

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

SKYYWALKER RECORDS, INC.; LUTHER
CAMPBELL; MARK ROSS; DAVID HOBBS;
and CHRIS WONGWON;

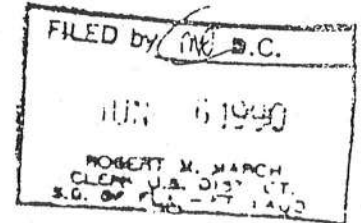
Plaintiffs,

v.

Case no. 90-6220-CIV-JAG

NICHOLAS NAVARRO,

Defendant.



F I N A L O R D E R

This is a case between two ancient enemies: Anything Goes and Enough Already.

Justice Oliver Wendell Holmes, Jr. observed in Schenck v. United States, 249 U.S. 47(1919), that the First Amendment is not absolute and that it does not permit one to yell "Fire" in a crowded theater. Today, this court decides whether the First Amendment absolutely permits one to yell another "F" word anywhere in the community when combined with graphic sexual descriptions.

Two distinct and narrow issues are presented: whether the recording As Nasty As They Wanna Be(Nasty) is legally obscene; and second, whether the actions of the defendant

Nicholas Navarro(Navarro), as Sheriff of Broward County, Florida, imposed an unconstitutional prior restraint upon the plaintiffs' right to free speech.

It is before the court following a trial on the merits held May 14 and May 15, 1990. The court has considered the pleadings, exhibits, the testimony of the witnesses, plus argument of able counsel. By the stipulation of the parties, the trial record also includes all evidence and argument presented at the plaintiffs' preliminary injunction hearing held April 19, 1990.

THE PLAINTIFFS

The plaintiff Skyywalker Records, Inc.(Skyywalker) is a Florida corporation headquartered in Miami, Florida. The plaintiffs Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon, constitute the group known as "2 Live Crew" whose recording, As Nasty As They Wanna Be, is the subject of this lawsuit. Luther Campbell is also the President, Secretary, sole shareholder, and sole director of Skyywalker.

The plaintiffs have brought this action under section 1983, Title 42 of the United States Code, which provides a federal statutory remedy for unlawful deprivations of federal rights including those liberties guaranteed under the United States Constitution. The plaintiffs also seek a declaration of their legal rights, under the Federal Declaratory Judgment Act, 28 U.S.C. §2201(a), and injunctive relief under section 2202(b) thereof. This court has

previously denied the plaintiffs' motion for a preliminary injunction by ore tenus order entered April 19, 1990. There is no prayer for money damages.

Because this is a civil action, the party with the burden of proof must prevail by a preponderance of the evidence. On the issue of obscenity, the defendant Navarro has the burden of proof. As to the prior restraint claim, however, the plaintiffs have the burden to prove, beyond a preponderance of the evidence, that the defendant's actions were unconstitutional.

It must be emphasized at the outset that this decision does not criminalize the plaintiffs' conduct, nor does it charge anyone with a crime. That is a matter for the police and the criminal courts to determine. Whether the plaintiffs are guilty of a crime can only be decided if criminal charges are brought, a trial by jury conducted, and all other due process requirements have been met. Whether As Nasty as They Wanna Be is criminally obscene is left for the determination of another court on another day.

THE FACTS

The recording As Nasty As They Wanna Be was released to the public by 2 Live Crew in 1989. To date, public sales have totalled approximately 1.7 million copies. The recording is available in various formats including phonograph records, cassette tapes, and compact discs. 2 Live Crew has also produced a recording entitled As Clean As They Wanna Be (Clean) which has sold approximately 250,000

copies. Although neither party introduced Clean into evidence, it apparently contains the same music as Nasty but without the explicit sexual lyrics.

In mid-February 1990, the Broward County Sheriff's office began an investigation of the Nasty recording. The investigation began in response to complaints by South Florida residents.

Broward County Deputy Sheriff Mark Wichner was assigned to the case. On February 26, 1990, he traveled to Sound Warehouse, a Broward County retail music store, and purchased a cassette tape copy of the Nasty recording. The tape was purchased from an open display rack marked "Rap Music", easily accessible to all of Sound Warehouse's customers regardless of age.

Deputy Wichner listened to the Nasty recording, had six of the eighteen songs transcribed, and prepared an affidavit detailing these facts requesting that the Broward County Circuit Court find probable cause that the Nasty recording was legally obscene. On February 28, 1990, Deputy Wichner submitted the affidavit, an attached transcript of the six songs, and the tape cassette of the Nasty recording to the duty judge of the Broward County Circuit Court, the Honorable Mel Grossman. The communications between Deputy Wichner and Judge Grossman were limited to the filing of the affidavit, transcript, and tape cassette. Several days later, Judge Grossman's chambers contacted the deputy and requested further information concerning the location in

sound Warehouse of the Nasty recording and its accessibility to the public. Deputy Wichner communicated that information to the judge.

On March 9, Judge Grossman issued an order after reviewing the Nasty recording "in its entirety." The judge explicitly found probable cause to believe this recording was obscene under section 847.011 of the Florida Statutes and under applicable case law.

The Broward County Sheriff's office received and copied the order, and distributed it county wide to retail establishments that might be selling the Nasty recording. It decided to "warn the stores as a matter of courtesy" rather than make an initial arrest because, according to Deputy Wichner's testimony, such conduct would have been overaggressive. The Sheriff's office has not opened any investigations of other musical recordings because of the absence of citizen complaints.

Thereafter, Deputy Wichner re-visited the store where he had purchased the original recording plus another Sound Warehouse outlet and a store called Uncle Sam's Records. On these visits, the deputy wore a jacket marked "Broward County Sheriff" and displayed his badge in plain view. He spoke with a manager in each of the three stores, provided them with a copy of Judge Grossman's order, and told them, in a friendly conversational tone, that they should refrain from selling the Nasty recording. The managers were warned that further sales would result in arrest and that if

convicted, the penalty for selling to a minor was a felony, and a misdemeanor if sold to an adult. Between fifteen and twenty different Broward County stores were personally visited by the Sheriff's office, and the evidence indicates that each of the visits was conducted in the same manner as were Deputy Wichner's three stops.

The Sheriff's office warnings were very effective. Within days, all retail stores in Broward County ceased offering the Nasty recording for sale. Those stores not directly visited by deputy sheriffs pulled the recording from their shelves after hearing about the visits from television and radio reports. Some stores continued to sell the Clean recording. Nasty was no longer sold even by stores having a policy of specially marking the recording with a warning, and of not selling it to minors. 2 Live Crew also includes a small statement on the front of the paper insert to their recording, as follows: "WARNING: EXPLICIT LANGUAGE CONTAINED".

The Broward County Sheriff's office took no further action because there was no information that any store was selling the Nasty recording.

On March 16, 1990, the plaintiffs filed this action in federal district court. On March 27, 1990, Sheriff Nicholas Navarro filed an in rem proceeding in Broward County Circuit Court against the Nasty recording seeking a judicial determination that it was obscene under state law. See Navarro v. The Recording "As Nasty As They Wanna Be", case

number 90-09324(12)(Reasbeck). There is no evidence of the status of the state case including whether a trial date has been set. No criminal proceedings against either the recording or the group 2 Live Crew have been instituted.

OBSCENITY AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech." The Fourteenth Amendment declares that "[n]o State shall...deprive any person of...liberty...without due process of law." It is now well-established that this "liberty" includes the right to free speech. See Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71(1942); Roth v. United States, 354 U.S. 476, 479-80(1957); Stanley v. Georgia, 394 U.S. 557, 559(1969); Miller v. California, 413 U.S. 15, 20(1973). Hence, neither the federal nor the state governments may abridge this Constitutional right.

The First Amendment is one of our most sacred liberties since freedom of thought and speech are the key to the preservation of all other rights. Free speech plays a critical role in furthering self-government, in encouraging individual self-realization, and fostering society's search for truth via exposure to a "marketplace of ideas."

To protect that sacred right, the judiciary carefully scrutinizes government regulation to determine if such regulation impermissibly infringes upon it. When legislative or executive action is directed at the content of one's

speech, it will pass judicial review only upon a showing that the action is designed to further a compelling governmental interest by narrowly drawn means necessary to achieve the end. See, e.g., Widmar v. Vincent, 454 U.S. 263, 270-71 (1981).

The First Amendment's guaranty is not absolute, however. See, e.g., Chaplinsky, 315 U.S. at 571. Although the amendment is unconditional on its face, the fact that there were accepted state limits on speech at the time it was ratified indicates that the "phrasing of the First Amendment was not intended to protect every utterance." Roth, 354 U.S. at 483.

This is certainly true about speech on sexual subjects.

Obscene speech has no protection under the First Amendment. See Sable Communications of California, Inc. v. FCC, ____ U.S. ____, 109 S.Ct. 2829, 2835 (1989); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973); Miller, 413 U.S. at 20; Roth, 354 U.S. at 483; Chaplinsky, 315 U.S. at 571-72. The rationale is simple: the message conveyed by obscene speech is of such slight social value that it is always outweighed by the compelling interests of society, as manifested in the laws enacted by its elected representatives. See, e.g., Chaplinsky, 315 U.S. at 571-72.

Sex has been called "a great and mysterious motive force in human life". Roth, 354 U.S. at 487. Because of its power, both federal and state governments have chosen to regulate its abuse. For example, states have banned

prostitution, incest, rape, and other sexually related conduct. These prohibitions are no different than a ban on obscenity. The distinction between regulations of conduct and speech does not invalidate obscenity laws. As noted in Miller v. California, "Sex and nudity may not be exploited without limit by films and pictures exhibited or sold in places of public accomodation any more than live sex and nudity can be exhibited or sold without limit in such public places." 413 U.S. at 25-26.

really?
speech
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acts

The state may also have an important interest in protecting minors and unwilling or sensitive adults from exposure to obscene materials. See Miller, 413 U.S. at 18-19.

The plaintiffs attempt to diminish the state's interest by relying upon language in Butler v. Michigan, 352 U.S. 380(1957), that if materials that are only obscene as to minors are banned, a state's statute would "reduce the adult population...to reading only what is fit for children." Id. at 383. This decision only applies, however, to governmental regulations of materials which are not obscene as to adult audiences. [Certainly it is not improper for a state to protect children from materials which are too lewd for even adult consumption.]

Words, including musical lyrics, are powerful. As noted in Paris Adult Theatre I,

[If there is a] well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality,

and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? 413 U.S. at 63.

Even though there is no Constitutional protection for obscenity and there are potential governmental interests at stake, it does not necessarily mean that obscene speech is illegal. Indeed, state governments could legalize obscenity including use by consenting adults. See, e.g., United States v. Twelve 200-Foot Reels of Super 8mm. Film, 413 U.S. 123,129(1973).

The government must first criminalize obscenity before it is outlawed. Indeed, if there were no statutory bans enacted by the legislature, courts would not have to decide what is and what is not obscene.

The U.S. Supreme Court discussed this in United States v. Reidel, 402 U.S. 351,356-57(1971):

[C]ases have interpreted the First Amendment not to insulate obscenity from statutory regulation. But the Amendment itself neither proscribes dealings in obscenity nor directs or suggests legislative oversight in this area. The relevant constitutional issues have arisen in the courts only because law-makers having the exclusive legislative power have consistently insisted on making the distribution of obscenity a crime or

otherwise regulating such materials and because the laws they pass are challenged as unconstitutional invasions of free speech and press.

The Florida Legislature has acted, however. It has enacted a statutory scheme outlawing obscenity. It is apparent that this legislation is intended to regulate obscenity to the maximum extent allowed by the Constitution of the United States. Section 847.001(7), Florida Statutes, tracks the language of the controlling case of Miller v. California in defining obscenity for purposes of the state ban. Cf. A Book Named "John Cleland's Memoirs Of A Woman of Pleasure" v. Attorney General of Massachusetts (Memoirs), 383 U.S. 413, 418 (1966) (state statute interpreted by state's highest court as including all works "obscene in the constitutional sense").

↓ The Florida Legislature has enacted a comprehensive set of laws. The primary provision is section 847.011 of the Florida Statutes. Subsection (1)(a) criminalizes the distribution, sale, or production of any obscene thing including a "recording" which can be "transmuted into auditory...representations." Subsection (2) similarly makes it a crime for a person to knowingly have an obscene thing, including musical recordings, in his possession. Section 847.06 and 847.07 make it criminal to transport obscenity into the state or to create, deliver, or publish obscenity. There are several provisions which specifically apply to

*criminalizes:
sale
distribution
production*

ownership

child pornography. See FLA. STAT. ANN. §§847.012, .0125, .013, .0135, .0145(Supp. 1990). Finally, sections 847.201 and 847.202 prohibit obscene programming on cable television during promotional periods and require ratings on video tapes rented and sold to the public.

1 An argument underlying the plaintiffs' position is that the obscenity or non-obscenity of any material should not be a concern of the criminal law, but rather should be left to the free market of ideas. Let each individual member of the public decide whether they wish to buy the material. 2 Live Crew has labeled their work with an explicit warning. They claim this label allows adults who would object to the recording's contents to exercise the consumer's right of free choice to not buy the product. To use the example of television, if the viewer does not like what he sees on Channel X, he may switch to Channel Y or turn off the set. In the case of obscene music, people who do not want to listen to obscenity do not have to buy it.

This is the argument of those absolutists who believe all speech, regardless of its content, is protected by the First Amendment. Such individuals label all regulation of speech as "censorship" and "paternalism". This absolutist view finds strength among those who believe rugged individualism is a valued virtue, if not a protected right that everyone should be permitted to "do their own thing."

This is a facially appealing argument. The problem is that it is not the law.

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Florida has declared obscenity to be a crime. To repeat, violation of the laws against obscenity is as much against the law as assault, rape, kidnapping, robbery, or any other form of behavior which the legislature has declared criminal.

The absolutists and other members of the party of Anything Goes should address their petitions to the Florida Legislature, not to this court. If they are sincere let them say what they actually mean--Let's Legalize Obscenity!

To be redundant, obscenity is not a protected form of speech under the U.S. Constitution, with or without voluntary labeling. It is a crime. If the people of Florida, want to legalize obscenity, they have every right to do so. It is much easier to criticize the law, however, than it is to work to repeal it. As the Supreme Court stated in Paris Adult Theatres I:

It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice--those in politics, religion, and expression of ideas--are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not

allowed in our or any other society....

The States, of course, may follow...a "laissez-faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. 413 U.S. at 63-64(emphasis in original).

Court cannot judge the laws on obscenity passed by legislature

This court's role is merely to interpret the law to determine whether the particular material is obscene. If the inquiry yields an affirmative response, judicial review is limited to whether the means chosen to implement the law are rationally related to the goal of the legislation. It is not the role of this court to sit as a Super-Legislature to second-guess whether the best possible law was passed. See Paris Adult Theatre I, 413 U.S. at 64. This court must also refrain from substituting its own choice of the appropriate means to outlaw obscenity, for this is a matter of legislative discretion subject only to the boundaries of the Constitution and the conscience of the legislators. See Kingslev Books, Inc. v. Brown, 354 U.S. 436,441(1957). And if a statute only regulates unprotected obscenity, mere rationality is sufficient to satisfy due process.

In an era where the law and society are rightfully concerned with the rights of minorities, it should not be overlooked nor forgotten that majorities also have rights.

In our democratic form of government, citizens elect representatives to protect their interests and promote their welfare. State legislatures have the authority to exercise the governmental police power which reaches all manner of human conduct. As already seen, state regulation may reach some of the most intimate aspects of man's existence including sex. Also see Paris Adult Theatre I, 413 U.S. at 68-69 ("Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment.").

When man enters into a society and becomes a member thereof, he necessarily submits to its laws and thereby must give up the unfettered liberty he would otherwise possess in his natural state. See Near v. Minnesota, 283 U.S. 697, 707 (1931).

* as members of society and must give up the unfettered liberty

In sum, if persons subscribe to the view that obscenity should be legalized, they should take their petitions to Tallahassee, the Florida capital, not to the steps of the U.S. courthouse.

The people of Florida have made obscenity a crime. Individuals are not free to disobey or disregard the law. The law is not a smorgasbord where people are free to pick and choose among which laws they will obey and which they will reject. Neither is it a channel selector available to every member of the public to use as they deem fit. As noted in the Pattern Instructions of the Eleventh Circuit, jurors

* cannot pick and choose which laws to obey

in deciding the rights and liberties of their fellow citizens "must...follow the law...whether.....[they] agree with that law or not."

Men and women in good faith may agree or disagree as to whether obscenity should be prohibited. They can argue that the obscenity statutes should or should not be repealed. In the meantime, however, the law must be obeyed and the Sheriff has a duty to enforce it. Indeed, Florida's Legislature has mandated that all sheriffs in the state are to "vigorously enforce" the obscenity laws. See FLA. STAT. ANN. §847.001(9)(Supp. 1990).

THE MILLER V. CALIFORNIA TEST

during Nixon

In deciding whether a specific work is or is not obscene, the court must apply the controlling test enunciated in Miller v. California, 413 U.S. 15(1973). To be obscene, there must be proof of all three of the following factors: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (2) measured by contemporary community standards, the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id.; also see Memoirs, 383 U.S. at 419(to be obscene, all three elements must be met and each element must be "independently" evaluated); Penthouse International, Ltd. v. McAuliffe, 610

Judge has to decide whether it has any value

part or whole

1354, 1363 (5th Cir. 1980) (same); United States v. various Articles of Obscene Merchandise, 709 F.2d 132, 135 (2nd Cir. 1983) (same).

THE RELEVANT COMMUNITY

Both the first and second elements of Miller require application of "contemporary community standards." The issues of the size of the appropriate community, its composition, and the view of the average person in that group are all questions of fact to be decided by the trier of fact, which is the court in this case. See Miller, 413 U.S. at 30.

Both parties Apparently assumed that the relevant community was only Broward County, Florida. Neither litigant presented any evidence to support this assumption, which was apparently based upon the jurisdiction of the Broward County Sheriff and the County lines. However, the boundaries of the relevant community under Miller are a matter for judicial, not legislative, determination. See Smith, 431 U.S. 291, 303 (1977).

This court finds that in assessing whether this work is obscene, the relevant community is the area of Palm Beach, Broward, and Dade Counties. In reaching this determination, the court has considered numerous factors. These three adjoining counties share common geography on the eastern coast of Florida. They also share beachfront on the Atlantic Ocean including all the common experiences that derive therefrom including the exposure to tourists. All three

counties are open communities in the sense that visitors, from abroad and other states, come to South Florida to vacation and resettle. The area is also linked via common transportation. The three counties are connected by rail (Florida East Coast, Amtrak, and Tri-Rail), water (Atlantic Ocean and the Intracoastal Waterway), air, and highway (Federal Highway, Florida Turnpike, and Interstate 95). Through these transportation links, the labor forces of Broward and Dade on the one hand, and Broward and Palm Beach on the other, commingle. Each county has targeted media, but the three counties generally share access to the same radio and television stations and newspapers. Culturally, there is also a strong connection. Even though each county has a distinct mix of ethnic peoples, cultural events are advertised to and attended by the residents of all three. Because of the strong transportation ties, the area is also linked economically. Trade and industry in South Florida do not limit their business by county lines. Palm Beach, Broward, and Dade also share a similar composition of rural and urban areas, with the larger cities in the eastern portion of each county. Finally, there are political ties. Florida House and Senate Districts include areas within both Broward and Palm Beach. Other State House and Senate Districts include both Broward and Dade Counties. In terms of the federal districts, Congressional District 14 encompasses areas within Broward and Palm Beach, and District 16 includes both Broward and

Dade counties. The state court systems are also linked. The Fourth Appellate District includes both Broward and Palm Beach. The federal district of the Southern District of Florida includes all three counties. This court's district also includes other counties both north of Palm Beach and south of Dade, but after consideration of all the above factors, it is apparent that these other counties do not share the integral connections that Broward, Dade, and Palm Beach have. For example, the counties of Highlands, Okeechobee, Indian River, St. Lucie, and Martin would appear to be a separate community with only significant ties to Palm Beach, not to Broward or Dade.

If the relevant community is Broward, Dade, and Palm Beach counties, the next step is to determine the composition of the citizens of this area. The court, as the finder of fact, must rely upon its own personal knowledge as the parties failed to present evidence on this point. In a word, this area is remarkable for its diversity. The three counties are a mecca for both the very young and the very old. Because of the beaches and the moderate year-round climate, this area includes young persons establishing homes and older residents retiring to enjoy life under the sun. There are both families and single individuals residing in the communities. Generally, the counties are heterogeneous in terms of religion, class, race, and gender.

THE AVERAGE PERSON STANDARD

The next inquiry is more difficult because this court

must determine what are the standards for determining prurient interest and patent offensiveness in Palm Beach, Dade, and Broward Counties. The fact that the state legislature has enacted laws prohibiting obscenity is certainly relevant and entitled to great weight. The state's anti-obscenity stance as a whole, however, is overinclusive because other communities outside the three counties are included in the majority who passed the legislation.

In determining the views of the "average person" in this area, the court has not focused only on the views of the most tolerant or the most sensitive individuals. See Smith v. United States, 431 U.S. at 304-05 ("the most prudish or the most tolerant" or "the reactions of a sensitive or of a callous minority"). The "average person" does not necessarily represent any one segment of the community. It is a legal concept whereby a single perspective is derived from the aggregation or average of everyone's attitudes in the area including persons with differing degrees of tolerance. See Pinkus v. United States, 436 U.S.

293,298-302(1978)(community under Miller is made up of all adults in the area including the most sensitive). The court has not considered minors in its considerations because there was not sufficient evidence adduced at trial that the music was targeted at such persons or that it actually reached children.

This court finds that the relevant community standard reflects a more tolerant view of obscene speech than would

average person =
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of everyone's attitudes

other communities within the state. This finding of fact is based upon this court's personal knowledge of the community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned has traveled and worked in Dade, Broward, and Palm Beach. As a member of the community, he has personal knowledge of this area's demographics, culture, economics, and politics. He has attended public functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth. In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

The court does not adopt the plaintiffs' position that these three counties can be labeled as "tolerant" per se as opposed to some degree thereof. Neither the trier of fact's personal knowledge nor the plaintiffs' evidence supports such a conclusion. The plaintiffs argue that the lack of written complaints in the Nasty investigation file created by the Broward Sheriff's office is evidence of a tolerant community standard. While this fact is entitled to some weight, it is far from significant. There may be many reasons why concerned citizens have not complained. For example, the Nasty recording was not released until 1989 and

it takes time for even a popular musical release to reach the public consciousness. Although the Sheriff has the duty to enforce the obscenity laws regardless of community protest, Deputy Wichner's explanation of why this particular album was singled out can reasonably be linked to significant community discontent, whether communicated by telephone calls, anonymous messages, or letters to the police. Furthermore, the vast majority of complaints in the file, although not exclusively from Broward County, were residents of the relevant community.

Further, the plaintiffs' reliance upon the admission of other sexually explicit works is also not entitled to great weight in determining community standards. First, the Supreme Court has recognized that this type of evidence does not even have to be considered even if the comparable works have been found to be nonobscene. See Hamling v. United States, 418 U.S. 87, 126-127 (1974). In this case, there is no evidence that the comparable materials are not themselves obscene. More importantly, most of the materials are simply irrelevant. This case involves the alleged obscenity of a musical recording. Evidence of depictions of sexual conduct in pictures, moving or still, is not substantially equivalent to musical lyrics.

The most comparable works introduced are the sexually explicit writings in the various books and magazines, the audio tape entitled Raw by Eddie Murphy, and the double cassette tape recording by Andrew Dice Clay. All three of

these works focus upon a verbal message analogous to the format in the Nasty recording. The court does give these particular works some weight.

The plaintiffs also raise several collateral arguments as to why this court is allegedly unable to determine the community standards. They claim that the defendant's failure to introduce evidence at the trial including expert testimony is fatal. The plaintiffs also allege that this court's opinion will only reflect the personal opinion of the undersigned judge, not the relevant community. They support this argument by pointing to the court's alleged refusal to empanel a jury in this case.

Dealing with the last contention first, the plaintiffs' argument on the lack of a jury is disingenuous. First, the plaintiffs filed this action in federal court and only requested equitable relief without any right to a trial by jury. Second, there is no Constitutional right to trial by jury in obscenity cases. See Alexander v. Virginia, 413 U.S. 836(1973). Finally, neither party agreed to trial by jury. If both parties consent, Federal Rule 39(c) allows a court to empanel a jury whose verdict would have the same binding effect as if trial by jury was a matter of right. The provision also allows for use of an advisory jury whose verdict is not binding on the court. The defendant Navarro only consented to an advisory jury. The plaintiffs conditioned their consent to any form of a jury upon the court's ruling on another motion before the court. In that

motion, the plaintiffs advanced the argument that this court should impose a standard of proof more demanding than a preponderance of the evidence upon the defendant on the obscenity issue. Such a request was without merit. This is a civil, not a criminal case, and hence does not require proof by clear and convincing evidence or, proof beyond a reasonable doubt. The plaintiffs would agree to an advisory jury only if this court required a standard of clear and convincing evidence. Even if the court had used an advisory jury, the verdict of six other citizens on the issue of community standards would have been of doubtful value. The individuals would have only been Broward County residents. Moreover, this court, as demonstrated, has sufficient personal knowledge of the community and its standards to make a decision in this case.

The plaintiffs' claim that this court cannot decide this case without expert testimony and the introduction of specific evidence on community standards is also without merit. The law does not require expert testimony in an obscenity case. The defendant introduced the Nasty recording into evidence. As noted by the Supreme Court in Paris Adult Theatre I, when the material in question is not directed to a "bizarre, deviant group" not within the experience of the average person, the best evidence is the material, which "can and does speak for itself." Paris Adult Theatre I, 413 U.S. at 56 & n.6.

In deciding this case, the court's decision is not

based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find As Nastv As Thev Wanna Be obscene, he would be compelled to do so if the community's standards so required.

The true basis of the plaintiffs' argument is that the legal standard of the "community" and the "average person" are too nebulous to apply to an issue of constitutional law. This position ignores the fact that the law does not require absolute certainty as to its determinations. The standard of proof is adjusted upward or downward to reflect the balance between the competing rights of individuals and society. In civil cases, the law gives effect to a determination based on a preponderance of the evidence. Even in criminal matters where a person can lose his liberty, property, and even his life, there is no requirement that the government prove guilt beyond all possible doubt. As noted in Hamling v. United States, 418 U.S. 87, 101 (1974), "[I]t is common experience that different juries may reach different results... This is one of the consequences we accept under our jury system." The same holds true when the court is the finder of fact in a bench trial. Application of the "community" and "average person" standards are no different than that of applying the standard of the "reasonable person" used in negligence and tort law. See Pinkus v.

United States, 436 U.S. 293, 300-01(1978); Smith, 431 U.S. at 308.

THE FIRST MILLER TEST: PRURIENT INTEREST

This court finds, as a matter of fact, that the recording As Nastv As They Wanna Be appeals to the prurient interest. The Supreme Court has defined prurient as "material having a tendency to excite lustful thoughts." Roth, 354 U.S. at 487 n.20. Appeals only to "normal, healthy sexual desires" are not adequate to meet the test. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498(1985). The material must exhibit a "shameful or morbid interest in nudity, sex, or excretion". Id. (readopting definition in Roth, 354 U.S. at 487 n.20).

definition of prurient

Nastv appeals to the prurient interest for several reasons. First, its lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning. Florida's Legislature has provided a valuable source of evidence in the form of its obscenity statutes for determining what is sexual conduct. The initial provision is section 847.001(11), Florida Statutes, which defines "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse, ...masturbation, ... sadomasochistic abuse; [or] actual lewd exhibition of the

genitals". Section 847.001(2), Florida Statutes, defines deviate sexual intercourse as sexual conduct between unmarried persons involving contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva. Section 847.001(8) defines sadomasochistic abuse as satisfaction from sadistic violence derived by inflicting harm upon another. These definitions cover most, if not all, of the sexual acts depicted in As Nasty As They Wanna Be.

Furthermore, the frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity. The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.

It is also noteworthy that the material here is music. It is true that it would be difficult, albeit not impossible, to find that mere sound without lyrics is obscene. Music is sufficiently subjective that reasonable persons could disagree as to its meaning. But, the focus of the Nasty recording is its lyrics. Based on the evidence at trial, music of the "rap" genre focuses upon verbal messages accentuated by a strong beat. 2 Live Crew itself testified that the Nasty recording was made to be listened and danced to. The evident goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to "dirty" thoughts and the loins, not to the intellect and the mind.

what if
they were
married?

SD
music is
behavior

good imagination, your
likeness

WOW

The court has also given some, but not great, weight to the plaintiffs' commercial motive. Of course, the fact that the plaintiffs made a profit from the public distribution of the Nasty recording is not relevant in determining obscenity. See Ginzburg v. United States, 383 U.S. 463, 474 (1966). However, the court can consider the manner in which the material was distributed and promoted to determine if the "leer of the sensualist" permeates the work. Id. at 463-66, 468, 475-76. In Ginzburg, the court found that publishers of certain magazines and books had directed their advertising in such a way as to commercially exploit erotica solely for the sake of their prurient appeal. Id. at 466. For example, the advertisements sent to potential customers "stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded [as] an unrestricted license allowed by law in the expression of sex and sexual matters." Id. at 469. The Court went on to note that, "the deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." Id. at 470.

Consideration of the creator's intent to appeal to the prurient interest is still a valid consideration today, even after Miller v. California. See Splawn v. California, 431 U.S. 595 (1977); Pinkus, 436 U.S. 293 (1978).

The record at trial indicates that the plaintiffs'

commercial exploitation of this work was done in a manner calculated to make a salacious appeal. The title of the recording, As Nasty As They Want To Be, in addition to the names of many of the songs and the illustration on the recordings' insert certainly fit within the confines of the Ginzburg case for materials "look[ing] for titillation."

One of the more interesting points suggested by the evidence at trial, but not dwelt on by the defendant, was that 2 Live Crew made two apparently identical albums with the only difference being the sexually explicit lyrics. The plaintiffs' own expert, John Leland, testified that the Nasty recording, without the salacious lyrics, would not have been expected to sell more than 500,000 copies nationwide. To date, the Nasty version has sold 1.7 million copies. The identical recording sans sexual lyrics (Clean) has sold only 250,000 copies. The difference between the actual sales of the two recordings can reasonably be found to have been motivated by the "leer of the sensualist". The plaintiffs cannot claim they needed the vulgar lyrics to promote their message since the plaintiffs' own experts testified that music from neither the "rap" or "hip-hop" genre does not require the use of such language.

Finally, the plaintiffs rely upon testimony, both lay and expert, that the Nasty recording did not actually physically excite anyone who heard it and indeed, caused boredom after repeated play. However, based on the graphic deluge of sexual lyrics about nudity and sexual conduct,

this court has no difficulty in finding that As Nasty As They Wanna Be appeals to a shameful and morbid interest in sex.

THE SECOND MILLER TEST: PATENTLY OFFENSIVE

The court also finds that the second element of the Miller test is satisfied in that the Nasty recording is patently offensive. This is a question of fact, which must be measured by contemporary community standards. See Miller, 413 U.S. at 30.

It is quite true that not all speech with sex as its topic is obscene. See Roth, 354 U.S. at 487. The As Nasty As They Wanna Be recording is another matter.

The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts. Furthermore, the frequency of the sexual lyrics must also be considered. With the exception of part B on Side 1, the entire Nasty recording is replete with explicit sexual lyrics. This is not a case of subtle references or innuendo, nor is it just "one particular scurrilous epithet" as in Cohen v. California, 403 U.S. 15, 22 (1971).

As already noted, Florida's Legislature has defined obscene acts to include sadomasochistic sexual conduct, oral sex, and anal intercourse. See FLA. STAT. ANN. §§847.001(2), .001(8) (Supp. 1990). In addition, Florida's obscenity statutes are intended to have the broadest, constitutional