IN THE SUPREME COURT OF FLORIDA

TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA and CMH ENTERPRISES, INC., Petitioners, vs. THE STATE OF FLORIDA, Respondent.	Case No. **74,390** (Consolidated with Case No. **74,020**) Case No. **88-246** IN THE SECOND DISTRICT COURT OF APPEAL

Discretionary Review Of Decision Of The

District Court Of Appeal Of Florida, Second District

BRIEF ON JURISDICTION FOR PETITIONERS

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PRELIMINARY STATEMENT

Petitioners, five individuals and one corporation (along with separate Petitioner Stall), were Appellees in the Second District Court of Appeal and defendants in the trial court. Respondent, the State of Florida, was Appellant in the Court of Appeal.

STATEMENT OF THE CASE

Petitioners were charged by information in the Polk County Circuit Court with multiple obscenity violations and obscenity-predicated RICO offenses. Following an extensive hearing, the trial court dismissed the information, concluding the Florida obscenity statute violated the privacy, due process and free speech clauses of the Florida and federal Constitutions, and that the severe penalties of the RICO Act created an impermissible chilling effect in violation of the First Amendment. (The Order of Dismissal is appended as Exhibit A.) The Second District Court of Appeal reversed. (The Court of Appeal's opinion, filed on March **31, 1989,** is attached as Exhibit B.) All Petitioners now seek this Court's discretionary review in these consolidated cases, which involve identical facts and legal issues.[1]

SUMMARY OF ARGUMENT

As evidenced by the Court of Appeal's earlier certification of this case as one requiring immediate resolution because of its great public importance[2], this petition presents critical issues

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[1]These Petitioners sought rehearing, while Petitioner Stall in Case No. **74,020** immediately sought this Court's review. This Court stayed its proceedings until this petition was filed.

[2]Discretionary jurisdiction was declined by this Court on September **16, 1988,** in Case No. **73,019.**

regarding the rights of privacy and free speech in this state. The trial court's decision is illustrative of a growing trend emerging from the nationwide ferment concerning the issues of privacy and free speech which surround sexually-oriented materials in the changed cultural landscape of post-Video Revolution" America. Indeed, it was issued, coincidentally, on the same day the Hawaii Supreme Court similarly invalidated its state's obscenity laws as violative of the Hawaii Constitution's right of privacy.

Petitioners are charged with violating Florida's obscenity law, and solely on that basis the RICO Act as well, primarily for selling to consenting adults videotapes of the sort now available at most video stores across the country. For the dissemination of these mainstream adult materials to adults, the petitioners each face guidelines sentences of 17 to 22 years.

The widespread home consumption and enjoyment of sexually-oriented materials by American adults has skyrocketed with the sales of VCRs. The resulting changes in social mores have rendered prosecutions like this one an anomaly.[3] For presumptively protected expressive conduct they could not have known in advance to be unprotected and criminal, and which on the contrary responds to enthusiastic consumer demand, video store operators and employees face the direst criminal penalties. The severity of the punishments threatened by the RICO Act in particular, including a maximum 30-year prison term, is seemingly calibrated to ensure

[3]Unlike any other criminal statute, the law of obscenity is significantly shaped by community attitudes towards and consumption of the materials subject to regulation.

the removal of all erotica from the shelves of the typical expressive business.

The trial court concluded that the Florida obscenity statute and obscenity-predicated RICO Act were unconstitutional for all the following reasons, which Petitioners now urge before this Court:

1) Because of its adverse impact upon adult citizens' right to choose expressive materials for enjoyment in the privacy of their own homes, the Florida obscenity statute, F.S.A. § 847.011, violates the right of privacy overwhelmingly endorsed by Florida's citizenry in adding Art. I, § 23 to the Florida Constitution.

2) As applied to obscenity, the Florida RICO Act, F.S.A. §§ 895.01-.06, threatens such severe penalties that it inevitably chills and indirectly censors an extensive range of protected expression, in violation of the First Amendment.

3) The standard for obscenity is unconstitutionally vague, providing inadequate notice to the speaker as to what speech is prohibited, and failing to establish any meaningful guidelines for law enforcement (compounding the problem of chilling effect).

4) As recently amended, the Florida obscenity statute does not conform to the current federal test for obscenity under Miller v. California, 473 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[4]

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[4] See Princess Cinema v. Wisconsin, 292 N.W.2d 807 (Wis. 1980). The trial court addressed this and other, less central issues which are not highlighted here because of the brevity required in this petition and the surpassing importance of the constitutional claims presented by this case.

I. THE RIGHT TO BE LET ALONE: F.S.A. § 847.011 VIOLATES THE RIGHT OF PRIVACY GUARANTEED BY THE FLORIDA CONSTITUTION

In 1979, the Florida electorate voted to amend the state Constitution, by adding this declaration of the "right to privacy": "Every natural person has the right to be left alone and free from governmental intrusion into his private life...." The scope of that right of privacy is crucially at issue here--whether adults in this state have the right to determine for themselves what they may view in the privacy of their own homes.[5] Voters in at least eight states have passed such privacy amendments, which, like Florida's, have consistently been construed to afford more personal freedom than the federal Constitution.

American adults now rent more than 200 million sexually-oriented videotapes each year; home VCR viewing has become the dominant mode of consuming erotic materials and indeed has greatly popularized them. With this backdrop, Hawaii's Supreme Court held that a similar provision of the Hawaii Constitution invalidated the state's obscenity laws. In State v. Kam, 748 P.2d 372 (Hawaii 1988), that Court found no compelling state interest to outweigh the state right of privacy: "Since 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." 748 P.2d at 380.

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[5] This case involves no issue of child pornography or distribution to minors, nor do Petitioners argue that the Florida right of privacy impedes the criminalization of these offenses.

The Court of Appeal below acknowledged Kam but nonetheless rejected the trial court's conclusion that Art. I, §23 limited the scope of obscenity legislation. In so doing, the Court of Appeal relied on three clearly incorrect premises. First, it relied on this Court's decision in Sardiello v. State, 394 So.2d 1016 (Fla. 1981), as binding contrary authority. However, this Court did not address Art. I, § 23 in Sardiello, nor in any other case involving obscenity. Second, the Court of Appeal summarily concluded that Florida's privacy right does not extend beyond the home, whereas many well-established privacy rights extend far beyond the confines of the home, such as going to the store to purchase contraceptives. Finally, the court observed that before a right of privacy can attach, "a reasonable expectation of privacy must exist," thus invoking a notion relevant only in determining the reasonableness of a search or seizure under the Fourth Amendment. See Paul v. Davis, 424 U.S. 673, 712-713 (1976) (contrasting the search and seizure context with the "fundamental guarantee of personal privacy" which does not depend upon particularized expectations).

Florida's adult citizens voted to add a right of privacy to Florida's Constitution. Many of those citizens undoubtedly enjoy erotic materials at home and must have a correlative right to acquire to those materials. Art I, § 23, which insulates citizens from legislative interference with their personal decision-making, stands at odds with this obscenity prosecution. This case squarely presents the privacy issue and calls for its resolution by this Court in the interests of articulating the scope of the

privacy amendment and resolving this clash between Florida's legislature and its Constitution.

11. THE FEDERAL CONSTITUTIONAL ISSUES: THE FLORIDA OBSCENITY AND RICO STATUTES DENY DUE PROCESS AND CHILL PROTECTED SPEECH

The U.S. Supreme Court has always recognized that a "dim and uncertain line" separates obscenity from protected speech. Under current law that boundary line is impossible to locate in advance of publication, so that the would-be speaker must hazard the chance of a wrong guess as to what some prosecutor or jury may deem "obscene" in the future. Obscenity determinations have proved notoriously unpredictable; prosecutorial evaluations are as changeable as tropical weather.

Moreover, drastically enhanced penalties for obscenity, like those created by the RICO Act, have raised the stakes dramatically. Given this pressure, it is inevitable that many would-be disseminators of erotica, e.g. the corner video store operator, will simply remove anything a prosecutor might conceivably claim to be illegal. The lack of fair notice as to what materials constitute "obscenity," and the lack of clear standards to guide police, prosecutors, judges and juries in making that determination,[6] demonstrate that current obscenity laws entail a denial of due process. Among the critics of the obscenity test are four current U.S. Supreme Court justices, who have expressed their desire to reconsider the vague and unworkable Miller test in an appropriate case such as this one. See Pope v.

[6]See Kolender v. Lawson, 461 U.S. 352, 357-358 (1983).

Illinois, 107 S.Ct. 1918, 1923-1924 (Scalia, J., concurring; Brennan, Stevens, and Marshall, J., dissenting). At least three of those justices agree with the position eloquently stated by Justice Brennan in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973): "none of the available formulas can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the [First Amendment]... and ... the asserted state interest in regulating ... sexually-oriented materials."

The Oregon Supreme Court has also emphatically embraced this view in State v. Henry, 303 Or. 510, 732 P.2d 9 (1987), striking down that state's obscenity laws as fundamentally at odds with the Oregon Constitution's free speech clause. Like the Hawaii Court in State v. Kam, supra, the Oregon Court concluded that while zoning laws and statutes to protect minors are perfectly legitimate forms of regulation, government should not restrict speech "in the interest of a uniform vision of how human sexuality should be portrayed." Henry, supra, 732 P.2d at 17, 18.

The Court of Appeal below misconceived the issue by treating the closely intertwined issues of the vagueness of the obscenity standard and the chilling effect as separate and distinct concerns. It is particularly because of the inherent vagueness of the obscenity test that RICO/obscenity prosecutions are so constitutionally troubling for their chilling effect upon a wide range of protected speech. This indirect censorship is an impermissible result under the First Amendment, and Judge Bentley correctly invalidated the RICO Act on this basis.

Fort Wayne Books v. Indiana, 109 S.Ct. 916 (1989), is not to the contrary. That case, although involving a challenge to Indiana's RICO/obscenity law on grounds of chilling effect, is clearly distinguishable. First, although the Court in Fort Wayne Books found that the petitioner had not adequately demonstrated an unconstitutional chilling effect, the penalties at stake there -- a maximum of 8 years with the possibility of probation -- were considerably less than are threatened under Florida's RICO Act, the most extraordinarily punitive anti-obscenity law in the country. The Court in Fort Wayne Books recognized that at some point the chilling effect threshold would be breached, but declined to so find in that case. Certainly, the 30-year prison term threatened under Florida's law-- with no guidelines-permissible probation -- transgresses that constitutional barrier.[7]

Also, since all parties to the Fort Wayne Books litigation expressly disclaimed any challenge to the Miller test, the Court understandably declined to consider that issue.[8] In contrast, Petitioners in this case have thoroughly attacked the Miller test from the outset, and have comprehensively briefed and argued the issue.[9] This case therefore **is** an appropriate one for re-

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[7]This is particularly so where there are no safeguards against arbitrary prosecutions such as a grand jury (as in many states and the federal system) or a probable cause hearing (as in Louisiana and Indiana).

[8]Undersigned counsel John H. Weston argued Fort Wayne Books on behalf of all petitioners in the Supreme Court.

[9]Petitioners append their Appellees' Brief to the Court of Appeal as Exhibit C to this brief, not as part of the argument herein but rather to demonstrate the complexity and seriousness of the issues litigated in this case.

evaluation of the Miller standard.

III. THE PRACTICAL AND CONSTITUTIONAL SIGNIFICANCE OF THESE ISSUES MANDATES REVIEW BY FLORIDA'S HIGHEST COURT

In recent years, state courts have been increasingly willing to depart from federal standards, and to interpret their state constitutions with heightened regard for the free speech and privacy rights of their citizens. See, most recently, People v. Ford, 57 U.S.L.W. 2711 (Colo. S.Ct. No. 87SA61, May 15, 1989) (Colorado Constitution's free speech clause requires a more stringent definition of obscenity than the federal Constitution).

This case presents an appropriate and compelling occasion for this honorable Court likewise to vindicate the Florida Constitution's broader guarantees of free speech and privacy. The scope of those rights affects in myriad ways the lives of Florida's citizens, who have voted resoundingly in favor of the privacy amendment.

The obscenity laws in their current form, especially with the RICO Act's threat of virtually limitless penalties, promise to curtail the availability of much erotic material which adult citizens obviously desire, and to which they have a fundamental right of access. In light of popular acceptance of this entertainment genre, it is incumbent upon this Court to explicate fully the justifications for and limits upon such laws. Otherwise, the perfunctory approval of censorial laws denigrates the security of constitutional rights and sends a message to the

citizenry that speech may be suppressed not on the basis of reason but because, as in China, government has the untrammelled power to do so.

Traditionally, courts appropriately accord legislative acts great deference. By their nature, however, constitutions are both sources of and limitations upon legislative power. These privacy and free speech provisions stand as bulwarks between the rights of all citizens and temporal legislative enactments sometimes passed at the behest of vocal minorities. Florida's citizens have voted for an expanded realm of personal freedom from governmental interference. If Art. I, § 23 does not protect the expressive conduct alleged in this information, then the justification should be clearly articulated by this Court of last resort.

CONCLUSION

As was recognized by the original certification of this case to this Court, this case raises complex and important federal and state constitutional questions which merit the full consideration of Florida's Supreme Court. For all the foregoing reasons, Petitioners respectfully urge this Court to exercise its discretionary review over this appeal.

Dated: July 18, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States mail to Peggy A. Quince, Esq., 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, and Deborah Brueckheimer, Esq., Assistant Public Defender, P. O. Box 9000, Bartow, Florida 33830, on this 18th day of July, 1989.

Billie Hines

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