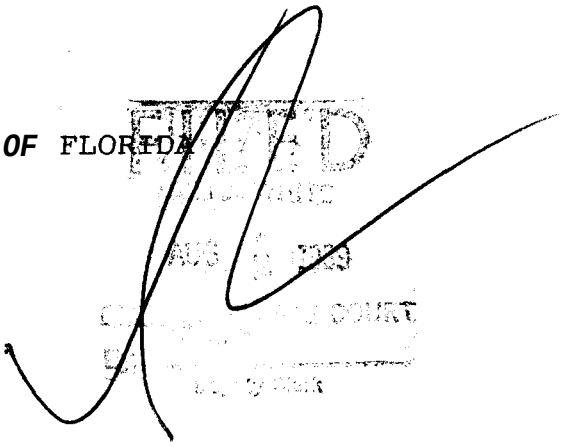
IN THE SUPREME COURT OF FLORIDA



TOMMIE LYNN STALL,
TODD EDWARD LONG, et al.,

Petitioners,

v. Case No. 74,020 & 74,390

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON JURISDICTION

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SUMMARY OF THE ARGUMENT

This Court should not exercise its discretionary jurisdiction in this case since the opinion of the Second District Court of Appeal, State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989), is a well-reasoned analysis of Section 847.011, Florida Statutes, and that statutory provision's effect on the RICO Act. The Second District properly found the obscenity statute does not violated the Florida or the United State Constitutions. The court also correctly held the combined use of the obscenity statute with the RICO Act does not have an unconstitutional chilling effect on protected speech. Additionally, the Second District was correcting in its analysis of the reasonable man standard applicable to obscenity cases.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE SECOND DISTRICT'S OPINION IN STATE V. LONG, 544 So.2d 219 (Fla. 2d DCA 1989) SINCE THAT DECISION IS IN ACCORD WITH OTHER DECISIONS FROM THIS COURT ON THE SAME ISSUES AND IS A CORRECT ANALYSIS OF THE APPLICABLE LAW OF THIS STATE AND THE CONSTITUTIONS OF BOTH FLORIDA AND THE UNITED STATES OF AMERICA

The Second District Court of Appeal in State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989) was asked to review an order from the trial court of the Tenth Judicial Circuit in and for Polk County, Florida, which had declared the obscenity statute, Section 847.011, Florida Statutes, unconstitutional for a variety of reasons. The trial court had also, in essence, found that the use of the obscenity statute with the RICO Act had a chilling effect on the exercise of speech. That court went on to erroneously announce a new reasonable man standard for use in obscenity cases. The Second District reversed the trial court's dismissal of this forty-eight count information.

In finding Section 847.011 constitutional, the Second District relied on prior cases from this Court, and the opinion is in accord with this Court's precedent. The Second District in holding the trial court erred in finding Section 847.011 vague. This holding was based on this Court's decision in Rhodes v. State, 283 So.2d 351 (Fla. 1973), which found the prior obscenity statute not unconstitutional due to vagueness. The court also relied on Rhodes in holding that the statute was in compliance with the standards enunciated by the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d

419 (1973) and Pope v. Illinois, 481 **U.S.** 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987).

Although this Court has not directly applied the right to privacy as found in the Florida Constitution to Section 847.011, this Court has on other occasions outlined the scope of the Florida privacy amendment. This Court did, however, uphold the obscenity statute subsequent to the adoption of the privacy amendment. *See,* Sardiello v. State, 394 So.2d 1016 (Fla. 1981). The Second District's opinion holding the Florida Constitution does not convey to these defendants' the right to sale, show, distribute or rent obscene materials is derived from the principles outlined by this Court in such cases as Winfield v. Div. of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985) and Florida Bd. of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983).

This Court has held both the RICO statute and the Obscenity statute constitutional. And in Bowden v. State, 402 So.2d 1173 (Fla. 1981), a prosecution under both statutes was affirmed. The district court in this instance decided the issue in a similar manner. Lastly, the district court's ruling on the reasonable man issue is in accord with the federal law. The reasonable man test is a standard to be applied by the jury in determining whether material is in fact obscene; it is not an element of the crime.

CONCLUSION

The decision by the Second District Court of Appeal relies on the precedent set by this Court in prior obscenity cases and in cases involving the Florida privacy amendment. Since the decision is in accord with this Court's prior rulings, this Court need not exercise its discretionary jurisdiction to entertain this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John C. Wilkins, 111, 770 East Main Street, Bartow, Florida 33830, John Weston, Weston & Sarno, 433 North Camden Drive, Suite 900, Beverly Hills, California 90210, Deborah Brueckheimer, Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 31st day of July, 1989.

OF COUNSEL FOR RESPONDENT