

## ***Vamos a Cuba* - 2009 Update to an Ongoing Challenge**

The Florida Library Association (FLA) filed an *amicus curiae memorandum*, or friend of the court brief, in United States District Court in 2006 supporting a lawsuit filed by the American Civil Liberties Union (ACLU) of Florida and the Miami-Dade Student Government Association. The lawsuit was filed against the Miami-Dade County School Board for its removal of the book *Vamos a Cuba* and the book series "A Visit to..." from Miami-Dade School Board libraries and classrooms.

On February 5, 2009 the 11<sup>th</sup> Circuit Court of Appeals reversed the earlier decision of a lower court to return the book to school library shelves. The court's decision may be found at <http://www.ca11.uscourts.gov/opinions/ops/200614633.pdf>

Walter Forehand, Attorney at Lewis, Longman & Walker, P.A., prepared FLA's friend of the court briefs in the *Vamos a Cuba* case. He provides this analysis of the Appellate Court decision:

I am sure that all of you who have followed the case now know that the federal 11<sup>th</sup> Circuit Court of Appeals, the appellate court which reviews the decisions of federal district courts in Florida, Alabama, and Georgia, has reversed the ruling of the federal district court in the Southern District of Florida (the Miami court which issued the preliminary injunction requiring that the children's book, *Vamos a Cuba* and the other books in the "Vamos a" or "Let's go to" series, previously order removed from the school libraries in Miami-Dade schools by the school board, be returned to the shelves). My effort here is to explain what, at least in my view, the decision says, and to suggest what it may mean in practical terms for school libraries.

To begin, for one to understand fully the decision would frankly require more familiarity with legal principles than most non-lawyers could be expected to have. Notwithstanding, it is easy enough to summarize the decision's thrust in readily accessible terms as long as one understands that the reaction "but that doesn't make any sense" is a sensible reaction to technical legal matters which the lawyers representing the plaintiffs and those representing the friends of the court, of which FLA is one, also question, but more for technical reasons than "it doesn't make sense." Lawyers are experienced in dealing with appellate decision adverse to their points of view to which they continue to disagree.

The first "technicality" is that the decision of the appellate court will not become final for a couple of weeks, during the period in which motions for rehearing can be filed. I do not know what the ultimate decision by the plaintiffs will be on the filing rehearing motions, but it may well be that some sort of rehearing will be filed, perhaps a request for the entire "banc" of all the judges in

the circuit rehear the case. Stay tuned on this one, perhaps for another report, perhaps for dead air.

As to the opinion itself, it has been twenty months in the making and comprises 177 typed pages. There is an “opinion of the court” (“majority opinion”) written by Judge Carnes and “joined in,” that is, agreed to, by Judge Walter (who is not a member of the circuit, but a district court judge in Louisiana participating in the case “by designation,” a common occurrence in appellate cases). The majority opinion is the version of the case which will be cited as legal precedent in the federal courts of Florida, Alabama, and Georgia (and as “persuasive” authority in other courts). There is also a “dissenting opinion,” that is, the view of a judge believing that the case should have been decided differently, written by Judge Wilson.

The perceived importance of the case as a “constitutional challenge” has been based on the question of which “branch” of First Amendment might govern school law. Without getting into the details, free speech protections in the schools are different depending on whether one is dealing with personal expression, with library books, or with what is contained within the school’s curriculum. The “library books” area has been the most perplexing because the United States Supreme Court has issued only one opinion directly on this subject and this opinion (called a “plurality” opinion because a majority of justices agreed on the result but a majority could not agree on a single opinion expressing the Court’s view) has been of uncertain precedential value. There was much effort expended by the parties (and friends of the court) in their briefs arguing for the legal “constitutional” standard to be applied to the case.

Notwithstanding, the Eleventh Circuit Court in both the majority opinion and the dissent specifically avoided deciding which constitutional standard applied to the case, thereby side-stepping the “theoretical” issue. Given the fact that the Court came down against us, the opinion is probably better than one might have feared. The fear was that the Court, if it reversed the district court, would delineate a constitutional standard which might have very great adverse effect on First Amendment rights in school library collections and leave decisions about removing books from collections almost exclusively to the changing political climate or the changing prejudices of school boards. This did not happen. Instead, the majority focused on “refinding” the school board’s motive in removing the books.

The board (at least the majority—the action was not unanimous) asserted that its decision to remove *Vamos a Cuba*, and by

association the other books in the series, was based on the presence of admitted inaccuracies in the book, both in fact and by omission. Of course, there had been a lengthy review of these questions by educators and citizens in the process required by the school district to evaluate citizen complaints about a book before the issues went to the board. These individuals and groups had uniformly and overwhelmingly found the inaccuracies insignificant and the book suitable for the library. The school board, however, was the final step in the procedure and was not bound by earlier evaluations. The district court judge concluded that the board's proffered basis for its decision was pretextual and the book was removed because it did not portray life for children in Cuba as harsh and controlled by a communist dictatorship, and hence that the board's motivation was a disagreement with the "political viewpoint," perhaps more accurately, the fact that it did not portray the political situation in Cuba. Such a motive made the school board's actions unconstitutional.

As indicated, the majority reweighed the facts to reach the conclusion that the school board was indeed motivated by concerns over accuracy not by political viewpoint and so under whatever legal standard one applied, it had not acted unconstitutionally. This approach created a very long recitation from the record of evidence presented to the district court, focusing on evidence that criticized the book's accuracy, including acceptance of expert opinion that the district court had rejected, and an equally long recitation by the dissent of evidence, much of it relied on by the district court, that the majority of the board had ignored the advice of lower panels and educational experts who opined that the book was suitable to the library setting in favor of the contrary opinions not out of education conviction but because the board members disapproved of the book's failure to paint a bleak picture of life in a communist state. Thus, anyone who wishes to plow through the pages of the case, skipping the more technical legal questions, will have a good overview of the evidence from which to make up his or her on mind about the board's motivation.

Regardless of one's private conclusion as to motive, however, many non-lawyer readers may wonder "Is that how it works?" that is, "Does the district court decide the facts, and then the appellate court ignores its decision and finds them all over again?" Indeed, the legal issue in this case comes from that very question. In almost all cases, the legal standard used by an appellate court to examine "findings of fact" made by a district of court is whether there was credible evidence upon which the district court might make its findings, and this includes its decisions as to which witnesses to credit and which to discount. In the very restricted

environment of constitutional law, however, there is the notion of “constitutional facts,” which briefly (and circularly) stated, says that an appellate court may examine facts that go to the core constitutional question anew (the technical term is de novo) without giving deference to the district court’s findings. The majority relies on that doctrine to, in my analysis, completely retry the evidence, and in the view of the dissent to go well beyond the legitimate limits of “constitutional facts” to “retry” conclusions of the district court to which deference should be given. By using this “technical” ploy, the majority is able to construct a version of the facts which avoids any need to announce a constitutional standard. In general, the majority concludes that the school board may, on any standard, remove a book which it finds to be so inaccurate as to be unfit to include in the collection. This decision does not offend any “protected” form of constitutional expression, a well-known doctrine, examples of which (not used by this court but mentioned here to help understand the concept) are the principle that one does not have the first amendment right to shout “fire” in a crowded theater, or to use profanity over the public airways. In other words, there is no constitutional right to have an educationally unsuitable volume remain on the library shelves.

One may conclude, as do I, that the majority has exhibited a “willing suspension of disbelief” in its conclusions about the school board’s motives. Notwithstanding, from a legal perspective, there is a very real question as to whether the appellate court has applied the doctrine of constitutional facts correctly. If further review of the case is requested by the plaintiffs, either to the 11<sup>th</sup> Circuit or to the United States Supreme Court, that will be the focus.

In the meantime, one can immediately see the mischief that the case may play. Most works of substance will contain some inaccuracies. More to the point, almost all works of substance will contain omissions that someone may object to as creating gross inaccuracies because they do not give a “complete” picture and so which disqualify the book as a proper volume to be made available in the school libraries. Does this decision provide a blueprint to school boards wishing to remove books they do not like from school libraries for how to clothe otherwise unconstitutional motives in constitutionally acceptable garb? I leave it to the reader to speculate as to where and with respect to what subjects this could lead.