OA 1-10-90

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

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I.

IN RESPONSE TO PETITIONERS' CHALLENGE ASSERTING A VIOLATION OF THE FLORIDA CONSTITUTIONAL RIGHT OF PRIVACY, THE STATE HAS FAILED TO MEET ITS BURDEN OF JUSTIFICATION

Although the Respondent State of Florida acknowledges this Court's decisions holding that Article I, § 23 "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution,"[1] its argument essentially contradicts that premise. Citing several United States Supreme Court privacy and Fourth Amendment decisions as if they set the limiting principles which should govern the analysis of petitioners' challenge in this case, respondent argues for a very constricted view of the right of privacy under the Florida Constitution. The state's essential argument, that there is no cognizable privacy interest in the asserted right of adults to choose whatever books and films they wish for their own private enjoyment, disregards both the Supreme Court's holding in Stanley *v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), and the broad scope of privacy rights as defined by this Court's decisions.

The core of the state's argument is that the asserted privacy right fails because petitioners' customers have

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[1] *In re: T.W.*, 551 So.2d 1186 (Fla. 1989).

no "reasonable expectation of privacy."[2] That argument, however, is inconsistent with the privacy rights analysis expounded by this Court.

First, respondent unduly constricts the law of privacy in asserting that "[t]he right of persons to be let alone in their private lives does not extend to public places" (Brief of Respondent at p. **3). As** this Court's decisions have made clear, the constitutional right to privacy protects people, not places. In its ground-breaking discussion of privacy rights in *Winfield V. Division of Pari-Mutuel Wagering,* **477** So.2d **544,** 548 (Fla. 1985), for example, this Court held that an individual had a legitimate expectation of privacy in financial records held by a bank. Thus even in the search-and-seizure context, the scope of privacy protection is not limited to the home or places in which a party has an ownership or possessory interest, as

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[2] Respondent also seeks to re-litigate the well-established rule regarding vicarious standing in the area of privacy and First Amendment claims. As the Second District Court of Appeal recognized, standing in this case is directly governed by the holdings on this point in *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), and in *Griswold v. Connecticut,* 381 U.S. **479,** 85 S.Ct. **1678,** 14 L.Ed.2d 510 (1965). Both courts below correctly noted that petitioners' customers "are not subject to prosecution and, consequently, they have no effective avenue of preserving their rights." *State v. Long,* 544 So.2d 219, 222 (Fla. 2nd DCA 1989). It is simply not a practical reality that petitioners' customers "can in fact raise their own privacy interest should they be arrested attempting to purchase these materials" (Brief of Respondent at p. 3). Petitioners stand as the only effective advocate of their customers' privacy and free speech interests in this regard, precisely **as** did the parties challenging the anti-contraceptive legislation in *Eisenstadt* and *Griswold.*

respondent suggests (B.R. at p. 10). Rather, the zone of privacy is determined by reference to the individual's expectations of privacy, "provided they are not spurious or false. **A** determination of whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances." *Shaktman v. State,* 14 F.L.W. **522,** 524 (Ehrlich, C.J., concurring specially).

The privacy right asserted here, the right of adults to choose freely the expressive materials they wish to read or view, is not at all location-specific by its very nature. Indeed, to confine it to the home is to render that right meaningless. As Justice Stevens recently noted, such an approach is inconsistent with the principles of *Stanley v. Georgia, supra,* and "insults the citizenry by declaring its right to read and possess material which it may not legally obtain." *Pope v. Illinois,* 481 U.S. 497, 107 S.Ct. 1918, 1930, 95 L.Ed.2d 439 (1987) (dissenting opinion).

In its discussion of privacy rights in *Winfield,* this Court discerned that there are essentially two distinct species of privacy rights. The first, as in *Winfield,* involves the Fourth Amendment-type right to be free from governmental intrusion in the form of an unreasonable search or seizure. The other type of privacy interest is the right to self-determination in "matters concerning marriage, procreation, contraception, family relationships and child rearing, and education," for example. *Winfield, supra,* 477 So.2d at 546. The Supreme Court recognized in *Stanley v. Georgia, supra,* that the right of adult citizens to possess erotic materials, including those which might be deemed legally "obscene," for their personal enjoyment or educational purposes falls within this latter category of privacy

rights, the "autonomy zone," as this Court distinguished it in *Winfield*. Rights of this nature relate to the individual's personal autonomy and private decision-making; they have little to do with the places in which the individual might exercise that freedom of choice. The right to choose to have an abortion, for example, follows the woman to the clinic or hospital, regardless of the fact that a "public place" is involved.

Crucial to privacy rights analysis, therefore, are the circumstances and essential nature of the asserted right. Petitioners certainly do not contend that the state has a "duty . . . to provide the public with a place to obtain these materials" (B.R. at p. 8). Rather, they advocate the right of the adult public to obtain reading and viewing materials from private sources, untrammeled by the state's censorial intervention. This privacy right in the selection of the books and films citizens wish to consume is a matter of personal choice well within the "autonomy zone" this Court has recognized in cases such as *In re: T.W.*, 551 So.2d 1186 (Fla. 1989). Even leaving aside First Amendment considerations, the privacy amendment makes clear that the state has no business making this choice for adult citizens by prohibiting romance novels in favor of fine literature, or televised wrestling in favor of PBS, for example. The same principle applies to bring the choice of erotic materials within the scope of cognizable privacy rights. If anything, the privacy interest is amplified in the realm of materials dealing with an intimate subject matter such as sexuality.

The Second District acknowledged that enforcement of Florida's criminal obscenity statutes "will 'materially impair' the ability of the [petitioners'] customers to

obtain the materials." **544** So.2d at 222. In *State v. Kam*, 748 P.2d 372, 379-380 (Hawaii 1988), the Hawaii Supreme Court endorsed the right to receive information affirmed in *Stanley v. Georgia*, and further noted: "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." Under the sound reasoning of the trial court in this case, the Hawaii Supreme Court in *Kam*, and the decisions of this Court broadly construing the right to privacy, petitioners have certainly raised a colorable claim that the criminal obscenity statute violates Article I, § **23.**

To say that their customers have a cognizable privacy interest in their choice of and access to erotic materials is not to say that petitioners must necessarily prevail, of course. Their well-taken challenge simply shifts to the state the burden of justifying its incursion into that zone of privacy. Respondent has adduced no compelling rationale in support of its obscenity laws, however, because, petitioners submit, no such compelling interest exists. Further, the state has not demonstrated, nor could it demonstrate, that the criminal obscenity statute represents the least restrictive alternative in pursuit of any legitimate state interests. Under the mode of analysis this Court has consistently applied in privacy-rights cases, therefore, the challenged statute must fall as violative of Article I, § 23.

A. There Is No Compelling Governmental Interest Which Would Justify the Censorship of "Obscenity" Disseminated to a Willing Adult Audience

Petitioners having demonstrated both a legitimate privacy interest in the individual's personal selection of media materials for private use, and the fact that the challenged statute significantly impairs this right, the burden shifts to the State to justify the law under the standard this Court announced in *Winfield, supra.* The absence of any compelling state interest dooms the statute to invalidation under the strict scrutiny required by the privacy amendment.

The state's assertion that it has a compelling interest in the prohibition of an amorphous category of "obscene" materials is unsubstantiated. The state alleges only that the legislature in enacting the obscenity statute "has determined the . . . dissemination of obscene materials [is] not in the public interest and the State has a compelling interest in halting that distribution" (B.R. at p. 13). Later, in its discussion of the vagueness of the *Miller* test for obscenity, the state asserts that the dissemination of "obscene" materials "cuts to the fabric of our society'' (B.R. at p. 18). Again, no particular harms are specified.

Respondent's failure to adduce a compelling state interest is hardly novel or surprising. Indeed, such a failure has characterized every attempt to justify obscenity laws, including the Supreme Court's discussion of its rationale in *Miller* and its companion case, *Paris Adult Theatre I v. Slaton,* **413** U.S. **49, 93** S.Ct. 2628, 37 L.Ed.2d **446** (1973). Apart from the objectives of protecting minors, unwilling audiences, and neighborhoods

(problems which are easily and more effectively addressed by narrowly tailored regulations), attempts to justify criminal obscenity laws inevitably come down to an argument that they are necessary in order to prevent the public from having "impure thoughts." Surely, passage of Florida's privacy amendment has discredited the notion that government has a legitimate, much less a compelling, interest in policing the private sexual attitudes or normal erotic curiosity of the adult public. As the Hawaii Supreme Court noted in *Kam, supra,* 748 P.2d at 379, "Reading or viewing pornographic materials in the privacy of one's own home in no way affects the general public's rights."

Particularly in a society in which sexually explicit materials have become standard fare for viewing in an enormous number of American homes, the argument that government may properly intrude to prevent this "immorality" seems entirely at odds, with the spirit of the privacy amendment endorsed by the citizens of Florida. Moreover, the state's argument logically implies that it should be allowed to suppress *all* such materials, regardless of their popularity and constitutionally-protected status even under the *Miller* standard. Both Florida's privacy guarantee and the federal and state free speech clauses stand in the way of that improper goal.

B. Whatever Governmental Interest the State Might Adduce in Justification of These Statutes, the Obscenity and RICO Statutes Are Not the Least Intrusive Means of Realizing Those Goals.

The state having specified no compelling interest, petitioners can respond only in terms of the rationales

typically advanced in justification of obscenity laws – protecting minors, safeguarding the integrity of neighborhoods, etc. Even assuming that criminal obscenity statutes substantially advance a compelling interest, they do not represent the least intrusive means of addressing the state's interest. As petitioners have extensively demonstrated in their opening brief (B.R. at pp. **28-36),** none of these rationales is narrowly achieved by the obscenity statutes, particularly as amplified by the RICO Act.

The goal of protecting minors, while laudable and compelling, cannot justify a blanket ban on "obscenity" distributed to willing adults. The Supreme Court long ago held in *Butler v. Michigan,* 352 U.S. **380,** 77 S.Ct. 524, 1 L.Ed.2d 1412 (1957), that even under the federal Constitution, protecting minors is insufficient justification for prohibiting adults' access to erotic materials. Florida, like most if not all other states, has appropriate and narrowly tailored legislation to protect minors from exploitation and exposure to sexually explicit materials. Those laws are perfectly valid even in the light of Florida's privacy amendment. Criminal obscenity laws, on the other hand, are superfluous and overbroad as a means of protecting minors.

Likewise, as Petitioners have noted, isolated and random prosecutions seeking to eliminate particular films or books as obscene do little or nothing to protect the "quality of life" in neighborhoods, an objective which has been widely and effectively advanced subsequent to *Miller* through appropriate zoning and licensing legislation. *See Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d **310** (1976); *City of Renton V. Playtime Theatres, Inc.,* 475 U.S. 41, **106** S.Ct. 925, 89 L.Ed.2d 29 (1986).

Likewise, all of the state's arguably legitimate goals can better be served by specific time, place, and manner restrictions.

If the state were genuinely concerned to eliminate particular offensive, "obscene" works from circulation, it could do so by the less intrusive means of civil adjudications prior to which no one would face the severe criminal penalties prescribed by Florida's obscenity and RICO laws.[3] Instead, the state has chosen to implement a statutory scheme which threatens any distributor of erotic materials with these dire sanctions, although the defendant has no way of knowing in advance what is "obscene" and what is constitutionally protected. The inevitable result is the self-censorship of a great many materials protected by the First Amendment. Under the strict scrutiny required by Florida's privacy guarantee, this result signifies a patently overbroad statute.

Whatever one's personal opinion of this phenomenon, adult fare has become mainstream in American culture (B.R. at pp. 3-4), and American adults are accustomed to the freedom to choose erotic materials for their own private enjoyment. Just as with abortion rights, the privacy amendment endorsed by Florida's citizens

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[3] In noting this less restrictive alternative, petitioners do not concede that this means of denying adults access to media materials for their private use would survive a challenge under the privacy amendment. They cite this alternative merely as proof that the criminal obscenity laws do not represent the least restrictive means of achieving any legitimate goals of anti-obscenity legislation.

protects such freedoms, regardless of the moral disapproval some might express. This is the very nature of the constitutionally-secured privacy right: that the state may not intrude into realms of private decision-making just because a vociferous minority, or even a majority, would impose its beliefs upon other citizens who believe differently. If rights such as the freedom to choose the books and films one wishes to enjoy are not safeguarded from legislative interference, then the nature of our political culture as one of fundamental rights and pluralism is in severe jeopardy. Petitioners respectfully urge this Court to reaffirm the "ultimate goal" of the privacy amendment: "to foster the independence and individualism which is a distinguishing mark of our society." *Shaktman v. State*, ___ So.2d ___, **14** F.L.W. 522, 523 (Fla. S.Ct. October 12, 1989).

II. THE STANDARD FOR OBSCENITY UNDER § 847.011 IS HOPELESSLY VAGUE IN VIOLATION OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS

In their opening brief, petitioners have demonstrated that the obscenity standard's incurable vagueness works to the extreme detriment of constitutionally *protected* free speech. Since the *Miller* decision, petitioners have shown, this vagueness dilemma has substantially worsened with the popularization and broad community acceptance of "hard core" erotic materials. Ironically, their very popularity had triggered a spate of zealous prosecutions designed to chill all sexually oriented speech, the constitutional status of which the bookseller or video store operator can never be certain until after a final adjudication.

Respondent does not address these contemporary problems of chilling uncertainty but offers only the tired assurances the *Miller* majority issued sixteen years ago. In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Court announced a test for obscenity which it thought to be "sufficiently definite" to avoid the unconstitutional effects of vagueness. Experience has simply disproven this assertion.

To view the problem concretely, can it truly be said that the Florida obscenity statute provided these petitioners with "fair notice" that materials of a type widely circulating in their community were violating that community's standards? Could they realistically be expected to anticipate what materials a prosecutor would subjectively single out as "patently offensive" and "prurient" under those amorphous "community standards"?

The Florida obscenity statute provides "fair notice" only that even the mildest of erotic materials, i.e. those entailing nudity and the mere suggestion that sexual intercourse "will occur", are fair game for prosecution. See § 847.001(9), (11). The resulting self-censorship, and arbitrary censorial initiatives of law enforcement, intolerably abrogate the free speech and due process guarantees of our constitutional system.

III. THE CHILLING EFFECT OF THE FLORIDA RICO ACT, § 895.01 et seq., IS NO "MERE ASSERTION" BUT AN IMMINENT AND OPERATIVE THREAT TO FREE SPEECH IN THIS STATE.

In its discussion of the chilling effect of the RICO Act, respondent maintains, in the face of the *Fort* Wayne *Books*

decision, that First Amendment analysis is inapplicable in the task of scrutinizing the effects of RICO as applied to obscenity. No matter how extensive the deterrence of materials fully protected by the Constitution, respondent suggests, this censorship is merely the incidental by-product of a legitimate campaign against "racketeering." To adopt the state's position in this regard is to render the chilling effect doctrine a nullity.

The state cites *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 19871, for the proposition that First Amendment scrutiny need not be applied to the RICO Act in obscenity cases. The United States Supreme Court in *Fort Wayne Books, Inc. v. Indiana*, ___ U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (19891, completely *reversed* this decision and expressly disapproved its reasoning on this point, holding that RICO as applied here must be analyzed under the First Amendment just like any other obscenity statute.

Although it is true that the Court in *Fort Wayne Books* found the "mere assertion of some possible self-censorship" insufficient to establish a chilling effect violation, petitioners in this case have demonstrated far more. They have adduced, for example, the concrete experiences of distributors such as their Amici PHE Inc., et al., who have either curtailed distribution or ceased doing business in this state. The Florida RICO Act is of course incomparably more severe in its sanctions than the Indiana version, and this very prosecution bears testimony to the live threat of a guidelines – mandated **17-22** year prison term merely for a wrong estimation of the protected status of

words and pictures under prevailing "community standards." The chilling effect of this statute is readily apparent as a matter of common sense and experience.

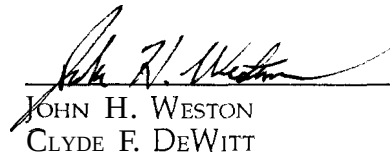
As further evidence of the state's unconstitutional aim of actively suppressing the circulation of presumptively protected media materials, Petitioners call the Court's attention to the citizen complaint form circulated by the State's Attorney (See Exhibit A, Petitioners' Supplementary Appendix.) This form encourages crusaders for censorship to invade every corner video store and to file complaints against materials they have not even viewed. This incitement clearly represents state-sponsored harassment of video store operators who are thereby threatened with the spector of RICO prosecutions bearing a potential 30-year prison term. The results are not difficult to predict: all erotic videotapes will simply be removed from their shelves.

The state implicitly argues that it should be allowed this power, through use of weapons like the RICO Act, to drive sexually-oriented material out of circulation altogether, or at least underground as in Victorian times. This objective is, of course, patently offensive to both the Florida and federal Constitutions. Petitioners urge this Court to join the courts in 4447 *Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 19851, and *State v. Feld,* 795 P.2d 146 (Ariz. App. 1987) *cert. den.,* 108 S.Ct. 1270 (19881, in rejecting such censorial legislation as violative of the First Amendment.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully urge this Honorable Court to reverse the judgment of the District Court of Appeal and to remand this cause with instructions to dismiss the information on grounds that the underlying statutes violate the United States and Florida Constitutions.

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 28th day of December, 1989.

Robert Jorgensen