 3 (Fla. 1979). This restriction, however, is subject to limited exceptions when first amendment rights are involved and where individuals who are not parties to an action stand to lose by its outcome but have no effective avenue to preserve their rights. Broadrick. See also, Eisenstadt v. Baird, 405

> **U.S.** 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); NAACP v. Alabama, 357 **U.S.** 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). The concept of vicarious standing has been applied specifically in the right of privacy area to permit a party to assert the constitutional rights of another. **See** Eisenstadt; Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Florida courts have recognized this exception to the general rules of standing where enforcement of a challenged restriction would adversely affect the rights of individuals who are not parties to the lawsuit but have no effective avenue of preserving their rights themselves. See State v. Saiez, 489 So.2d 1125, 1227 n.2 (Fla. 1986); Higdon v. Metropolitan Dade County, 446 So.2d 203, 207 (Fla. 3d DCA 1984). Since section 841.011(1)(a) prohibits distribution of obscene materials, the customer whose privacy rights could possibly be violated by the statute are not subject to prosecution and, consequently, they have no effective avenue of preserving their rights. **See** Eisenstadt. In addition, enforcement of the statute will "materially impair" the ability of the appellees' customers to obtain the materials which the appellees are prohibited from distributing under section 847.011(1)(a). **See** Eisenstadt; Griswold. We, therefore, find that the appellees have standing to assert a right of privacy claim on behalf of their customers in this case.

State v. Long, 544 So.2d 219 at 221, 222 (Fla. 2d DCA 1989). In addition, Petitioner would point out that Eisenstadt was recently relied upon by the Supreme Court of Hawaii in State v. Kam, 748 P.2d 372 (Hawaii 1988). In **Kam** the court held that clerks at an adult bookstore had standing to assert privacy rights of their customers to purchase sexually explicit adult materials. Relying on Eisenstadt, **Kam** notes that the buyers of pornography are usually never charged and, therefore, cannot generally raise the privacy issue. The same reasoning applied in **Kam** was properly utilized in

this case by the Second District Court of Appeal.

Turning to the actual issue involving the right to privacy as set forth in this case, two issues arise: (1) does Article I, section 23, apply to the obscenity statute; and (2) if it does apply, does the State have a compelling interest to override the right to privacy. The Second District Court of Appeal held that Florida's Constitutional privacy provision did not apply because there was no expectation of privacy for customers acquiring allegedly obscene materials at a public commercial establishment such as the one where Ms. Stall worked at. The reasonable expectation of privacy question, however, should not be confused with the expectation of privacy used in deciding standing on motion to suppress cases. It is not the same privacy question that is used to determine whether or not the police can search your car, your home, your friend's car, your friend's home. The reasonable expectation of privacy for purposes of Article I, Section 23 of the Florida Constitution is much broader.

In Winfield v. Division of Pari-Mutual Waserins, 477 So.2d 544 (Fla. 1985), this Court first addressed the issue. Stating that the threshold question before section 23 can be applied is the existence of a reasonable expectation of privacy, this Court went on to define or delineate this expectation of privacy. Factually, the case dealt with financial institution records; and although the United States Supreme Court had refused to find such papers to be within the zone of privacy protected by the Fourth Amendment of the United States Constitution, this Court

found a legitimate expectation of privacy in financial institution records to exist. The difference in the two results was that the states, not the federal government, were to decide how and to what extent the right to privacy would be protected; and Florida, via section 23, had opted for more protection from governmental intrusion. "Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution." Id. at 548. This Court gave section 23 wide latitude, in accordance with the intent of its drafters, and applied this broad right to privacy to financial institution records.

In keeping with the Winfield opinion and this broad application of section 23, this court has recently issued two opinions applying section 23. In Re: TW, Case No. 74,143 (Fla. Oct. 5, 1989)[14 F.L.W. 497], dealt with statutory restrictions placed on a minor wishing to have an abortion. Noting that Florida has "its own express constitutional provision quaranteeing an independent right to privacy," this Court analyzed the abortion question under the Florida Constitution and did not reach the United States Constitutional standards. Id., 14 F.L.W. at 498. In looking at its prior applications of section 23, this Court had found the right applicable in a wide range of activities dealing with the public disclosure of personal matters (closure of court

proceedings and records, confidential donor information re AIDS-tainted blood, bar application questions re psychiatric counselling) and cases dealing with personal decisionmaking (refusal of blood transfusion, removal of life-support systems from the brain dead or those in a vegetable state). This Court then applied section 23 to the abortion question by stating: "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment." Id., 14 F.L.W. at 499.

In Shaktman v. State, Case No. 72-272 (Fla. Oct. 12, 1989)[14 F.L.W. 5221, this Court again applied section 23 to the use of pen registers. In reaching the conclusion that the right of privacy extended to pen registers, this Court stated:

> In Olmstead v. United States, 277 U.S. 438 (1928), Justice Brandeis wrote:
>
> > 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 (Brandeis, J., dissenting).
>
> Fifty-two years later, while legal scholars continued to debate whether the federal constitution provided express or

implied privacy protections, the people of Florida unequivocally declared for themselves a strong, clear, freestanding, and express right to privacy as a constitutional fundamental right. This provision was approved by the voters as article I, section 23 of the Florida Constitution, adopted in 1980, when the people exercised their sovereign power to amend the state's organic law.

This right ensures that individuals are able "to determine for themselves when, how and to what extent information about them is communicated to others." A. Westin, Privacy and Freedom 7 (1967). See also T. Emerson, The System of Freedom of Expression 548 (1970) (arguing that "the main thrust of any realistic system for the protection of privacy" must be the prevention of "outside persons from obtaining information about individuals seeking privacy"). One of its ultimate goals is to foster the independence and individualism which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent.

The right of privacy, assured to Florida's citizen, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest. In an opinion which predated the adoption of section 23, the First District aptly characterized the nature of this right:

> A fundamental aspect of personhood's integrity is the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.

Bryon, Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel. Schellenberg, 360 So.2d 83, 92 (Fla. 1st DCA 1978), quashed and remanded on other grounds, 379 So.2d 633 (Fla. 1980). Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over "majoritarian sentiment" and

> thus cannot be universally defined by consensus.
>
> The telephone numbers an individual dials or otherwise transmits represent personal information which, in most instances, the individual has no intention of communicating to a third party. This personal expectation is not defeated by the fact that the telephone company has that information. As the Supreme Court of Colorado noted:
>
> > The concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.. . .[I]t is somewhat idle to speak of assuming risks in a contexts where, as a practical matter, the telephone subscriber has no realistic alternative.
>
> People v. Sworleder, 666 P.2d 135, 141 (Colo. 1983)(citations omitted).
>
> We agree with the Third District That the privacy interests of article I, section 23 are implicated when the government gathers telephone number through the use of a pen register. See Winfield v. Division of Pari-Mutuel Waaerina, 477 So.2d 544, 548 (Fla. 1985). This gathering of private information clearly affects a matter within that zone of privacy.

Shaktman, 14 F.L.W. 523.

The most important things to note about these Florida Supreme Court cases are that section 23 is given a strong and wide interpretation and that the right to privacy is not a rigid little zone as that defined by the Fourth Amendment. It is not simply relegated to one's person, home or car. Instead it is a broader concept that extends to one's "decisions concerning marriage, procreation, contraception, family relationships and child rearing, and education." Winfield, 477 So.2d at 546. The section also

extends to one's interest "in avoiding the public disclosure of personal matters." Id. The right to be left alone is geared toward protecting one's thought, person and personal actions. Shaktman, 14 F.L.W. at 523; and it doesn't matter if the private information is known to others--such as the phone company. The important thing is that the individual has no intention of communicating this to another party.

Such an important and basic right is geared towards not only the tangible but the intangible. If one has the right to be left alone as to one's thoughts and personal action, this right should translate into the ability to view films with concepts that may or may not be obscene and to privately obtain these films.

The trial court's order in our case (R605, 606) and co-petitioners' Motion #1 to Dismiss the Information Grounded Upon the Underlying Statute's Violation of Florida's Constitutional Right to Privacy (R57-64), set forth the United States Supreme court history on the right to possess in one's own home obscene materials as permitted in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); but the denial of the right to acquire such materials as determined in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); and United States v. Twelve 200-Foot Reels of Super 8 Millimeter Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), is long, tortious, hotly contested, and inconsistent. The voting on these cases have been extremely close (5-4 decisions), and inconsistent

as noted by Justice Douglas in his dissents:

> Finally, it is ironic to me that in this Nation many pages must be written and many hours spent to explain why a person who can read whatever he desires [citing Stanley v. Georgia, supra] may not without violating a law carry that literature in his briefcase or bring it home from abroad. Unless there is that ancillary right, one's Stanley rights could be realized, as has been suggested, only if one wrote or designed a tract in his attic and printed or processed it in his basement, so as to be able to read it in his study.

Twelve 200-Foot Reels, 413 U.S. at 137. The trial court in our case concluded that the citizens of Florida afforded greater protection for privacy than the United States Constitution in adopting section 23; and those who drafted the section must have been aware of the limitations placed on the right to privacy in the 1973 decisions of Orito, supra, and Paris Adult Theatre I, supra. It is only natural that Florida's Article I, section 23 be applied to extend the holding in Stanley to not only allow the private possession of sexually explicit materials but to also allow the acquisition of these materials by consenting adults.[2]

Returning to the case of Kam, supra, the Hawaiian Supreme Court was faced with an issue almost identical to that presented in this case: did Hawaii's statute prohibiting promotion of pornographic adult magazines infringe on a customer's right to privacy under the State Constitution. The State of Hawaii enacted

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[2] In light of the recent explosion in the use of VCRs by the private sector and its impact on Americans to view such materials in their own home, this conclusion to extend section 23 is even more natural and logical. See trial court's order at R596.

a right to privacy provision in 1978 very similar to that enacted in Florida:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Hawaii Constitution, Article I, section 6. Kam goes through the same examination of United States Supreme Court cases that has been done sub iudice and notes the paradoxical conflict between Stanley, supra, and Twelve 200-Foot Reels, supra:

> Herein lies the paradoxical conflict. Is an individual's fundamental privacy right to own and view pornographic material violated when he or she is effectively denied the right to obtain such material (since generally, pornography is bought for private use at home)? This is the threshold issue of this appeal. The question is what should take precedence: State's police power to regulate obscene material versus an individual's fundamental privacy right to have pornography at home?

Kam, supra at 376. Kam also notes that the people of Hawaii had the right to provide broader privacy protection than that given by the federal constitution. Kam found the right to privacy amendment applicable and proceeded to the issue of whether compelling State interest overrode the right to privacy.[3] Rejecting the State's argument that there is a legitimate state interest to regulating

[3] It is to be noted that in the case of Shaktman, supra, the court also applied the State's compelling interest test once it found the right to privacy amendment applicable even though Florida's amendment does not specifically set forth this test in the amendment.

the commerce in obscene material,[4] the court held that "[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." Kam, supra, at 380. The State was not able to demonstrate a compelling interest in prohibiting the acquisition of obscenity by adults for home use; therefore, the court concluded that the right to privacy made the obscenity statute unconstitutional.

In the case sub judice the arguments made at the trial level and the conclusions reached by the trial court in applying the right to privacy to obscenity acquisition by adults for home use and finding the obscenity statute unconstitutional mirror the Kam decision. As in Kam, the trial court's ruling finding Florida's statute unconstitutional as applied to material offered for sale or rent of obscene items intended for home use is correct in that the statute violates Florida's constitutional right to privacy. The State could not meet its burden of establishing a compelling state interest in the prohibition of the acquisition of obscenity by adults for home use. The Second District Court of Appeal erred in refusing to apply section 23 to this case.

B. Vagueness

In its well-reasoned opinion on the issue of vagueness

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[4]The State's use of Paris Adult Theatre I, supra; Orito, supra; and Twelve 200-Foot Reels, supra, was not applicable because the analysis used in those cases was "rational basis" instead of "compelling state interest."

in defining obscenity (R608-611), the trial court--in a nutshell--points out the following:

> (1) Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) did not create a "bright line" test defining obscenity. The dissenting United States Supreme Court decisions in cases since Miller clearly indicate a dissatisfaction with the attempts to define obscenity, and Pope v. Illinois, 481 U.S. ____, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) contains language from at least four justices indicating a desire to reconsider Miller. In addition, case law demonstrates that every case has been marginal with conflicts and unpredictable results.
>
> (2) Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), has redefined vagueness. Whereas Miller only considered "fair notice" to dealers, Kolender states that the actual notice element is not as important as "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender, 103 S.Ct. at 1858. The importance of this test is that it keeps policemen, prosecutors and juries from pursuing their personal predilections and prevents arbitrary enforcement.
>
> (3) Last but not least, Florida's statutory definitions of proscribed sexual conduct is so broad that it would cover many "R" rated movies and modern widely sold novels. The court notes San Bernadino's ability to come up with a specific definition of obscene sexual conduct.

Based on the above, the trial court held the obscenity statute unconstitutionally vague. The Second District Court of Appeal merely pointed to Rhodes v. State, 283 So.2d 351 (Fla. 1973), and Haaaerty v. State, 531 So.2d 364 (Fla. 1st DCA 1988) (a case that upholds the constitutionality of section 847.011 without discussion), to hold that section 847.011, Florida Statutes (Supp. 1986), is not unconstitutionally vague.

On the trial level the State argued that even though Miller may be imprecise and often results in contrary decisions on what is or is not obscene, it still complies with the actual-notice-to-dealers standard. The State then argued that Kolender has not changed anything and points to an Arkansas case which has rejected the Kolender argument attacking Miller. The State's arguments are not persuasive.

The history of problems surrounding the attempt to define obscenity since Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957), with the last word in Pope indicating a desire by at least four justices to reconsider the Miller test belief the State's argument that the Miller test is doing its job.[5] Kolender points out that the real issue in a vague definition is arbitrary enforcement based on personal predilections of policemen, prosecutors, and juries. Considering the cases that have come out since Miller with such results as Georgia courts finding a movie to be obscene only to have the United States Supreme Court find it non-obscene (R86), it is obvious that the problem emphasized in Kolender and not addressed in Miller is occurring in obscenity cases.

Conflicting results, of course, are not just limited to what is or is not obscene. If Arkansas recently upheld its

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[5] The history is discussed in depth in Appellees Motion #3 to Dismiss for Vagueness of Underlying Statute--R80-97. Undersigned counsel cannot improve on this discussion and argument and will not attempt to paraphrase it. The court, therefore, is asked to consider this motion, as well as the other motions, in examining these issues.

obscenity statute, then there is Oregon that did not. Although the Oregon court did not discuss Kolender in reaching its decision to rule its own statute unconstitutional, the case of State v. Henry, 732 P.2d 9 (Or 1987), presents an excellent history of obscenity laws going back to sixteenth century England and Early American times. Oregon had an obscenity statute similar to Florida's with vague and broad definitions of sexual conduct also similar to Florida's. The controlling factor in ruling the Miller-based obscenity statute unconstitutional, however, was Oregon's own constitutional provision protecting the freedom of expression:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right.

Article I, section 8, Oregon Constitution. Noting that the Miller test 'may' pass federal constitutional muster, the test constituted censorship forbidden by the Oregon Constitution. It is interesting to note that Oregon based its decision on the issue that the obscenity statute went to consenting adults only:

> We do not hold that this form of expression, like others, may not be regulated in the interest of unwilling viewers, captive audiences, minors and beleaguered neighbors. No such issue is before us. But it may not be punished in the interest of a uniform vision on how human sexuality should be regarded or portrayed. See Tribe. supra at 662. We also do not rule out regulation, enforced by criminal prosecution, directed against conduct of producers or participants in the production of sexually explicit material, nor reasonable time, place and manner regulations of the nuisance aspect of such material or laws to protect the unwilling viewer or children. Again, no such issue is before us. However,

> no law can prohibit or censor the communication itself. In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered "obscene,"

Henry, supra at 18. The trial court in our case also based its decision on this factor.

Florida also has a constitutional provision almost identical to that of Oregon's in Article I, section 4:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press,

This constitutional provision combined with a vague test under Miller and an overbroad statutory definition of sexual conduct[6] all contribute to the unconstitutionality of Florida's obscenity statute, The trial court's decision should be affirmed.

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[6] Florida Statute 847.001 has the following definitions:

> (11) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast,; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.
>
> * * *
>
> (13) "Simulated" means the explicit depiction of conduct set forth in subsection (11) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

C. Conformity with Miller and Pope.

As pointed out in the trial court's well-reasoned opinion at R597, Florida Statute 847.07--which set forth the obscenity test prior to Miller, supra, and continued to do so until the legislature amended the statute in 1986--applied the community standard test to all three prongs of the statute:

> Considered as a whole and applying community standards, material is obscene if:
>
> (a) Its predominant appeal is to prurient interest; that is, a shameful or morbid interest in nudity, sex or excretion;
> (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. (Emphasis added)

After the 1986 amendment, the applicable statute--847.001--placed the community standard in only prong "a" and defined obscenity as follows:

> 'Obscene' means the status of material which:
> (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interests;
> (b) Depicts or describes in a patently offensive way, sexual conduct as specifically defined herein and;
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value. (Emphasis added)

The State argued that the 1986 changes were done in order to conform to the 1973 case of Miller and any updated interpretations of Miller as set forth in Pope v. Illinois, 481 U.S. ____, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), should automatically be applied to Florida's 1986 statute under the "authoritative construction"

principle in order to uphold the constitutionality of the statute. The contortions the courts in Florida would have to do, however, in order to salvage the statute by utilizing the authoritive construction principle are simply too extreme and cannot be done.

Pope clearly stated that the community standard was to be applied to the first two prongs of Miller in regards to prurient interests and patently offensive sexual conduct but not to the third prong involving value. The third prong was to be an objective test with the reasonable person standard to be applied. Pope, however, was not the first United States Supreme Court case to point out the community standard vs. reasonable person standard in the various prongs of Miller. In Smith v. United States, 431 U.S. 291 at 300, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), the court stated:

> The phrasing of the Miller test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The Miller opinion indicates that patent offensiveness is to be treated the same way.... The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however that juror discretion in this area is to go unchecked. Both in Hamling [v. United States, 418 U.S. 87 (1974)] and in Jenkins v. Georgia, 418 U.S. 153...(1974), the court noted that part (b) of the Miller test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 [mailing of obscene material] prosecution are the 'hardcore' types of conduct suggested by the examples given in Miller. ...Literary, artistic, political, or scientific value, on

> the other hand, is not discussed in Miller in terms of contemporary community standards. (Emphasis added.)

Thus, in 1977 the United States Supreme Court was informing the states that the community standard only applied to the first two prongs in Miller and not the third prong. This fact is noted in Pope, 95 L.Ed.2d at 445.

In spite of the ruling in Smith, the Florida legislature amended the obscenity statute in 1986 to take the community standard test out of all three prongs and placed it in only the first prong.

The "authoritative construction" rule, the State argues, should be used to place the appropriate community standards test where they properly belong--in prong a and b. The legislative amendment is very recent--1986--while Miller was decided in 1973 and Smith in 1977. Moving the community standard test around and reinserting it in a standard where the legislature purposefully took it out in 1986 constitutes a major change in the statute that, as noted by the trial court in its order (R611), "flies in the face of legislative intent" and is "inappropriate." As the trial court noted:

> Authoritative construction cannot and should not be used to re-do that which the legislature clearly and recently did. Its motive in removing community standards from the second prong is not clear. They failed to give any standard for prongs b) and c). (R611)

Any case decided before the 1986 amendment must be re-examined. Under the pre-1986 statute this Court upheld the

constitutionality of the statute noting that the Miller test for value was less strict than Florida's (work, as a whole, lacks serious literary, artistic, political, or scientific value vs. utterly without redeeming social value--the latter being Florida's more strict standard of value), and the State of Florida could place a heavier burden on the State in defining the value of sexual materials. See First Amendment Foundation of Fla., Inc., vs. State, 364 So.2d 451 at 452 (Fla. 1978); and State v. Aiuppa, 298 So.2d 391 (Fla. 1974). Thus, the third prong of Miller was not applicable in Florida. That left only prongs a and b, and those prongs--as has been noted above--already had the community standard built into them. The 1986 amendment, however, went to the less strict test of values as set forth in Miller and proceeded to take the community standard out of prongs b and c. Thus, cases on authoritative construction prior to 1986 went to a totally different Florida Statute from that which we are presently dealing with and cannot be used to blindly apply the authoritative construction test to our present statute.

The question now becomes whether the courts can alter the statute in spite of the recent amendment in order to salvage it in light of Smith and Pope. Even though authoritative construction was used in the past, it was not used to the extent that would be needed to salvage section 847.011. In First Amendment Foundation of Fla., Inc., supra, the rule was used to elaborate the definition of sexual conduct so as to include that which was patently offensive as defined by state law. State law

defining obscene sexual conduct already existed, thus, prong b of Miller did not really alter the Florida Statutes in any substantial way. Similarly, in Rhodes v. State!, 283 So.2d 351 (Fla. 1973), the rule was used to elaborate definitions describing sexual conduct: i.e., putting people on notice of what constituted conduct proscribed as obscene, lewd and lascivious. So, too, did the rule get used in State v. Reese, 222 So.2d 732 (Fla. 1969), and Aiuppa, supra, to elaborate the proscribed types of conduct. These cases went to specific types of sexual conduct such as intercourse, sodomy, lewd and lascivious. These definitional elaborations of proscribed sexual conduct are of a limited nature subject to change on a regular basis by statute or case law. These changes, however, do not go to something as dramatic as a standard or the heart of a test.

Not only was the authoritative construction rule limited to a minor aspect of the obscenity statute, but it was carefully worked around the statute. This Court was always careful to apply the rule in conjunction with the statute instead of as a replacement for the statute. This Court in Reese could have struck the entire subsection (10) of 847.011 in favor of authoritative construction, but it chose not to do so. In Rhodes this Court could have abandoned the entire Florida Statute section 847.011 in favor of applying the newly-established Miller test via the rule, but it did not. Instead, this Court upheld Florida's statute in spite of the recently decided United States Supreme Court case. As was noted in Aiuppa, 298 So.2d at 396, 397, it was the court's

duty to ascertain legislative intent and effectuate when construing a statute. It would not rewrite the statute by incorporating by reference the Miller definition, noting that any amendments would be left to the legislature.

In this case the legislature has spoken, but it has done so in a way that it violates the Miller and Pope standards that protect the First Amendment. Taking out community standards from prong b rendered the statute unconstitutional, and this major defect cannot be remedied by rewriting the statute under the guise of authoritative construction.

ISSUE II

DID THE SECOND DISTRICT COURT OF APPEAL ERR IN HOLDING THE RICO STATUTE AS APPLIED TO OBSCENITY HAS NOCHILLING EFFECTONFIRSTAMENDMENT RIGHTS?

In this particular issue the Second District Court of Appeal ruled that the obscenity statute and the obscenity RICO statute did not have an unconstitutional chilling effect on the First Amendment. Pointing to Johnson v. State, 351 So.2d 10 (Fla. 1977), the Second District Court of appeal found the level of required scienter acceptable. The Second District Court of Appeal also found no problem with the stiff penalties imposed in Florida for RICO offenses. Each of these two areas will be explored below.[7]

A. Low Scienter.

Florida Statute 847.011 prohibits the knowing distribution of obscene material. "Knowing," however, is loosely defined as follows:

> (1)(b) The knowing possession by any person of three or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is prima facie evidence of the violation of said paragraph.
>
> * * *

[7] For this issue Ms. Stall relies heavily on the arguments contained in Appellee's Motion to Dismiss #4--Unconstitutionality of the Statute Because Excessive Punishment, Insufficient Scienter and Resulting Chilling Effect on First Amendment Rights (R114-144). All of the arguments contained in that motion are adopted by Ms. Stall for this issue.

> (6) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

As the trial court noted in its opinion (R606), the above scienter standard is extremely low. Ms. Stall argues that it is so low as to be, for all practical purposes, non-existent. Yet, the United States Supreme Court has ruled that obscenity can never be a strict liability crime. Smith v. California, 361 U.S. 147 (1959).

As noted in Smith, id at 153, 154:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, ~~he will tend~~ to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.' The Kina v. Ewart, 25 N.Z.L.R. 709, 729 (C.A.) And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material

> of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and **his timidity in the face of his absolute criminal liability**, thus **would** tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded. [footnotes omitted; emphasis added].

In light of Smith, other states have struck down their obscenity statutes based on a lack of or too low a level of scienter. State v. Bumanalag, 634 P.2d 80 at 96, 97 (Hawaii 1980), struck down its older obscenity statute (Kam, supra, has struck down the most recent statute) by declaring that distributing obscene materials for money was not sufficient for making a prima facie case of scienter:

> We think [the Hawaii obscenity statute], if applied, may have a collateral effect of inhibiting free expression. Its application would tend to limit public access to protected material because booksellers may then restrict what they offer to works that are familiar with and consider "safe." The distribution of protected, as well as obscene, matter may be affected by this self-censorship. And a statute with such effect does not withstand constitutional scrutiny under the First Amendment overbreadth doctrine. [footnote omitted].

The court rejected the State's claim that a scienter requirement made convictions too difficult to obtain. See also Davis v. State, 658 S.W.2d 572 (Tex.Crim.App. 1983); and Fernwood Books and Video

v. City of Jackson, Miss., 601 F.Supp. 1093 (S.D. Miss. 1984) (these cases are more fully discussed at R138, 139).

The conclusion to be gleaned from these cases is that a lack of a meaningful level of scienter results in a self-censorship that cannot be tolerated. Owners of bookstores and, in this case, video rental stores cannot be burdened with examining every item they carry. Florida's lack of a meaningful level of scienter, however, endeavors to place such a burden on not only the owners but on employees who merely hand the materials over to customers. Possessing three or more identical or similar materials being a prima facie case of knowledge is no knowledge at all; and inferring knowledge or showing circumstances that would put a "man of ordinary intelligence and caution on inquiry as to such contents or character" is so low a level of scienter as to be non-existent. The mere fact that Ms. Stall, a clerk in the store who merely acted as a conduit in handing out rental tapes, has been charged in this case is proof positive that Florida's statute requires no meaningful level of scienter. Florida has, for all purposes, gone to a strict liability test in its obscenity statutes. This makes the statue unconstitutional. Johnson, supra, needs to be reconsidered and rejected.

B. Excessive Punishment.

Delivery of obscene material in Florida used to be considered a misdemeanor offense. In light of the addition of obscenity to the RICO statute, violation of the obscenity statute can no longer be considered a minor infraction. RICO has moved

the misdemeanor charge up not one notch, not two notches, but three notches to a first-degree felony punishable by up to 30 years in prison and a $10,000 fine. See § 775.082-.084, Fla. Stat. (1985); § 895.02-.04, Fla. Stat. (1985). The guidelines take away judicial discretion in sentencing in this area and take away probation as an option for even a first offender who faces a minimum of 2 1/2 years imprisonment. For the severity of the punishment and/or the lack of a prior record are not valid reasons for a downward departure. Sanders v. State, 510 So.2d 296 (Fla. 1987); and State v. DeVine, 512 So.2d 1163 (Fla. 4th DCA 1987). And all it takes to fall under this extremely harsh statute is two sales of obscene materials (i.e., pattern of racketeering activity as defined in Florida Statute 895.02(4)) by an employee or an individual owner (i.e., enterprise defined as any individual or corporation, etc., in Florida Statute 895.02(3); and Florida Statute 895.03 prohibiting any person from receiving proceeds and any employee from participating in the activity). The trial court noted this low level of establishing RICO in its order at R607. Contrary to what the Attorney General argued before the Second District Court of Appeal that more is required than two simple sales, the prosecutor argued strenuously that two rentals of just two tapes in one day was all it took to justify the RICO charge against Ms. Stall (R581-584). The fact that Ms. Stall rented several tapes in one day conveniently moved her out of the lowest possible guideline sentence of 2 1/2 years and places her in a higher range (the trial court notes that the parties are facing a minimum of 4 1/2 years

at R595, 606; and without a prior record--undersigned counsel not having knowledge of Ms. Stall's criminal history--Ms. Stall would at the very least, fall into the 3 1/2 to 4 1/2 year range).

The trial court's conclusion that substantial mandatory prison time with a maximum of 30 years imprisonment at stake is not cruel and excessive punishment is based on the erroneous assumption that the legislature can impose whatever punishment it feels is appropriate. Even our legislature has limitations in spite of its wishes to the contrary as witnessed by the unconstitutionality of the statute imposing a death penalty for a sexual battery on a child. See Buford v. State, 403 So.2d 943 (Fla. 1981). Striking down state penalties on the grounds of cruel and unusual punishment is not limited to the imposition of the death penalty. In Solem v. Helm, 103 S.Ct. 3001 (1983), the United States Supreme Court struck a life sentence with no possibility of parole that was imposed pursuant to a recidivist statute. Finding the sentence significantly disproportionate to the crime, the sentence was struck as being prohibited by the Eighth Amendment.

In analyzing what is cruel and unusual punishment, Solem lists several factors to consider. These factors and Appellees' arguments as to how the instant case falls under these factors (see R124-130 for a more detailed argument) are as follows:

> 1. The gravity of the offense and the harshness of the penalty--a misdemeanor offense which becomes a first-degree felony when two offenses are committed shows the disproportionate effect in this area.
>
> 2. The sentences imposed on criminals in the same jurisdiction--RICO has pushed the

misdemeanor charge to a level where it is more severely punished than sexual battery, robbery, burglary or even manslaughter.

3. The sentences imposed for commission of the same crime in other jurisdictions--as can be seen from an appendix attached to Appellees' motion #4 (R146-152), no other state in the union imposes a more harsh penalty on obscenity. The State's argument that RICO as applied to obscenity in Indiana and Virginia becomes extremely weak when it is realized that the penalties are far less severe.

4. The harm caused or threatened--the State has never demonstrated the harm caused by the distribution of obscene materials involving adults only for adult use in the home. The fact that Stanley says such materials can be viewed in the home clearly demonstrates a lack of harm.

5. The culpability of the offender--Florida has reduced the culpability of the offender to a level of strict liability.

In light of these above-stated factors, it is obvious that Florida's RICO statute as it applies to obscenity is excessive and violates the Eighth Amendment.

The United States Supreme Court's recent decision in Fort Wayne Books, Inc., v. Indiana, ____ U.S. ____, 57 LW 4180 (1989), does not involve the same sort of stiff penalties that are at issue in Florida. Whereas in Indiana a RICO violator faces a maximum of 10 years in prison, in Florida the maximum of 30 is far more severe. In addition, Florida's guidelines have taken away judicial discretion in allowing for a smaller sentence and there is no more parole in Florida. All of these factors make Florida's RICO statute extremely excessive in its punishment.

C. Chilling Effect on the First Amendment.

The trial court in this case combined the problems with low scienter, excessive punishment and vague tests to reach the conclusion that Florida's obscenity RICO statute was unconstitutional (R606-608). The Second District Court of Appeal found no chilling effect, noting that, as per Fort Wayne Books, Inc., stiffer penalties resulting in possible self-censorship is not enough to find an antiobscenity law unconstitutional. In light of the extremely low level of scienter in Florida and Florida's excessive punishment, the chilling effect goes beyond possibilities. In summation it can only be stated that what little it takes to convict "Mom and Pop" operators of rental tapes under RICO and subject them to massive, mandatory prison terms would have an obvious chilling effect on their desire to carry even "R" rated films. Such self-censorship chills the First Amendment to its very core, and cannot be tolerated. The statute is unconstitutional.

ISSUE III

DID THE SECOND DISTRICT COURT OF APPEAL ERR IN ITS RULING ON WHAT WAS THE PROPER REASONABLE MAN STANDARD?

First of all, it is to be noted that this issue will only be ripe if this Court rejects the trial court's finding that the obscenity statutes are unconstitutional. Should this court agree with the trial court on the unconstitutionality of the statutes, then this issue need not be reached.

The State argued two items in this issue: (1) the use of experts and lay persons in prong c of the obscenity test, and (2) the requirement that the State present evidence that the material in question fails prong c. Each of these will be discussed below.

A. The Use of Experts and Lay Persons.

The Second District Court of Appeal did not address the use of experts and lay persons as to the reasonable-man prong of the Miller test; but the trial court in this case gave an excellent, well-reasoned opinion as to why experts and lay people should be allowed to testify as to the reasonable man/prong c/literary, artistic, political, or scientific value test at R601-603. It is difficult for undersigned counsel to improve on the trial court's reasoning which so aptly justifies the trial court's conclusion. Ms. Stall relies heavily on the opinion on this issue.

In response to the argument that lay testimony is not used in the area of tort law, Ms. Stall points to the trial court's decision which notes that tort law is not entirely applicable

(R601). The trial court's quotes from Prosser and Keeton on Torts and Harper and James-The Law of Torts that define the reasonable man on a community standard which is exactly what Pope rejects. Thus, reliance on tort law is not appropriate. A better analogy would be the insanity issue where both experts and lay persons are allowed to give their opinions in order to assist the jury.

The use of experts in obscenity cases has been held appropriate in obscenity trials by the United States Supreme Court in Kaplan v. California, 413 U.S. 115 at 121, 93 S.Ct. 2680 at 2685, 37 L.Ed.2d 492 at 498 (1973). The date of the opinion reflects that the use of experts was allowed even before the Pope decision. Now that the reasonable-man issue is clearly before the jury, the use of experts and lay people is even more vital in an obscenity case.

There are many areas of a literary or artistic or political or scientific nature that would be beyond the average juror in examining material alleged to be obscene. For example, the doctors who testified before the trial court in regards to seating a jury discussed the use of the alleged obscene films in sex therapy treatment (R466-469, 538, 539). Persons not familiar with sexual therapy (undersigned counsel included) would find such testimony helpful in determining a material's value under prong c. The same need or use would hold true in the other areas to be considered. People not familiar with the art, political or literary world would need the testimony of experts and lay persons in order to either accept or reject the questionable material's

value. The fact that the reasonable man need not be in the majority nor of the juror's community makes the opinion of experts and lay people even more important in this objective standard.

Of course, whether or not an expert or lay person can actually contribute via testimony to a work's value is ultimately up to the trial court. The trial court has discretion in accepting or rejecting the use of a witness who cannot give relevant testimony, and this decision must be made on a case-by-case basis.

B. Requiring the State to prove that the material in question, as a whole, lacks serious literary, artistic, political or scientific value and that no reasonable person could find value.

The State argued that the above-stated requirement is unworkable and too heavy of a burden for the State, and the Second District Court of Appeal agreed with the State. However, obscenity laws with their impact on First Amendment rights and serious penalties require a heavy burden on the State. In light of the vague definition of obscenity, the prosecutors in this state should be forced to move against only those that distribute materials without any value; and a jury should not be allowed to convict until the State meets its burden. The obscenity and RICO laws should be reserved for only the most questionable of materials (such as those listed by the San Bernardino, California, District Attorney's Office--see R610), and not for the borderline materials that often require years of litigation before a high court ultimately finds them not obscene in spite of jury verdicts to the contrary. Georgia's treatment of the film "Carnal Knowledge" in

Jenkins v. Georaia, 418 U.S. 153 (1974), is a prime example of what this high reasonable man standard must avoid.

The argument that the burden is unworkable is without merit. Going back to the analogy of insanity, the burden is similar to that required in Yohn v. State, 476 So.2d 123 (Fla. 1985), where the State is required to establish beyond a reasonable doubt that the defendant is sane once the defense is raised. If the State feels it is unfair to have such a heavy burden placed on it in overcoming the reasonable-man test in prong c, then it is experiencing the same feelings of frustration that trial courts and defendants have in dealing with obscenity laws and their ill-defined terms. The burden of the objective reasonable-man test must fall on someone, and that someone must be the State. There are too many fundamental rights at stake--freedom of expression: the right of privacy: the right of liberty; and the right to acquire, possess, and protect property--to require a lesser burden or a placement of the burden on the Petitioners. The Second District Court of Appeal held that Pope does not require a reasonable-man element of proof on the State. It then goes on to note that this is the proper standard for a finder of fact to apply in determining obscenity. This appears to be a distinction without a difference. The Miller test is a three-part test: and before a case goes to the jury, the State should be required to prove all three-elements of the Miller test. The trial court's ruling, if this case goes to trial, on the reasonable-man test must be upheld.

CONCLUSION

In light of the above-stated arguments and authorities, the Second District Court of Appeal's opinion in this case should be set aside and the obscenity statute and RICO obscenity statute found unconstitutional. In the alternative, should this case go to trial, the State should be forced to prove that the material in question, as a whole, lacks serious literary, artistic, political or scientific value and that no reasonable person could find value. If this case does go to trial, Petitioner should be allowed to use experts and lay witnesses in establishing the reasonable-man prong.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, and John H. Weston, 433 North Camden Drive, Suite 900, Beverly Hills, CA 90210 on this 31st day of October, 1989.

Respectfully submitted,

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