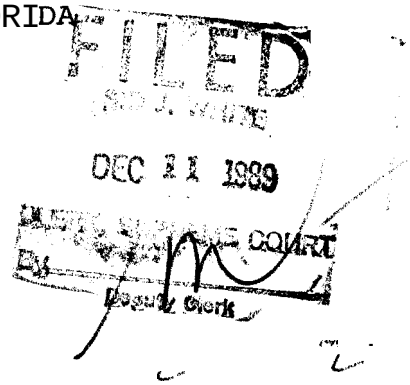
OA 1-10-90

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 OF THE

SECOND DISTRICT COURT OF APPEAL

BRIEF OF THE RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioners were charged in a forty-seven (47) count information in the Circuit Court for the Tenth Judicial Circuit in and for Polk County, Florida, with a number of offenses involving the hiring of persons to distribute obscene materials, distribution of an obscene movie, RICO, distribution of an obscene magazine, distribution of an obscene article or instrument, possession of obscene movies with intent to sell or distribute, possession of obscene instrument with intent to sell or distribute and possession of obscene magazine with intent to sell or distribute, in violation of Section 847.11, Florida Statutes and Section 895.03 and Section 895.04, Florida Statutes. A number of pretrial motions were filed including a motion to determine the reasonable man standard, a motion to dismiss alleging Section 847.011 violates Florida's right to privacy, a motion to dismiss alleging the statute does not conform to the requirements of 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), a motion to dismiss for vagueness, a motion to dismiss alleging the obscenity statute provided for excessive punishment, insufficient scienter and had a chilling effect on first amendment rights.

Memoranda in opposition to these motions were filed by the State. A hearing was held before the Honorable E. Randolph Bentley on December 1-2, 1987. On January 8, 1988, Judge Bentley entered an order denying the motion to strike the jury list, denied the motion to dismiss for inability to seat a fair

jury, modified the definition of a reasonable man, granted the motion to dismiss finding a right to privacy is violated when applied to material offered for sale or rent and intended for home use, denied the motion to dismiss for excessive punishment and insufficient scienter and granted the motion as having a chilling effect on first amendment rights. He also held the RICO statute as applied to obscenity to be violative of the U.S. Constitution, declared the obscenity statute to be violative of due process because of vagueness, and found the obscenity statute did not conform to the requirements of Miller and Pope.

The State of Florida timely filed a notice of appeal, and briefed all of the points the trial judge had decided adversely to the State. The Second District Court of Appeal on March 31, 1989 filed an opinion, cited as State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989), reversing the trial court and indicating the obscenity statute met constitutional muster.

Discretionary review in this Court now follows. Six of the petitioners in this case are represented by one attorney and has filed a four issue brief addressing issues raised in both the trial court and the court of appeals. One other petitioner, Tommie Lynn Stall, is being represented by separate counsel and has raised as an issue the reasonable man standard which should be applied to obscenity prosecutions. In the interest of brevity and judicial economy, counsel for Respondent will address the reasonable man issue as Issue V, thus allowing for the serving of one brief on all parties.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal in State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989), correctly held that the Florida obscenity statute, Section 847.011, Florida Statutes, does not violate any constitutional principles. Respondent, however, still asserts that the petitioners have no standing to challenge this statute based on the privacy rights of potential customers. Such customers can in fact raise their own privacy interest should they be arrested attempting to purchase these materials.

Particularly, the statute does not violate Florida's Constitutional right to privacy. Although Article I, Section 23, Florida Constitution, does give the citizens of Florida broader privacy protection than does the federal right, that provision does not give one an absolute immunity from governmental intrusion. The right of persons to be let alone in their private lives does not extend to public places. Even assuming, *arguendo*, the statute affects the privacy rights of petitioners' customers, the State has a compelling interest in curtailing the widespread dissemination of obscene materials, and the government has chosen the least intrusion means possible to exercise that compelling interest. More importantly, the right to privacy is not implicated by this statute since petitioners customers do not enjoy a reasonable expectation of privacy in the commercial establishment.

The Second District's ruling that the statute was not vague is likewise correct. The statute defines the prohibited conduct

with sufficient definiteness so that citizens can understand what conduct is prohibited. Both this court and other district courts have rejected challenges to this statute based on vagueness. *See,* Rhodes v. State, **283** So.2d **351** (Fla. **1973)** and Haqgerty v. State, **531** So.2d **364** (Fla. 1st DCA **1988).**

This Court in Bowden v. State, **402** So.2d **1173** (Fla. **1981),** rejected the claim that the RICO (Racketeer Influenced and Corrupt Organization) statute could not be used with an obscenity prosecution. In keeping with this court's ruling the United States Supreme Court in Fort Wayne Books, Inc. v. Indiana, **489** U.S. ____**, 109** S.Ct. **916, 103** L.Ed.2d **34 (1989),** indicated the fact that some booksellers may remove other materials from the shelves does not render an obscenity statute unconstitutional or make an obscenity prosecution under a RICO statute unconstitutional. Additionally, the potential for more severe penalties does not make the statute unconstitutional.

The Second District also properly found Section **847.011,** Florida Statutes, defines and describes terms in a manner consistent with the United States Supreme Court standards as outlined in Miller v. California, **413** U.S. 15, **93** S.Ct. **2607, 37** L.Ed.2d **419 (1973),** and the statute should be read to include the clarification made by the court in Pope v. Illinois, **481** U.S. **497, 107** S.Ct. **1918, 95** L.Ed.2d **439 (1987).**

The serious value prong of the obscenity determination must be made in light of the reasonable man standard. This reasonable man is the standard to be applied by the jury to the evidence; it is not an element of the crimes.

The Second District Court of Appeal correction held that the Florida obscenity statute, Section 847.011, was and is constitutional.

ARGUMENT

ISSUE I

SECTION 847.011, FLORIDA STATUTES, THE FLORIDA OBSCENITY STATUTE, DOES NOT VIOLATE THE RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION

The petitioners argue that the Florida obscenity law violates the constitutional right to privacy because their potential customers would have difficulty in obtaining obscene materials for use at home. Respondent submits no privacy rights are implicated by the State's regulation of obscenity in public places, and Respondent submits these petitioners have no standing to assert the privacy rights, if any, of others. Thus, the opinion of the Second District Court of Appeal, State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989), on the privacy issue should be affirmed based on a lack of standing by these petitioners and on the basis that no right to privacy is involved. Additionally, if a right to privacy is implicated by the statute, the State's compelling interest in stopping the widespread dissemination of obscene materials outweighs that right.

The right to privacy is embodied in the Florida Constitution as a result of constitutional amendment passed by the electorate on November 4, 1980. That amendment, Article I, Section 23, provides:

> **823. Right of privacy**
>
> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to

> access to public records and meetings as provided by law. (emphasis added)

It is clear from a plain reading of the constitutional provision that the right to privacy is one which exists only for human beings, not artificial or juristic persons. Petitioner, CMH Enterprises, is a corporation not a natural person. To the extent that entity is asserting any privacy right, one exists.

Respondent also submits that CMH Enterprises and the other petitioners don't have standing to challenge or assert the constitutional right to privacy, even if one exists under the circumstances of this case, of any past, present or future commercial customers. Both the state and federal courts have generally held that constitutional rights are personal and cannot be vicariously asserted by others. A party who may have a statute constitutionally applied to him/her cannot validly challenge that statute on the ground that it may be unconstitutionally applied to someone else or some other situation not before the court. ***See,*** Broadrick v. Oklahoma, **413** U.S. **601, 93** S.Ct. **2908, 37** L.Ed.2d **830, 837 (1973);** Sandstrom v. Leader, **370** So.2d **3** (Fla. **1979)** and Gardner v. Bradenton Herald, Inc., **413** So.2d **10** (Fla. **1982).**

Respondent recognizes that exceptions to this general rule have been made by the courts where individuals who are not parties stand to lose rights but have no effective avenue to preserve their rights themselves. ***See, e.g.,*** NAACP v. Alabama, **357** U.S. **449, 78** S.Ct. **1163, 2** L.Ed.2d **1488 (1958).** The exception has been applied in the first amendment area when a statute is challenged on grounds of overbreadthness. Dombrowski v. Pfister,

380 U.S.479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) and State v. Saiez, 489 So.2d 1125, 1127 n. 2 (Fla. 1986). In the right to privacy arena, the exception was applied on the issue of dissemination of contraceptives. *See,* Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The Second District held these petitioner's had standing to assert the privacy rights of their customers because enforcement of the statute substantially impairs the customers ability to obtain obscene material. While potential customers have a right to possess obscene material in the privacy of their own homes pursuant to the court's pronouncement in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 543 (1969), that right does not translate into a duty on the State or government to provide the public with a place to obtain these materials. *Cf.* United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).

If we assume, for the sake of argument, that petitioners have the standing to assert the privacy interest of their customers, petitioners have failed to demonstrate any privacy right exists under these circumstances or that any privacy rights have been violated. It is undisputed that obscenity is not entitled to the full protection of the First Amendment. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The court in Roth recognized that the states and government have a valid interest in dealing with the problem of obscenity. However, States must exercise caution in regulating

obscene materials; the conduct proscribed by the statute must be specially described in the statute as written or as authoritatively construed. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

Because of the very nature of one's home being sacrosanct, the Supreme Court held that a person has the right to possess obscene material in the privacy of his/her own home. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 543 1969). The district court also indicated that the right to privacy, however, even the right to privacy as interpreted under the Florida Constitution, does not extend to the purchase of obscene materials in public commercial establishments, the right to privacy is not implicated in this situation. In reaching this conclusion the district court relied on this Court's opinion in Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). In Winfield this Court stated:

> However, before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist. Thus, implicit within the question of whether article I, section 23 of the Florida Constitution prevents the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's bank records without notice, is the threshold question of whether the law recognizes an individual's legitimate expectation of privacy in financial records.

Before the right of privacy would attach, sub *judice*, petitioners must demonstrate their customers enjoy a reasonable expectation of privacy in the commercial establishment containing the obscene materials and/or a reasonable expectation of privacy in the materials themselves.

The lower court correctly found that petitioners' customers had no such expectation of privacy, and therefore no privacy right of their under the constitutional provision was implicated. Generally, one can show an expectation of privacy if he/she can demonstrate ownership or lawful possession or control of property or premises. Rakas v. Illinois, **439** U.S. **128, 99** S.Ct. **421, 58** L.Ed.2d **387 (1978)** and Katz v. United States, **389** U.S. **347, 88** S.Ct. **507, 19** L.Ed.2d **576 (1967).** There has been no showing that any of petitioner's past, present or future customers can claim any ownership or possessory rights in the Varsity Theatre, a public commercial establishment, thus no expectation of privacy. *See,* Paris Adult Theatre I v. Slaton, **413** U.S. **49, 93** S.Ct. **2628, 37** L.Ed.2d **446, 463 (1973),** wherein the Supreme Court indicated that activity which enjoys privacy protection in the home does not carry with it an expectation of privacy when done in a public forum.

Petitioners rely heavily in their privacy argument on the decision of the Hawaii Supreme Court in State v. Kam, **748** P.2d **372** (Haw. **1988).** Hawaii, like Florida, has a specific constitutional provision on the right to privacy, Article I, Section **6** of the Hawaii Constitution. The defendants in Kam sold magazines which the State alleged to be obscene to undercover officers. The court found that the statute prohibiting the sell of obscene material was a violation of the right to privacy. However, it is clear from a carefully reading of the Kam opinion that the Hawaii Supreme Court, unlike this Court, has not determined that a reasonable expectation of privacy must be shown

before the right to privacy attaches and the compelling state interest standard is applied. That court simply without more states because you have a right to possess obscenity in your home, you have a corresponding right to purchase it. Such a statement flies in the face of the teaching of Paris Adult Theatre I v. Slaton, *supra.*

The district court stated and respondent agrees that the right to privacy as embodied in Article I, Section 23, Florida Constitution, affords the citizens of this State a greater privacy protection than does the United States Constitution. *See,* Winfield v. Division of Pari-Mutuel Wagering, *supra.* "This constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." Florida Board of Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983). These principles were recently reiterated by this Court in In Re: T.W., 14 F.L.W. 531 (Fla., Case No. 74,143, Opinion filed October 5, 1989) and Shaktman v. State, 14 F.L.W. 522 (Fla., Case No. 72,272, Opinion filed October 12, 1989).

Although this Court found that the right to privacy was implicated in both T.W. and Shaktman, those cases are both factual and legally distinguishable from the instant case. In T.W. the issue there was whether a state law requiring a minor to get parental consent before obtaining an abortion or convince a judge that she is either mature enough to make the decision herself or that the abortion is in her best interest violates the right to privacy as outlined in the Florida Constitution. The

primarily inquiry of whether the minor enjoyed a reasonable expectation of privacy in her own body needs no further discussion. In holding that the statute did violate the right to privacy, this Court said, quoting from Thornburgh v. American College of Obstetricians and Gynecologists, **476** U.S. **747, 106** S.Ct. **2169, 90** L.Ed.2d **779 (1986),** "The Florida Constitution embodies the principle that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision **...** whether to end her pregnancy. A woman's right to make that choice freely is fundamental."" It is indeed difficult to conceive of any thing that is more personal or private than one's own body.

Similarly, in Shaktman the issue involved pen registers on the telephone at the defendant's home. As with Stanley v. Georgia, *supra,* a man's home, his castle, was being violated. Again, there can be no doubt that a person must have some expectation of privacy in the contents of his telephone conversations had from his home, including the telephone numbers that are dialed or otherwise transmitted. The gathering of this private information by the government affected that home privacy.

In both instances this Court found that there were reasonable expectations of privacy, thus implicating the constitutional right to privacy voted on by the good people of the State of Florida. However, in the instant case, as indicated above, the petitioners' customers have no such reasonable expectation. We do not need to reach the constitutional privacy issue.

While maintaining there was no expectation of privacy hence no violation of constitutional right to privacy, it should be noted that the State has a compelling interest in curtailing the distribution of obscene materials. Even where there is a right to privacy affected by a particular statute, the individual's right to privacy must be considered in the context of the state's compelling interest in the area regulated. Sub ***judice,*** the trial court made no attempt to balance these interests. The State of Florida by enactment of Chapter 847 has determined the widespread making and dissemination of obscene materials are not in the public interest and the State has a compelling interest in halting that distribution. States are free to make that determination concerning obscenity in their communities. ***See,*** Paris Adult Theatre I v. Slaton, ***supra.***

Balanced on the other hand is an individual's right to possess these obscene materials in the privacy of his home. Section 847.011 does not purport to control or restrict home possession of the types of obscene material involved in this case. ***Compare,*** State v. Edmond, 1989 W.L. 111500 (Ariz. Ct. App. 1989), where the court held the government's interest in preventing the exploitation of child was of "surpassing importance", thus a statute making it illegal to possess child pornography in the home does not violate the right to privacy. ***Accord,*** People v. Duboy, 540 N.Y.S.2d 905 (N.Y.A.D. 1989); State v. Davis, 768 P.2d 499 (Wash. Ct. App. 1989) and People v. Geever, 522 N.E.2d 1200 (Ill. 1988). The statute is aimed at the making and distribution of obscene items. The statute complies

with the requirements of Winfield v. Division of Pari-Mutuel Wagering, *supra,* in that it regulates an area in which the State has a compelling interest and accomplishes the goal of reducing dissemination of obscene materials in the least intrusive manner possible.

This Court has on other occasions upheld this statute against various other constitutional attacks. In Johnson v. State, 351 So.2d 10 (Fla. 1977), it was said that obscenity did not enjoy the protection of the First Amendment but was subject to regulation under the state's police power. This Court went on to say the statute was not overbroad, did not violate double jeopardy, nor did it involve cruel and unusual punishment. In State v. Kraham, 360 So.2d 393 (Fla. 1978), the statute's validity was addressed in the context of the right to privately possess the materials and was found to be constitutional. And this Court found the statute constitutional after the November, 1980 vote of the people for the privacy amendment, although the right to privacy was not addressed in the opinion. Sardiello v. State, 394 So.2d 1016 (Fla. 1981).

It was pointed out in the trial court that the legislature could enact a statute allowing for the transportation of obscene materials under conditions necessary to insure privacy. Neither the legislature or Congress has chosen to do so. There is certain no right under federal jurisprudence to sell or deliver obscene materials. United States v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). No such right exists nor should it exists under State law.

The Second District Court of Appeal properly found the statute does not violate the Florida right to privacy since no privacy right is implicated. The customers of petitioners do not have a legitimate expectation of privacy in obtaining obscene materials from a commercial establishment. Additionally, the State has a compelling interest in preventing and/or stopping the widespread dissemination of obscene material and has chosen the least intrusive means possible to obtain that goal.

ISSUE II

THE FLORIDA OBSCENITY STATUTE, SECTION **847.011,** FLORIDA STATUTES, IS NOT UNCONSTITUTIONALLY VAGUE AND THEREFORE DOES NOT VIOLATE THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioners are in essence asking this Court to declare that the standard for obscenity as enunciated by the United States Supreme Court in Miller v. California, *supra,* and in Pope v. Illinois, *supra,* is unconstitutional. This Court does not have that authority.

A statute will survive a challenge based on vagueness if that statute is sufficiently definite to apprise a person of what conduct is being prohibited. Section **847.011,** Florida Statutes, meets that test. While some terms may not be defined with scientific precision, a lack of precision is not itself offensive to the requirements of due process. All that is required is language which conveys sufficient definite warning as to the proscribed conduct measured by common understanding. Miller v. California, **37** L.Ed.2d at **433.** Although judges and juries may disagree on whether or not a particular movie, magazine, or article is obscene, this does not necessarily mean the statute defining the term is vague. In footnote **9** of the Miller decision the court said:

> The mere fact juries may reach different conclusions as to the same material, does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, **354** US, at **492** n **30, 1** L Ed 2d **1498** "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. Dunlop v. United States, **165** US **486, 499-500, [41** L Ed **799, 17** S Ct **375]."**

Ibid. at **432.**

These results can be expected when part of the definition of obscenity involves a community standard. Such standards do differ from place to place.

The same argument concerning the differing views of jurists on the meaning of obscenity was presented and rejected by Supreme Court of Arkansas in Dunlap v. State, **728** S.W.2d **155** (Ark. **1987).** There has been difficulty among members of the courts in defining obscenity; however, that is no reason to "throw out the baby with the bath water". The Florida statute defines obscenity as material which: (1) the average person, applying contemporary community standards, would find, taken as a whole, lacks serious literary, artistic, political, or scientific value. Section **847,011** was obviously drawn with Miller v. California, ***supra,*** in mind.

Application of the vagueness standard articulated by the Supreme Court in Kolender v. Lawson, 461 U.S. **352, 103** S.Ct. **1855, 75** L.Ed.2d **903 (1983),** does not result in the obscenity statute being vague. The court in Kolender dealt with a California stop and identify statute which required the person stopped to give credible and reliable identification. The statute failed to define credible and reliable identification, thus leaving it to each individual police officer to determine. The Kolender court said the void for vagueness doctrine requires that a criminal statute define the crime with sufficient definiteness that an ordinary person can understand what is prohibited and in a manner which does not encourage arbitrary and

discriminatory enforcement. The court invalidated the statute because the terms were not defined, thereby encouraging arbitrary enforcement.

Section 847.011 does not encourage arbitrary or discriminatory enforcement since it defines terms and puts the public on notice of what conduct is prohibited. The standards are set out as to which materials are obscene. The Arkansas statute, Section 41-3585.1(4), Arkansas Statutes, addressed by the court in Dunlap v. State, *supra,* defines obscenity in much the same way as the Florida statute. The Dunlap court found the statute provided sufficient guidelines to law enforcement and thus did not encourage arbitrary enforcement.

The opinions expressed in dissents are just that, differences of opinion. These differences of opinions appear with frequency in our system of laws. However, to elevate them to the status of being the law defeats the whole purpose of our system. The majority in Miller and Pope recognize the problems inherent in defining obscenity; however, that difficulty does not mean that it was not done. Both Congress and the Florida legislature has addressed an ill which cuts to the fabric of our society. These laws have been drawn with enough flexibility to protect any individual rights while also protecting the greater good.

Petitioners have failed to shown that Section 847.011, Florida Statutes, is unconstitutionally void.

ISSUE III

THE DISTRICT COURT CORRECTLY HELD THAT THE FLORIDA RICO STATUTE, AS APPLIED TO OBSCENITY, DOES NOT HAVE A CHILLING EFFECT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS UNDER THE FLORIDA OR UNITED STATES CONSTITUTIONS

The United States Supreme Court recently said in Fort Wayne Books, Inc. v. Indiana, 489 U.S. ____, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), that a state RICO which includes obscenity violations was not violative of the federal constitution. That court specially stated such a prosecution was not violative of any constitutional principle based on vagueness, and the more severe RICO punishments did not have an improper chilling effect on first amendment rights. The Second District in deciding the issue in this case said:

> Although the possibility of stiff penalties from a RICO obscenity prosecution might cause cautious booksellers to remove protected material from their shelves, the mere assertion of possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional. *Fort Wayne Books, Inc. v. Indiana,* ____U.S.____, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Any form of a criminal obscenity statute will induce some tendency toward self-censorship and have some effect on the dissemination of nonobscene materials. *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). We hold that the level of self-censorship, if any, which may be caused by the combined provisions of the Florida RICO Act and the criminal laws involving obscene material, does not render an obscenity prosecution under the Florida RICO Act unconstitutional.

This is basically the same position taken by the United States Supreme Court in Fort Wayne Books, Inc..

Again the petitioners argue the obscenity statute is vague and the RICO statute overbroad. That argument has already been

addressed under Issue II of this brief and will not be readdressed at length here. Suffice it to say, that the statute has withstood challenges based on vagueness in Rhodes v. State, 283 So.2d 351 (Fla. 1973) and Haggerty v. State, 531 So.2d 364 (Fla. 1st DCA 1988). This Court has also rejected a challenge to obscenity prosecutions under RICO. Bowden v. State, 402 So.2d 1173 (Fla. 1981). And both the United States and Florida Supreme Courts have indicated the obscenity statutes contain elements of knowledge of the nature of the materials, thus an acceptable level of scienter is required under the statute. *See,* Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) and Johnson v. State, 351 So.2d 10 (Fla. 1977).

Arguments concerning the applicability of RICO to obscenity prosecutions is not new; there have been similar attacks made on the Virginia and Indiana statutes. United States v. Pryba, 674 F.Supp. 1504 (E.D. Va. 1987) and State v. Sappenfield, 505 N.E.2d 540 (Ind. 1st DCA 1987). The Indiana Supreme Court in 4447 Corporation v. Goldsmith, 504 N.E.2d 559, 564 (Ind. 1987), said:

> Obscenity does not come within the area of constitutionally protected speech or press. Miller v. California, (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; Roth v. United States (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent. We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications.

Such an analysis is equally applicable to obscenity prosecutions in Florida under out RICO statute.

There is no dispute that the penalties involved in a RICO prosecution is more severe than penalties under Section 847.011. It must be kept in mind the purpose for RICO and the penalties. RICO is a tool to convict and punish those persons who have demonstrated a continuing course of criminal conduct, *i.e.*, an enterprise. It is not enough under a RICO prosecution that you engage in any of the predicate offenses once. The State must not only prove the defendant engaged in the prohibited activity at lease twice, the State must also plead and prove "a pattern of racketeering activity" and "an enterprise".

All of the offenses outlined under Section 847.011 are either first degree misdemeanors or third degree felonies. The defendants in this case were charged with first degree misdemeanors, with CMH Enterprise, Inc., who has a prior obscenity conviction, being charged with third degree felonies. Prosecution under the RICO statute subjects these defendant's to criminal punishment for felonies of the first degree. While this may appear on it's face to be overly severe, it must be kept in mind that before a conviction is obtained the prosecutor has proven beyond a reasonable doubt all of the elements of racketeering, including multiple violations of the law.

Additionally, no discussion of penalties under Florida law would be complete without mention of the Florida Sentencing Guidelines. Rule 3.701, Florida Rules of Criminal Procedure, is applicable, by its own terms, to all crimes except capital

crimes. Racketeering is not a capital offense; therefore, the guidelines are applicable. In this case, the guidelines would result in sentences much less severe, including any nonstate prison sanction, than the "draconian" sanctions continually argument by petitioners in these obscenity cases.

The Florida RICO statute is not aimed specially at obscenity. The statute, Section 895.02, Florida Statutes, lists twenty six (26) criminal activities which may be charged as the predicate offenses. Any number of these predicate offenses would carry a relatively small penalty when committed once by someone not engaged in an enterprise. It is clear that this statute is directed to general criminal activity, repeat criminal activity; suppression of free expression is not its aim. As the Supreme Court indicated in City of Renton v. Playtime Theatres, Inc., 475 U.S 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), a "contents neutral" statute is not invalid merely because it may touch on First Amendment claims.

Florida's RICO statute as applied to obscenity prosecutions does not have an unconstitutional chilling effect on First Amendment freedoms.

ISSUE IV

THE FLORIDA OBSCENITY STATUTE IS IN CONFORMITY WITH THE TEST FOR OBSCENITY AS DEFINED IN UNITED STATES SUPREME COURT PRECEDENT AND THEREFORE IS NOT OVERBROAD

Under the Florida Obscenity Statute, obscenity is defined as:

> "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 interest;
>
> (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.

It is patently obvious that the statute is based on the language of the Supreme Court in Miller v. California, ***supra.*** The Miller Court in defining the obscenity standard stated:

> (a) Whether the average person, applying contemporary community standards would find that the work taken as a whole, appeals to the prurient interest. ***Kois v. Wisconsin, supra,*** at 230, 33 L.Ed.2d 312, quoting ***Roth v. United States, supra,*** at 489, 1 L.Ed.2d 1498;
>
> (b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The statute is almost a mirror image of the Miller standards.

In Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), the court stated that the second prong or "patent offensiveness" was to be resolved by the trier of fact in

the same manner as the first prong or "prurient interest" prong. The court found that this was *so* indicated in Miller. The court went on to say that the third prong or "serious value" prong was not discussed in terms of contemporary community standards. Smith at 301.

In Pope v. Illinois, *supra,* the Supreme Court reaffirmed the standard set forth in Miller and clarified the third or "serious value" prong. In Pope the court held the "serious value" prong should be decided by the "reasonable man" standard. 95 L.Ed.2d at 445. The court stated this has been the standard since Miller when it said, "This comment was not meant to point out an oversight in the Miller opinion, but to call attention to and approve a deliberate choice." Ibid.

The Second District Court of Appeal correctly determined that in reading the statute in light of Miller and Pope the doctrine of "authoritative construction" precludes a finding that the statute does not conform to these Supreme Court precedents. This doctrine has been used in another situation involving the earlier obscenity statute. In State v. Reese, 222 So.2d 732 (Fla. 1969), this Court was faced with the question of whether the statute was unconstitutional for failing to prescribe a sufficiently ascertainable standard of guilt. The subsection in question provided, "For the purpose of this section, the test of whether or not material is obscene is: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

That subsection had been adopted by the Florida Legislature in 1961 following the decision in Roth v. United States, *supra.* Subsequent to the enactment of the statute in 1961, there were additional United States Supreme Court decisions on the subject, particularly, Memoirs of a Woman of Pleasure v. Atty. Gene. of Comm. of Mass., 383 U.S. 413 (1966). This decision made clarifications and/or elaborations on the Roth test. This Court held that the subsection at issue was merely a legislative declaration of judicial rule which had already been adopted by the courts of the state. This Court went on to hold that the subsection "should be interpreted, and the words of our obscenity statute applied, in the light of the clarification or elaboration of the Roth test as made in Memoirs. State v. Reese, 222 So.2d at 735.

This Court again in Rhodes v. State, 283 So.2d 351 (Fla. 1973), applied the "authoritative construction" or "amplification principle" used in Reese after the Supreme Court decided Miller. It was held that the "test" of what constitutes obscenity for purposes of notice of the proscribed conduct, and the test to be utilized at trial, is that which prevailed under the applicable statute as amplified by authoritative sources published at the time of the offense. Rhodes at 355. This Court then expressly adopted the Miller test for obscenity. This principle was reiterated in Johnson v. State, *supra.*

The principle of authoritative construction has also been used by the Court in areas other than obscenity. In First Amendment Foundation of Florida, Inc. v. State, 364 So.2d 450

(Fla. 1978), this Court referring to State v. Aiuppa, 298 So.2d 391 (Fla. 1974), opined:

> The *Aiuppa* decision stands for the further proposition that authoritative constructions that amplify an anti-obscenity statute that are in force (published) at the time of an obscenity offense apply to define obscenity -- for purposes of notice of what is proscribed and for purposes of instructing a jury -- so that judicial constructions may be considered in determining whether the statute meets *Miller* standards.
> (text at 364 So.2d at 452)

Florida has adopted the standards as outlined in Miller. The principle of authoritative construction should be applied to properly amplify the statute to include Pope. This is especially true since the court in Pope indicated it was not a change but merely pointed out the deliberate choice made by the court in Miller. The Supreme Court used such a construction in validating an Illinois statute which had been construed by the Illinois Supreme Court to incorporate the Miller standards although the statute had been enacted prior to Miller. Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085, 52 L.Ed.2d 738 (1977).

The Supreme Court in Miller expressly recognized the doctrine of authoritative construction when it said, "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values ... are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 37 L.Ed.2d at 431. (emphasis added)

The Second District correctly used the doctrine of authoritative construction and found that the Florida Obscenity

Statute, Section 847.011, Florida Statutes, conforms to the Supreme Court standards pronounced in Miller and Pope.

ISSUE V

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE TRIAL COURT IMPROPER ARTICULATED AN ERRONEOUS REASONABLE MAN STANDARD FOR OBSCENITY CASES

The district court correctly held that the trial court's pretrial determination of the reasonable man standard was erroneous. The trial court indicated as follows:

> (a) Reasonable man does not refer to community standards or to jurors social judgment.
>
> (b) If a reasonable man could find serious literary, artistic, political or scientific value, the material is not obscene.
>
> (c) Testimony of experts and law persons will be permitted.
>
> (d) The State must present evidence that the material, taken as a whole, lacks serious literary, artistic, political or scientific value and that no reasonable person could find value. (emphasis added)

The district found and Respondent agrees that this standard places an additional element of proof on the prosecutor, an element not required under Pope v. Illinois, *supra.*

The trial court states, "Testimony of experts and lay persons will be permitted.", however, there is no indication whether this statement refers to testimony concerning a reasonable man or serious value. To the extent that the testimony is to be used to determine what is or is not reasonable, there is error. As was pointed out, the courts have consistently denied such lay witness testimony in the area of tort law. *See,* Howland v. Cates, **43** So.2d **848, 851** (Fla. **1950).** The ultimate issue has always been left to the jury to decide. Scott v. Barfield, 202 So.2d **591, 594** (Fla. 4th DCA 1967).

Respondent submits expert testimony is not necessary in this area. Section 90.702, Florida Statutes, provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion; however, the opinion if admissible only if it can be applied to evidence at trial.

Both statutory and case law allow for the use of expert testimony when the subject is beyond the common understanding of the average layman. *See*, Johnson v. State, 393 So.2d 1069 (Fla. 1980) and Buchman v. Seaboard Coast Line R. Co., 381 So.2d 299 (Fla. 1980).

It has not been demonstrated that the issues before the jury in an obscenity prosecution, prurient interest; patently offensive; serious value; reasonable man, are matters which are beyond the understanding of the average person. Indeed, one of petitioners' experts who testified at the hearing in trial court questioned the use of experts in this type of case.

It is axiomatic that the State has the burden in a criminal case of proving each element of the crime beyond a reasonable doubt. In this case, the State had the burden to prove the defendants possessed, distributed and/or hired others to distribute materials which, taken as a whole, appeal to prurient interest, describes or depicts sexual conduct in a patently offensive way and taken as a whole these materials lack serious value. Once the State has proven these elements, the jury is to be instructed on the standards applicable to these elements.

Pope v. Illinois, *supra.* Prurient interest and patent offensiveness are to be determined applying contemporary community standards, and serious value is to be determined using a reasonable man standard.

The State does not have to prove that no reasonable man could find serious value; this must be decided by the jury. This standard should be applied by the jury to determine if the material presented are obscene.

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the Second District Court of Appeal holding Section 847.011 to be constitutional should be affirmed and the case should be remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Respondent on the Merits has been furnished by U.S. Mail to Deborah Bruckheimer, Office of the Public Defender, Polk County Courthouse, Post Office Box 9000-Drawer PD, Bartow, Florida 33830; John H. Weston, 433 North Camden Drive, Suite 900, Beverly Hills, California 90210; James K. Green, American Civil Liberties Union Foundation, 301 Clematis Street, Suite 200, West Palm Beach, Florida 33401; John K. Aurell, Suite 1000, Monroe-Park Tower, 101 North Monroe Street, Tallahassee, Florida 32301, this 7th day of December, 1989.

Of Counsel for Respondent