

**IN THE SECOND DISTRICT COURT OF APPEAL**

CHRISTOPHER M. WILSON,

Petitioner,

v.

GRADY JUDD, in his official capacity  
as Sheriff of Polk County, Florida, and  
JERRY HILL, in his official capacity as  
State Attorney in and for the Tenth  
Judicial Circuit,

Respondents.

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APPEAL CASE NO.:

LT CASE NO.: CF-05-7738

10th Judicial Circuit,  
Polk County, Florida

**Emergency Relief Requested  
Pursuant to *Fla.R.App.P.* 9.300(c)**

**EMERGENCY APPLICATION FOR STAY PENDING CONSIDERATION  
OF FULL PETITION FOR WRIT OF HABEAS CORPUS**

**A. The Emergency Relief Sought**

Petitioner Christopher M. Wilson (hereafter "Petitioner"), pursuant to *Fla.R.App.P.* 9.300 and 9.3101, moves this Court, on an emergency basis, to issue an immediate order staying, pending this Court's consideration of his full Petition for Writ of Habeas Corpus, the order of the lower court entered on December 16, 2005 in the case of *State v. Wilson*, Polk County Circuit Court No. CF-05-7738, revoking his bond and remanding him to custody pending trial. A. 231. Petitioner thus seeks a stay

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1 Petitioner sought a stay from the Lower Court but the Court refused to consider the request. Therefore, Petitioner alternatively requests that this Motion be considered a motion to review the Lower Court's refusal to consider a stay.

order requiring his immediate release from custody, and reinstatement of his original bond, pending a determination of the accompanying Petition, on the merits.

Petitioner also requests, on an emergency basis and pending this Court's consideration of his full petition for writ of habeas corpus, an order enjoining respondents from any further attempts to revoke his bond or remand him to custody pending trial, where the sole basis for such attempts would be the allegation that any allegedly obscene materials were posted on his website, in the absence of any allegation that he has exhibited any images or other media which have previously been determined obscene in any final judicial action.

**B. The Grounds Offered In Support of This Requested Emergency Relief**

Petitioner incorporates, as grounds in support of this emergency application, those portions of his accompanying Petition for Writ of Habeas Corpus which assert that the actions of Respondents constitute a facial violation of the First Amendment as either a prior restraint, state action impermissibly chilling expression, or prior punishment, in violation of the free speech guarantees of the First and Fourteenth Amendments of the United States Constitution and parallel provisions of the Florida Constitution.

It is Petitioner's position that, as a matter of law, incarceration based solely on probable obscenity, and prior to a final jury determination thereof, or at least absent an allegation that the exhibition occurred after a prior judicial determination of obscenity,

constitutes an impermissible prior restraint on First Amendment rights utterly inconsistent with state and federal constitutional safeguards.

While Petitioner readily concedes that for all offenses *other* than obscenity, a finding of probable cause that new violations have occurred while one is free on bail is more than sufficient grounds for the revocation of a prior bail order. However, an entirely different principle comes into play when the alleged crime is one of obscenity. This is because until sexually explicit materials are proven obscene in a final judgment, they are presumptively protected by the First Amendment.<sup>2</sup> This fact precludes a bond revocation under circumstances that ordinarily would *allow* a bond revocation. This is but one instance of a common principle perhaps best articulated in *Castro v. Superior Court*, 9 Cal.App.3d 675, 686, 88 Cal.Rptr. 500, 509 (1970): "[W]hat is permissible when ordinary criminal conduct is involved, frequently comes to grief when tested against the First Amendment."

For purposes of this emergency application only, Petitioner assumes, *arguendo*, the *probable* obscenity of all the images the State has relied upon in seeking the revocation of his bond, even though he is confident that, following a trial before a jury

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<sup>2</sup> See, e.g., *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), holding that, prior to a final judicial determination of obscenity, sexually oriented materials are "presumptively protected under the First Amendment." *Id.* at 491, 93 S.Ct. at 2794. Similarly, in *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), the Court held that bookstores and commercial theaters are "presumptively under the protection of the First Amendment." *Id.* at 504, 93 S.Ct. at 2801. The same presumption attaches to a website exhibiting sexually oriented materials, and to all the materials on such site. *ACLU v. Reno*, 521 U.S. 844, 112 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

of his peers, the images will not in fact be found obscene, nor will he be found criminally responsible for their presence on his website. (The uncontroverted evidence is that all of the allegedly obscene images were posted on Petitioner's website by members of the public without Petitioner's prior or subsequent awareness of their existence on his website until such fact was brought to his attention by Respondents.)

Because Petitioner's incarceration was based solely upon the allegation that his website posted allegedly obscene items while he was free on bail pending charges that other items on his website were obscene, the mere fact that the State sought his incarceration on this ground has forced him to remove all of the sexually oriented images from his website and has effectively put him out of business, all prior to any jury determination, or final judicial determination, that *any* of the items on his website were in fact legally obscene, or that he was criminally responsible for their exhibition.

Consequently, the novel procedures employed here by the State<sup>3</sup> have

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<sup>3</sup> Petitioner's attorneys, who have specialized in this area of the law for over 30 years, are unaware of any prior prosecution anywhere in the United States where one charged with alleged obscenity offenses was incarcerated prior to trial solely on the basis that they continued to distribute or exhibit allegedly obscene items (not yet found to be obscene) pending their trial on obscenity charges. The unprecedented nature of this action was confirmed by an independent, expert censorship attorney who has studied proceedings in obscenity cases for decades, and has found no instance of bond being revoked under these circumstances. A. 229.

effectuated an immediate and *de facto* pre-trial prior restraint of enormous and unconstitutional proportions (forcing the closure of the primary sections of a website with a large worldwide membership on which were typically posted approximately 270,000 different sexually oriented images at any one time prior to its forced closure by the State. A. 130-131). Because, as noted above, all sexually oriented media materials are presumptively protected by the First Amendment until proven otherwise in court, the State has caused a serious (and to Petitioner's awareness, unprecedented) ongoing restraint of First Amendment rights which increases with each additional day that the website is forced to remain closed.

As shown in Point IV of the accompanying Memorandum, this ongoing restraint of expression entitles Petitioner to an immediate stay of his bail revocation order (and to a temporary injunction prohibiting additional bond revocation motions based solely on additional allegations of unproven obscenity) so he can re-open his website at the very least, pending this Court's consideration of his full Petition for Habeas Corpus. The legal basis for this application is set forth below.

#### **MEMORANDUM IN SUPPORT OF EMERGENCY APPLICATION**

Pursuant to an order issued on December 16, 2005 revoking his bail bond and remanding him to custody, A. 231, Petitioner Christopher Wilson (hereinafter "Petitioner") is presently in the custody of Respondent Grady Judd, in his official capacity as Sheriff of Polk County, Florida ("SHERIFF") and shall remain so, unless

released by this Court, pending trial on charges that certain images found on a website he is charged with operating were obscene in violation of local community standards in Polk County, Florida<sup>4</sup>. Respondent Jerry Hill, in his official capacity as State Attorney in and for the Tenth Judicial Circuit (“STATE ATTORNEY”), successfully moved to revoke that bond and impose pretrial detention without bail based on allegations that new and different photos appeared on Petitioner's alleged website after his initial arrest<sup>5</sup> which the State likewise believes to be "obscene" under Polk County, Florida community standards.

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<sup>4</sup> This notwithstanding that: (1) the computer server on which the website has been maintained is located in The Netherlands; (2) Petitioner never sent any materials to, or specifically solicited any persons within, Polk County, Florida; (3) there was no suggestion that Petitioner, or any persons working under his control, had any prior awareness of any of the particular allegedly obscene materials charged in this case, nor that any of them had approved the placement of these particular images on the website; (4) the website typically maintained over 250,000 photos at any given point in time, approximately 95% of which were put on there unilaterally by users throughout the world authorized to access the website, without any prior review, knowledge or approval of Petitioner or those assisting in operating the website; (5) it would be a physical impossibility to run such a website successfully if the operator had to preview each separate photo before it could be posted on the website; and (6) the only connection to Polk County, Florida is that, at the time of the alleged offenses, Petitioner is alleged to have previously resided there. A. 129-138. Petitioner does not concede that Polk County community standards can be legally applied to materials disseminated via the Internet, as argued in his pretrial motion relating to that issue.

<sup>5</sup> As indicated in Petitioner's affidavit submitted below in opposition to the State's motion to revoke bond, Petitioner caused all sexually oriented images to be removed from the website when he learned for the first time that the State considered their maintenance to be a violation of the conditions of his pre-trial release. A. 130-131.

Believing that it may treat an alleged obscenity offense no differently than any other offense allegedly committed while one is free on bond, the Respondent STATE ATTORNEY filed, and the lower court granted, a motion that the trial court "revoke the defendant's bond and remand him to jail awaiting trial. A. 98

It should also be noted that, prior to the hearing, Petitioner, through his Affidavit, informed the trial court that he had no money left after paying the premium on his original bond with which to post any additional or supplemental bond. A. 137. Consequently, he informed the court that even if it were to deny the motion to remand him to custody, any order imposing a new or modified bond would be the *de facto* equivalent of an order remanding him to custody because Petitioner's website has been closed, and the existing bond consumed all of Petitioner's resources but for those necessary to obtain continuing legal representation. This fact was uncontroverted at the bail revocation hearing.

## THE PETITIONER'S LEGAL POSITION

The First Amendment prohibits the revocation of bond, increase of bond, or imposition of a new bond requirement, solely on the basis of allegations of one or more new obscenity offenses occurring while on bond (where none of the offenses have resulted in convictions, and where the defendant is otherwise in compliance with all independent pre-trial detention criteria set forth in § 907.041, *Fla.Stat.* (2005)), and does so in all cases, but at the very least under circumstances, as here, where such an order would constitute either *de jure* or *de facto* pre-trial detention.

## LEGAL ARGUMENT

The notion that pre-trial detention of obscenity defendants under these circumstances<sup>6</sup> is unconstitutional is clear under any of a variety of different aspects of First Amendment law including, but not limited to:

1. Pre-trial detention<sup>7</sup> for unproven obscenity offenses is an impermissible form of prior restraint of the Petitioner and his website, not different in any mean-

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<sup>6</sup> I.e., circumstances where, but for the asserted new obscenity violations, no revocation of the existing bail would be authorized by §907.041, *Fla.Stat.* (2005), Florida's pre-trial detention statute.

<sup>7</sup> As used herein throughout, the term "pre-trial detention" is a reference to both *de jure* pre-trial detention and *de facto* pre-trial detention where bail is set in an amount beyond the defendant's means.

ingful way from any of the numerous forms of prior restraint which have been universally condemned as prohibited by the First Amendment.

2. Pre-trial detention for unproven obscenity offenses under the circumstances of this case, unless reversed on appeal, will cause an impermissibly chilling impact on websites throughout the nation, if not the world, and violate the First Amendment because substantial amounts of constitutionally protected material will be removed from the marketplace, due to the inability to determine obscenity in advance of a jury determination, and particularly given that, under the State's theory, web-posted material must comply with the community standards of every local community in America. Also, this type of bail revocation procedure, if allowed, would not merely chill, but guarantee the total elimination of any and all "user-submission" type websites (of *all* types, sexually oriented or not) where the majority of the material on the website is placed there directly by individual users without prior approval of the website owner.

3. Pre-trial detention for unproven obscenity offenses is nothing less than "prior punishment," a concept abhorrent to First Amendment values.

**I**  
**PRE-TRIAL DETENTION FOR UNPROVEN OBSCENITY OFFENSES IS  
AN IMPERMISSIBLE FORM OF PRIOR RESTRAINT.**

In *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the Supreme Court first recognized the bedrock constitutional principle that prior

restraints on expression violate the First Amendment. Since that time, that Court has repeatedly stated that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Heller v. New York*, *supra*, 413 U.S. 483, 491 (1973), quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *Accord*: *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975); and *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316, fn. 13 (1980).

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 583, fn. 6 (1983), the Court reaffirmed that prior restraints "strike to the core of the Framers' concerns" and accordingly compel a standard of scrutiny even higher than that applied to most regulations challenged as violative of the First Amendment.

The question presented by the appeal of this bond revocation order is whether the *de facto* or *de jure* detention of one accused of exhibiting obscene materials on an internet website pending trial on those charges constitutes an impermissible prior restraint of expression where:

1. the grounds for bail revocation consist solely of new additional unproven allegations of obscenity offenses;

2. there has been no conviction or jury finding that *any* of the charged materials are obscene;

3. the Petitioner has already posted a bond in the maximum amount he could possibly afford and would not have enough money to meet any increase in his bond or the setting of any additional bond, and would be forced to remain in custody pending trial if any such change in his bond status were ordered;

4. there is no evidence or even suggestion that Petitioner had ever even seen or been aware of any of the particular assertedly obscene photos that were hand-picked by the State for this prosecution, and in fact, there is affirmative uncontroverted evidence demonstrating that the photos were supplied to the website anonymously by any of thousands of potential users of the website without Petitioner's advance knowledge;

5. it is abundantly clear that Respondents' unstated primary goal is and has been the closure of Petitioner's website;

6. no convictions have been returned by juries in obscenity cases in this jurisdiction in the last 20 years, obscenity cases against websites are rarely initiated in this jurisdiction, and this case involves a website with significant political value;

7. but for these asserted, but unproven, obscenity offenses, Petitioner has already demonstrated that he meets all the criteria under the state's pre-trial detention statute, FSA § 907.041, for remaining free under the previously set bond amount pending trial;

8. Petitioner has not otherwise in any way violated any terms of his existing bond; and

9. Respondents failed to request removal of the allegedly obscene material from the website after the arrest, and later declined Petitioner's counsel's request to provide any guidance as to what materials Respondents contend are obscene. A. 215.

In *Near v. Minnesota, supra*, the Court held that it will "cut through mere details of procedure" to analyze realistically "the operation and effect of the statute in substance." 283 U.S. at 713. *See also Kingsley Books v. Brown*, 354 U.S. 436, 441 (1957) ("The judicial angle of vision in testing the validity of a statute . . . is 'the operation and effect.'")

Here, it is clear that the operation and effect of the Florida pre-trial detention statutes, as construed and applied by the prosecution, is not merely to allow Petitioner reasonable bail pending the trial of rarely-filed and controversial charges, but to silence Petitioner's website *before* that trial takes place (as well as the websites of all other website owners in the jurisdiction, if not the state).

As Justice White wrote in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." Here, the nature of the right assertedly threatened is the right to operate a website without fear of imprisonment at least until such time as Petitioner has been convicted of exhibiting any obscene materials. Consequently, the standard of review is under the First Amendment standards of prior restraint rather than the normal standards applicable generally to criminal bail revocation proceedings.

The pernicious evil of this type of bail revocation proceeding is best revealed by the following point:

Even if Petitioner wins at trial, and does so in each succeeding trial the State may bring against him, the State will still have achieved its goal because any defendant's website (including the website in the present case) has no choice but to close down if the only alternative is the incarceration of those who operate it pending the opportunity for a fair trial on the underlying obscenity charges. But if the State may force the pre-trial detention of one charged with obscenity violations pending trial, simply for continuing to maintain a website the defendant believes to be constitutionally protected, then no such defendant, once obscenity charges are filed, will ever dare to continue to maintain a challenged website pending trial as it would insure the loss of their liberty, even if, as said above, none of the charges are ever

found valid at trial. In short, this bail-revocation strategy is a novel and outrageous assault on fundamental constitutional rights; its purpose and effect on the Petitioner is clearly that of a prior restraint. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), indicating that a prior restraint can be achieved through impermissible intimidation as well as by more traditional means.

However, for yet a *separate* reason, the State's abuse of the bail revocation statutes in this case attempts imposition of an impermissible prior restraint. Specifically, after his initial arrest, Petitioner, through counsel, requested guidance from the State as to the type of sexually oriented photos which the State would deem to be prohibited obscenity. A. 215. Not surprisingly, the State declined this invitation.

This makes the net effect of the obscenity statutes and the pretrial detention statutes (as the State is attempting to apply them here) very analogous to blanket civil injunctions prohibiting exhibition of *any* obscene materials. Such injunctions were roundly condemned in both *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980) and *Ladoga Canning Corp. v. McKenzie*, 370 So.2d 1137 (Fla. 1979).

In *both* these cases, the State and Federal Supreme Courts found injunctions against disseminating any obscene materials to be an unconstitutional prior restraint because they would impermissibly chill protected expression more than analogous criminal proceedings if those who would disseminate such material had "to guess at their peril which of their publications are not obscene under the criteria set forth in the

injunctions." *Ladoga*, 370 So.2d at 1141.<sup>8</sup> Obviously, in a civil injunctive proceeding, one is deprived of the significant protections available in a non-petty criminal prosecution (such as charges of obscenity under Florida law), e.g., trial by jury, requirement of unanimity by at least six jurors, requirement of proof beyond a reasonable doubt, etc.

Moreover, another rationale for these rulings was hinted at in *Vance* which is highly analogous to the circumstances of the present case. *Vance* concluded that someone against whom a blanket civil obscenity injunction had been imposed could be jailed for contempt prior to a final trial on the merits of the obscenity issue.<sup>9</sup>

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<sup>8</sup> *Ladoga* also reaffirmed that "a publication may not be suppressed merely because it contains certain poses or actions."

<sup>9</sup> *See Vance*, 445 U.S. at 312, n.4 where the majority rejects Justice White's dissent observing that "[e]ven if it were ultimately determined that the film is not obscene, the exhibitor could be punished for contempt of court for showing the film before the obscenity issue was finally resolved."

Moreover, in that same footnote, the majority indicates that even if the injunction was against exhibiting a *specific* named film, the danger is that such an injunction could be issued solely on a showing of a probability of success on the merits and thus, one could be jailed for contempt before the merits were ever ultimately resolved. Unquestionably, the Court was cognizant of the fact that the same procedural defect would lie if the temporary injunction was a blanket one against exhibiting *any* unnamed obscene film. The danger is that prior to a final determination of obscenity, the exhibitor could be punished for contempt based on a mere probable cause determination. Yet that, effectively, is precisely what has happened here.

For each of these reasons, the State's revocation of Petitioner's bail violated the First Amendment and Petitioner urges the Court to stay enforcement of that order pending full review of his entire habeas petition.<sup>10</sup>

**II**  
**PRE-TRIAL DETENTION FOR UNPROVEN OBSCENITY OFFENSES UNDER THE CIRCUMSTANCES OF THIS CASE WILL, UNLESS REVERSED ON APPEAL, CAUSE AN IMPERMISSIBLY CHILLING IMPACT IN VIOLATION OF THE FIRST AMENDMENT.**

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<sup>10</sup> As stated by Justice O'Connor in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), a case where the Court *rejected* an argument that a prior restraint was present:

"If ... a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books ..., the cases would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at 708.

Likewise here, the State has used the pre-trial detention statutes as a pretext for closing down a website because it showed allegedly obscene photos, without bothering to wait for a jury determination of whether the materials violate the applicable community standards. Clearly prior restraint analysis applies here.

Apart from the absolute prior restraint impact which the prosecution's bail revocation tactic has already had upon the Petitioner, it also violates the First Amendment for another distinct reason, its chilling impact in deterring others not before the court from establishing or maintaining sexually oriented websites of any type, and particularly of the "user-submission" type as is involved here. Specifically, Petitioner's alleged website is one where most, if not all, of the images on the website are provided by the public, not by the website owner, and approximately 95% of them are placed there unilaterally by approved users once they are granted access to the site. A. 134. In essence, it is a quintessential public forum with a scope and reach that could not even have been dreamed of by the framers of the Constitution.

The significance of this type of "user-submission" website is highlighted by Petitioner's affidavit herein which states that this particular website served a dual purpose of providing a forum for sexually explicit materials but also for photographs and video clips taken by our armed forces in Iraq and Afghanistan. A. 135-136. This latter aspect of the site apparently became increasingly popular because, once soldiers realized that their photos would be posted on the website, they sought to submit increasingly candid photos of how an actual war looks on the ground to those who are participating in it. A. 136. This serves a political purpose consistent with the most fundamental aspects of First Amendment protection as it allows an informed electorate substantial and unique additional information that would otherwise not be

available to it to assist it in evaluating the credibility of statements by its elected politicians.<sup>11</sup>

In any event, if the State's revocation of Petitioner's bond is allowed to stand based on nothing more than the postings of allegedly obscene photos on a "user-submission" website, the State will have accomplished a remarkably chilling effect upon all similar such websites throughout Florida, if not the nation.<sup>12</sup> Notably, Polk County residents cannot be blocked from receiving the website content at issue. A. 132.

Moreover, the only answer to protecting "user-submission" websites from such prosecutorial tactics would be to implement a method of monitoring each and every photo posted on the website. However, as indicated in Petitioner's accompanying affidavit, such a mechanism would die a still birth because no successful "user-submission" website system could afford the amount of personnel that would have to be employed to monitor each and every photograph submitted before it was allowed

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<sup>11</sup> Indeed, Petitioner strongly believes, though cannot yet prove, that it was political pressures generated by a desire to close this aspect of the site that led to the initiation of this highly novel obscenity prosecution. Whether these beliefs can ultimately be proved or not is beside the point. It is obvious that the bail revocation statutes, as applied here, have the *potential* for enormous abuse of First Amendment rights, even if those are not the circumstances ultimately motivating the present prosecution.

<sup>12</sup> This is particularly true given the State's effort to control Petitioner Wilson's Internet activity even after he left the confines of Polk County and the Tenth Judicial Circuit. A. 132.

on the website. A. 134-135. In essence, "user-submission" websites have the same impossible task of self-review, except magnified by far greater numbers of items to review, than the bookseller in *Smith v. California*, 361 U.S. 147 (1959). (In *Smith* the Court held that criminal obscenity charges could not be filed based simply on a strict liability theory.<sup>13</sup>) However, the big difference between the two is that the user-submission website does not offer individual images for sale, and functions more as a specialized internet bulletin board. Such a medium cannot exist if it must review and self censor each item placed on there by users.<sup>14</sup>

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<sup>13</sup> *Smith* stated:

There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. 361 U.S. at 152-153.

<sup>14</sup> As *Smith* went on to point out:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. \* \* \* And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. *Id.* at 153.

Also, if website users could no longer post any submissions without being subject to the prior scrutiny of the webmaster, that would deter a great percentage of all submissions, and not necessarily because of a fear of potential criminal charges, but simply due to the combinations of inconvenience, potential embarrassment, and a desire for anonymity in expression.

For each of these reasons, bail modification and/or revocation under these circumstances independently violates the First Amendment due to its impermissible chilling impact on the expressive rights of not only Petitioner, but of countless others not before the court whose rights can be asserted herein under the relaxed rules of standing applicable in First Amendment cases.

### **III PRE-TRIAL DETENTION FOR ONE OR MORE UNPROVEN OBSCENITY OFFENSES IS IMPERMISSIBLE PRIOR PUNISH- MENT PROHIBITED BY THE FIRST AMENDMENT.**

In discussing prior restraint cases, the Supreme Court has occasionally noted the distinction between restraints imposed prior to a final determination of obscenity, and those imposed as "subsequent punishment" only after a final determination of obscenity with all constitutional safeguards afforded to the defendant before such a determination is made. *See, e.g., Alexander v. United States*, 509 U.S. 544, 113 S.Ct. 2766, 2773 (1993): "[W]e have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments." Given the

presumption that all expressive materials are protected by the First Amendment, defendants in obscenity cases have historically been allowed to continue distributing materials pending a final judicial determination of obscenity. See, *State v. U&L Theatres, Inc.*, 307 So.2d 879, 881 (Fla. 3d DCA 1975) (citing precedent).

This is the first case of which undersigned counsel are aware where a state elected to impose not only a prior *restraint*, but went so far as to impose a prior *punishment* by incarcerating an individual before any materials he allegedly exhibited were ever found obscene. If prior restraints are impermissible, then, by sheer force of logic, prior *punishments* are necessarily more so.

Finally, the requirement of *subsequent* punishment for expression violations serves extremely important purposes. It ensures that no punishment will be imposed until an appropriately instructed jury of the defendant's peers has the opportunity to evaluate the allegedly obscene materials and determine for themselves whether those materials violate the applicable community standards.

A court, sitting without a jury, may constitutionally make civil determinations of obscenity calculated to provide advance notice. However, because the determination of obscenity is based upon assessment of community standards, it is indispensable, where one's *liberty* is at stake, that such determinations of community standards be made by a jury of one's peers representing a fair cross-section of the community.

Although the Supreme Court has never directly ruled on this specific issue, in the case of *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court concluded that an obscenity conviction returned by a unanimous five member jury violates the Sixth Amendment (holding that a minimum of 6 is required) and thus found it unnecessary to determine whether a six member jury is independently required in an obscenity case as a matter of First Amendment law. However, the Court strongly intimated that such would be the case:

We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is important in obscenity trials where juries must define and apply local standards. [Citation omitted.] The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled a misdemeanor and the robbery a felony. 435 U.S. at 241, n.33.

For these reasons, any punishment imposed for engaging in allegedly illegal expression prior to a conviction of such charges, affording full due process rights, would constitute a violation of the First Amendment.

#### IV

**WHERE, AS HERE, IMMEDIATE RELIEF IS REQUIRED TO PREVENT CONTINUATION OF AN ONGOING PRIOR RESTRAINT, THE SUPREME COURT HAS RECOGNIZED THAT IN THE ABSENCE OF IMMEDIATE APPELLATE REVIEW, A STAY SHOULD BE AVAILABLE AS A MATTER OF RIGHT.**

Pending this Court's consideration of Petitioner's full petition for writ of habeas corpus, the State's ongoing *de facto* prior restraint of his website causes ever-increasing First Amendment damage. For example, each day that his website remains closed down will be an additional day when more users of that website learn, for the first time, that the website is closed. Such users may never return due to their lack of any basis for concluding that it will be reopening. Consequently, the First Amendment injury is not only immediate, but grows greater with each continuing day of this restraint.

Where, as here, Respondents have caused an ongoing prior restraint, substantial Supreme Court precedent recognizes that if immediate appellate review of the restraint is not available, the petitioner is entitled to an interim stay as a matter of right until the reviewing court can provide full appellate review of the restraint. *See, e.g., National*

*Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977), stating:

If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, [citation omitted] including immediate appellate review . . . . Absent such review, the State must instead allow a stay.

Likewise, in *M.I.C., Ltd. v. Bedford Township*, 463 U.S. 1341, 1343, 104 S.Ct. 17, 18, 77 L.Ed.2d 1442 (1983), under circumstances remarkably similar to the present ones, Justice Brennan, acting in his capacity as Circuit Justice, issued emergency injunctive relief on behalf of the owner of a theater subject to a preliminary injunction enjoining it from exhibiting unnamed and allegedly obscene films. Justice Brennan held:

But here, as in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977), and *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327, 1329-1330, 96 S.Ct. 251, 253-254, 46 L.Ed.2d 237 (1975) (Blackmun, J., in Chambers), the State's highest Court has refused either to lift the challenged restraint or to provide for immediate appellate review. Such a failure indicates that the state court has decided finally to maintain the restraint in effect during the pendency of review. In this situation, I have no doubt that a Justice of this Court has full power to issue a stay.

Faced with situations similar to that presented here, this Court has repeatedly required that when a State undertakes to shield the public from certain kinds of expression it has labeled as offensive, it must 'provide strict procedural safeguards . . . including immediate appellate review.

Absent such review, the State must instead allow a stay."  
463 U.S. at 1342-1343, 104 S.Ct. at 18.

*See also Nebraska Press Assn. v. Stuart*, 423 U.S. 1319, 96 S.Ct. 237, 46 L.Ed.2d 199 (1975); and *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1327, 96 S.Ct. 251, 46 L.Ed.2d 237 (1975).

For all the reasons above, prior to this Court's review of the full merits of Petitioner's entire Habeas Petition, issuance of an immediate stay is necessary to prevent ongoing injury to First Amendment rights.

### **CONCLUSION**

For all the reasons above, pending this Court's full review of his entire accompanying Habeas Petition, the First Amendment entitles Petitioner to a stay of the trial court's bond revocation order and to an interim injunction preventing any further bond revocation motions where the basis for such motions consists of nothing other than additional unproven allegations of obscenity violations.

WHEREFORE, Petitioner requests that the court grant emergency, preliminary relief as follows:

- A. Grant a stay of the lower court's bond revocation order;
- B. Order immediate release of the Petitioner and reinstate his original bond pending a full determination of the Petition on the merits; and

C. Prevent Respondent STATE ATTORNEY from seeking any future bond revocation based on allegations of new obscenity offenses based on materials that have not been determined obscene in final judicial action.

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California State Bar No. 46146  
*Pro Hac Vice* application pending  
G. RANDALL GARROU  
California State Bar No. 74442  
*Pro Hac Vice* application pending

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been sent via overnight delivery to: **Charlie Crist, Florida Attorney General**, The Capitol PL-01 Tallahassee, FL 32399; **Bradford Copley, Esquire, Polk County State Attorney's Office**, 255 North Broadway, Second Floor, Bartow, FL 33830, **Sheriff Grady Judd, Polk County Sheriff's Office**, 455 North Broadway Avenue, Bartow, FL 33830, and **Richard D. Mars, Esquire**, 343 West Davidson St., Suite 103, Bartow, FL 33831, this 20th day of December, 2005.



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Lawrence G. Walters