

**IN THE SECOND DISTRICT COURT OF APPEAL**

CHRISTOPHER M. WILSON

Petitioner,

APPEAL CASE NO.:

LT CASE NO.: CF-05-7738

10<sup>TH</sup> Judicial Circuit, Polk County, Florida

**EMERGENCY PRELIMINARY  
RELIEF REQUESTED  
UNDER SEPARATE COVER**

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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**PETITION FOR WRIT OF HABEAS CORPUS FROM TRIAL COURT  
ORDER REVOKING BOND AND DENYING BAIL**

Petitioner, CHRISTOPHER M. WILSON, (“WILSON”), pursuant to *Fla.R.App.P.* 9.030(b)(3), 9.100, and 9.300(c), and *Fla.R.Crim.P.* 3.132(c)(4), petitions this Court for a Writ of Habeas Corpus directed to Respondents, GRADY JUDD, in his official capacity as Sheriff of Polk County, Florida, (“SHERIFF”), and JERRY HILL, in his official capacity as State Attorney in and for the Tenth Judicial Circuit, (“STATE ATTORNEY”), (collectively referred to as “Respondents”), and as grounds, states as follows:

## I. BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Habeas Corpus pursuant to Article V, § 4(b)(3), FLA. CONST. and *Fla.R.App.P.* 9.030(b)(3). Habeas Corpus is the proper remedy to challenge an unlawful detention pending trial in a criminal case. *Glinton v. Wille*, 457 So.2d 563 (Fla. 4th DCA 1984). Moreover, issues relating to the constitutionality of statutes relied upon as a basis for detention may be properly considered in a Habeas Corpus proceeding. *Ennis v. Regier*, 869 So.2d 701 (Fla. 2d DCA 2004). Petitioner WILSON has no other adequate remedy available to him which will prevent his continued unlawful incarceration without bail, or which will prevent additional obscenity allegations being used as a basis to revoke future bonds.<sup>1</sup>

## II. INTRODUCTION

This case involves the incarceration of a United States citizen without bond based on the dissemination of constitutionally-protected expression which has not been determined obscene on the merits.<sup>2</sup> The Order of detention results in a prior restraint of speech in violation of the United States Constitution. The evidence

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<sup>1</sup> To the extent that the Florida Rules of Criminal Procedure, Rule 3.132(c)(4), contemplate filing a different form of request for review of orders of pretrial detention, Petitioner requests that this Petition be considered as the appropriate Motion for review.

<sup>2</sup> All of the sexually oriented materials referenced in this Petition depict only adults; neither the depictions nor the allegations of obscenity indicate that any juveniles -- i.e., persons under 18—were involved. This case is only about adult obscenity.

supporting the bond revocation did not include the “whole” work as required under the *Miller* Test, and was obtained in violation of Petitioner WILSON’s Fourth Amendment rights contrary to binding precedent from this Court. Nonetheless, the Trial Court revoked Petitioner WILSON’s bond and ordered pretrial detention with no bond, without conducting a hearing on the matter, and without making any factual findings mandated by *Fla.R.Crim.P.* 3.132(c)(1) and §907.041, *Fla. Stat.* (2005). Both the underlying charges against Petitioner WILSON, and the basis for revoking his bond are premised on alleged violations of Florida’s obscenity statute, Chapter 847, *et. seq.*, *Fla.Stat.* (2005), against which Petitioner WILSON has mounted various constitutional challenges – none of which were considered or resolved prior to using the law as a basis to order pretrial detention without bond.

### III. FACTS

This case arises out of the operation of a website which allows individuals throughout the world to post a variety of erotic and non-sexually oriented images, video clips, and written comments on various web pages contained on the website. A 1-56; 132-133.<sup>3</sup> Petitioner WILSON did not create any of the content displayed on the website, and does not approve the content before it is posted on the website. A 133. Nothing on the website physically “exists” in Polk County, Florida, or within the Tenth Judicial Circuit. A 132. The website is hosted in Amsterdam,

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<sup>3</sup> References to the Appendix shall be designated by the letter “A,” followed by the appropriate page number(s) of the document or item referenced.

Netherlands, and is administered by various individuals, all of whom reside outside of Polk County, Florida and outside of the Tenth Judicial Circuit. A 132.

In November, 2004, the Polk County Sheriff's Office began an investigation into the website after the lead investigator contacted a newspaper reporter who was writing an article about the United States Military's investigation into Petitioner WILSON and the website. A 57, 61. The website at issue sparked nationwide controversy as a result of Petitioner WILSON's decision to allow soldiers to join the website and obtain full membership benefits by submitting images which depicted military activities from the War in Iraq and elsewhere in the Middle East. A 135. Petitioner WILSON created this procedure for soldiers who wanted to access the website by paying via credit cards, but whose credit card transactions were routinely denied, since they emanated from high credit risk countries such as Iraq or Afghanistan. A 135. Therefore, as an alternative to payment via credit card, Petitioner WILSON allowed soldiers to obtain free access to the entire website if they posted pictures evidencing their status as active military in the Middle East. A 135.

Although Petitioner WILSON did not solicit gory battlefield images, soldiers ultimately began submitting such images (hereinafter referred to as "War Images") as proof of their active military status in order to gain access to the website. A 136.

The existence of these uncensored War Images apparently resulted in a Military investigation. A 57. Respondents SHERIFF and STATE ATTORNEY also launched an investigation into Petitioner WILSON's website activities, during which an Investigator joined the website, [www.NowThatsFuckedUp.com](http://www.NowThatsFuckedUp.com), as a member, and printed out eighty (80) still images and twenty (20) short movies (all exclusively sexually oriented) that Respondent SHERIFF's Investigator, Charlie Gates, ("Investigator Gates"), determined (in his opinion) to be obscene. A 58. No warrant was obtained prior to copying the images and video clips from the website and using them in the course of the investigation. A 57-61. Investigator Gates presented the content copied from the website to the Honorable A. Cowden, Circuit Judge for the Tenth Judicial Circuit, in and for Polk County, Florida, on October 7, 2005, who issued one hundred (100) individual probable cause determinations to believe that each image was independently obscene. A 58. The website was not evaluated 'as a whole' contrary to the requirements of the *Miller* Test. A 58. Respondent STATE ATTORNEY filed three hundred one (301) separate counts of obscenity, although all materials at issue came from a single website. A 1-56; 57-59. Although Respondents deny that their investigation was prompted by, or motivated by, the Military's concerns with the War Images, Respondent SHERIFF is sharing evidence generated in connection with this case with the Military. A 62; 232.

Based on Judge Cowden's probable cause determinations, and the statements of Investigator Gates, Respondent SHERIFF sought and obtained an Arrest Warrant for Petitioner WILSON, charging him with one (1) felony count of wholesale promotion of obscene materials and three hundred (300) separate misdemeanor counts of distribution of obscene materials, pursuant to Chapter 847, *Fla. Stat.* (2005). A 1-56. Given the manner in which this case was charged, i.e. three (3) individual misdemeanor counts relating to each image selected from the website, Petitioner WILSON's bond was set in the amount of \$151,000.00. A 56. Petitioner WILSON was required to pay a bondsman \$30,500.00 as a bond premium, in order to obtain release pending trial. A 1-56. He has no financial means to post an additional bond, or pay a new bond premium. A 137.

Shortly after his arrest, Petitioner WILSON moved from within the geographic boundaries of Polk County and the Tenth Judicial Circuit, into Orange County, Florida. A 132. At no time was Petitioner WILSON told to stop distributing any sexually-oriented content on the subject website by any law enforcement agent, or that continuing to do so could jeopardize his bond or pretrial release. A 134. Petitioner WILSON was not aware of any other case where the continued distribution of presumptively-protected adult-oriented material after an arrest on obscenity has been determined to constitute a violation of bail release conditions or resulted in a revocation of bond or in pretrial detention. A 130. The

unprecedented nature of this proceeding was confirmed by the Affidavit of an expert censorship attorney, who has monitored proceedings in obscenity cases for decades. A 226-230. Petitioner WILSON did not imagine, comprehend or have any reason to believe that the continued operation of his website, from outside of Polk County, would put him at risk for violating any condition of bond, or having his bond revoked or being remanded to custody pending trial. A 130.

Despite the above, on November 22, 2005, Respondent STATE ATTORNEY filed a Motion to Revoke Defendant's Bond, alleging only that Petitioner WILSON committed new crimes in the form of distribution or promotion of additional content on the website, which Respondents alleged was obscene. A 98. The State's Motion to Revoke Defendant's Bond also sought pretrial detention, but contained no allegations in support of this request, concerning Petitioner WILSON's ties to the community, financial resources, or threat of physical danger to the community. A 98.

Shortly after receiving a copy of the State Motion to Revoke Defendant's Bond, Petitioner WILSON eliminated any and all sexually-oriented images/video from the website and prevented users from posting such images/video to the website in the future. A 130, 131. Receipt of the motion constituted the first notice to Petitioner WILSON that continued operation of his website could constitute a violation of his conditions of pretrial release, and therefore he took

these actions in an attempt to remedy the alleged violation, given his concern over pretrial incarceration. A 130-131. Petitioner WILSON was never told, in advance, that any of the “new” images at issue in the bond revocation proceeding were illegal, obscene, or otherwise problematic by anyone in law enforcement prior to the filing of the State Motion to Revoke Defendant’s Bond. A 130. After the revocation motion was filed, counsel for Petitioner WILSON attempted to obtain a clarification from Respondent STATE ATTORNEY as to what types of images/video can safely be distributed via the website without risk of additional allegations of obscenity and consequent future attempts to revoke Petitioner WILSON’s bond. A 131; 213-215. Respondents failed and refused to provide such guidance in order to assist Petitioner WILSON in complying with the law, and therefore Petitioner WILSON concluded that the only way to protect himself from future a bond revocation based on future allegations of obscenity was to remove all sexually-oriented images from the website, regardless of whether they may have serious value, or be otherwise constitutionally protected. A 131.

Petitioner WILSON testified, via his Affidavit, that none of the content at issue in this case affirmatively “exists” in Polk County, Florida, or in the Tenth Judicial Circuit. A 132. Images and video clips must be requested by an individual from the server in Amsterdam, Netherlands, and brought into Polk County to be downloaded onto a hard drive or a removable disk. A 132. The

materials are therefore not broadcast, or beamed into Polk County, like television or radio. A 132-133. Consequently, Respondents sought to revoke Petitioner WILSON's bond based on activities occurring completely outside of their jurisdiction, by individuals other than Petitioner WILSON, with no prior warning that the images may be obscene, no request for removal, and involving a website hosted in another country. A 98; 132-33. Moreover, none of the images at issue in the bond revocation proceeding was created by Petitioner WILSON, nor did he even see them before they were brought to his attention in the bond revocation proceedings. A 130, 133. At any given time, there were over 250,000 images or video clips on the website, and the content was constantly changing. A 135.

Respondent STATE ATTORNEY scheduled the hearing on the State Motion to Revoke Defendant's Bond for Friday December 16, 2005, and reserved only thirty (30) minutes for the hearing. A 99; 100, 103. Petitioner WILSON's attorneys requested a continuance of that hearing on December 12, 2005, arguing that insufficient time existed to address the complex issues involved in this case in regards to a determination of obscenity, and since numerous preliminary issues such as preemption of the state obscenity statute under the Commerce Clause and recent federal legislation, the constitutionality of the obscenity statute had not been addressed by the Trial Court, despite the pendency of numerous timely filed and

briefed pretrial motions raising such issues. A 100-104. The Trial Court denied the Motion for Continuance without comment. A 111.

The Trial Court conducted a hearing on the State Motion to Revoke Defendant's Bond on Friday, December 16, 2005. Just prior to the the beginning of argument, Petitioner WILSON filed a Verified Motion for Disqualification in order to disqualify the Judge from any further proceedings in the case based on his well-founded fear that Judge J. Dale Durrance could not conduct the necessary in-depth, visual review of the allegedly obscene materials, given a serious eyesight problem, and impending surgery to address same. A 216-222. The Trial Court denied the Motion as legally insufficient. A 223.

Petitioner WILSON, though counsel, renewed his request to continue the hearing on bond revocation, given the inadequate time, and pendency of other preliminary constitutional challenges, and that request was denied without elaboration. SA.<sup>4</sup> Petitioner WILSON also filed a Motion to Strike State's Motion to Revoke Defendant's Bond, as legally insufficient under Florida law. A 112-117. The Trial Court never ruled on the Motion to Strike. The Trial Court then proceeded to address the State Motion to Revoke Defendant's Bond, during which Investigator Gates sought to establish probable cause to believe that Petitioner

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<sup>4</sup> References to the audio recording of the proceeding on the Motion to Revoke Bond shall be designated by the letters "SA," referencing the Supplemental Appendix containing the audio recording.

WILSON committed “new crimes” while on pretrial release, in violation of §903.046(2)(j), *Fla.Stat.* (2005). In doing so, Investigator Gates adduced, over objection, printouts of thirty (30) still images, and three (3) short video clips, extracted from hundreds of thousands of images on the website at issue.<sup>5</sup> Investigator Gates admitted that no warrant had been sought or issued prior to copying the images and video clips from the website. SA. Counsel for Petitioner WILSON thereafter moved to suppress and exclude such evidence based on this Court’s decision in *Miragaya v. State*, 654 So.2d 262 (Fla. 2d DCA 1995), holding such procedure to be an illegal seizure and imposition of prior restraint on protected speech. SA. The Court overruled the objection and denied the suppression request without comment. SA.

After additional witness *voir dire* regarding the nature of the images sought to be introduced, counsel for Petitioner WILSON also objected to the introduction of the images and video clips at issue based on Inspector Gates’ admission that he eliminated various textual comments pertaining to each of the images, and selected certain images out of a series or set of images, without presenting the entire set of all images and associated comments to the Trial Court as required to present the

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<sup>5</sup> In so much as Petitioner WILSON, for purposes of this Petition only (or for the relevant portions of this Petition only) assumes, *arguendo*, that a magistrate could reasonably conclude that there was probable cause to believe that the "revoking" images were obscene, when considered in isolation, Petitioner WILSON does not attach any of those images. Petitioner WILSON will provide them if requested by the Court.

materials “as a whole” under the test set forth in Ch. 847, *Fla.Stat.* (2005) and *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 513 (1973). SA. In support of his objection, Petitioner WILSON referenced his previously-filed Affidavit of Defendant Regarding Comments Associated with Images, identifying a typical set of images posted by a user on the subject website, as it would appear when displayed with the associated comments. A 174-188. This Affidavit demonstrated how a set of images was portrayed on the website, and how the comments related to the set of images presented. The Trial Court overruled the objection<sup>6</sup> to the failure to consider the images ‘as a whole’ and allowed the isolated images (bereft of commentary) to be considered as evidence justifying revocation. SA.

On cross examination, Investigator Gates admitted that the website was hosted in The Netherlands; that he was not aware of anyone else in Polk County who had viewed the proffered images; that Petitioner WILSON no longer resided in Polk County, that Petitioner WILSON did not create or post the images himself; that no evidence existed that Petitioner WILSON ever saw the images; and that there was no evidence that Petitioner WILSON resold or redistributed the images at issue in the bond revocation proceedings. SA.

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<sup>6</sup> Petitioner WILSON had also filed a Motion in Limine and supporting Memorandum, A 163-165; 120-126, arguing that the State should be precluded from introducing only portions of the website, or eliminating the associated comments.

The State presented no evidence on whether Petitioner WILSON intended to violate the bond conditions, or even whether he was aware of the nature and character of the images involved. In addition, the State failed to present any evidence of the community standards that would apply to the images at issue, or which community's standards would apply, given Petitioner WILSON's move to Orange County, and lack of any presence in Polk County.

Thereafter, Petitioner WILSON, through counsel, attempted to call an Expert Witness, Dr. Randy Fisher, Professor of Human Sexuality at the University of Central Florida, on the issue of obscenity, and availability of similar, comparable sexually-explicit materials within the Polk County area. Petitioner WILSON previously filed the Affidavit of Dr. Randy Fisher in Opposition to State Motion to Revoke Defendant's Bond, in which Dr. Fisher set forth his conclusions on these issues, and opining that the images at issue in the bond revocation proceeding were not obscene, appealed to a healthy interest in sex, contained serious value, and were similar to other comparable materials readily available for purchase throughout the Polk County area. A 196-212. The Trial Court prohibited the defense expert from testifying. SA.

After final argument on the issue of bond revocation, the Court ruled that probable cause existed to find that Petitioner WILSON committed new crimes of obscenity while on pretrial release, which thereby justified his remand to custody

without bail. A 231. No pretrial detention hearing occurred. Counsel for Petitioner WILSON vigorously attempted to point out to the Court that the issue of pretrial detention had not yet been considered, and that such an issue required its own separate hearing, and evidence beyond a reasonable doubt, pursuant to *Fla.R.Crim.P.* 3.132(c). SA. Petitioner WILSON's position on the need for specific findings prior to ordering pretrial detention had also been thoroughly briefed in his previously-filed Memorandum in Opposition to State's Motion for Revocation of Pretrial Release. A 166-176. The Trial Court instructed Petitioner WILSON's counsel to stop arguing. SA. Petitioner WILSON's counsel then sought a stay of the Trial Court's pretrial detention order, which the Trial Court refused to consider. SA. The Trial Court again instructed counsel to stop arguing, since the hearing was over. SA.

Petitioner WILSON remains illegally incarcerated by Respondent SHERIFF and subject to future bond revocation by Respondent STATE ATTORNEY based on continued distribution of website material, before trial on the merits.

### **III. RELIEF SOUGHT**

Petitioner WILSON requests that this Court grant the following relief:

- A. Issue the Writ of Habeas Corpus;
- B. Reverse the Trial Court's Order revoking bond and remanding Petitioner WILSON to pretrial detention without bond;

C. Order release of Petitioner WILSON by reinstating his original bond with instructions that no further revocation occur based on any allegations of obscenity until a final conviction is obtained on the underlying obscenity charges;

D. [REQUESTED IN A SEPARATE CONTEMPORANEOUSLY-FILED MOTION] Emergency preliminary relief pursuant to *Fla.R.App.P.* 9.300(c) in the form of a stay pending consideration of the petition, requiring Petitioner WILSON's immediate release from pretrial detention, temporary reinstatement of Petitioner WILSON's original bond, and interim prohibition against revocation of that bond based upon allegations of obscenity until this Court renders a final determination of this Petition on the merits; and,

E. Such further relief as this Court deems equitable and just under the circumstances.

#### IV. LEGAL ARGUMENT

##### A. Revocation of Bond and Imposition of Pretrial Detention Results in a Prior Restraint on Protected Speech in the Instant Case.

As more fully set forth exclusively in Petitioner WILSON's Emergency Motion for Stay of Proceedings Based on Prior Restraint, the revocation of bond and imposition of pretrial detention based on allegations of new obscenity offenses, before any website content has been judicially determined to be obscene, results in the imposition of an unconstitutional prior restraint on protected speech.

Petitioner WILSON incorporates the arguments made in the accompanying Emergency Motion for Stay of Proceedings Based on Prior Restraint as if fully set forth herein. By way of summary, Petitioner WILSON contends the following:

1. Pretrial detention for unproven obscenity offenses is an impermissible form of prior restraint;

2. Pretrial detention for unproven obscenity offenses under the circumstances of this case will cause an impermissible chilling effect in violation of the First Amendment.

3. Pretrial detention for one or more unproven obscenity offenses is impermissible prior punishment prohibited by the First Amendment.

Since the prior restraint arguments support the granting of immediate, preliminary relief while this Court considers the balance of this Petition, those arguments are contained in a separate emergency motion.

B. The Trial Court Departed from the Essential Requirements of Law by Ordering Pretrial Detention Without Conducting a Hearing Thereon, or Considering any of the Required Factors.

Assuming, *arguendo*, that additional allegations of obscenity can form the basis for bond revocation in an obscenity case, without violating the First Amendment, such allegations do not, by themselves, justify pretrial detention.

The Florida Constitution guarantees:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is

evident or the presumption is great, every person charged with a crime...shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Article I, Section 14, Declaration of Rights. See also, *Fla.R.Crim.P.* 3.131.

Elimination of this strong constitutional right to bail can only occur under the narrowest of circumstances, with attendant Due Process protections and appropriate legal burdens placed on the State. The right to bail was not observed by the Trial Court.

Determinations regarding pretrial detention are controlled by §907.041, *Fla. Stat.* (2005), which requires the court to conduct a separate inquiry to whether any conditions of pretrial release will protect the community from the risk of physical harm to persons. The Florida Supreme Court, in *State v. Paul*, 783 So.2d 1042 (Fla. 2001), considered whether a court may revoke a defendant's bond, and order pretrial detention based merely on proof of commission of new crimes. The court held that trial courts must consider the criteria set forth in §907.041, *Fla. Stat.* (2005) when deciding the issue of pretrial detention, which is separate from the issue of bond revocation:

By breaching a condition of the bond originally set forth by the court, a defendant forfeits the right to continue release under the terms of that bond. However, the defendant does not forfeit his or her constitutionally-

guaranteed right to bail altogether. A refusal to readmit a defendant to any bail at all must be subject to the limitations of the pretrial detention statute.

*Id.* at 1050, citing *Paul v. Jeanne*, 728 So.2d 1167, 1171 (Fla. 4th DCA 1999); see also, *Rix v. Jeanne*, 728 So.2d 827 (Fla. 4th DCA 1999); *rev. granted, Bland v. State*, 744 So.2d 452 (Fla. 1999) and *decision approved, Jeanne v Rix*, 783 So.2d 237 (Fla. 2001) (granting writ of habeas corpus where state did not satisfy burden of proving requirements of pretrial detention upon breach of bond)

In light of the above, it is clear that the Trial Court departed from the essential requirements of law by incarcerating Petitioner WILSON without allowing the parties to address the requirements of § 907.041, *Fla. Stat.* (2005), without placing the appropriate burden of proof on the State to demonstrate the necessity for pretrial detention, beyond a reasonable doubt, pursuant to *Fla.R.Crim.P.* 3.132(c), and without making the required findings pursuant to §901.041(4)(i), *Fla. Stat.* (2005). Counsel for Petitioner WILSON attempted to address the issue of the propriety of pretrial detention, but was prohibited from making any further argument in that regard. SA. Petitioner WILSON had secured the attendance of numerous witnesses to testify regarding his significant ties to the community, unquestioned likelihood of attendance at future court proceedings, and minimal financial resources. However, his attempt to raise these issues, as required by the Florida Supreme Court, was rejected by the Trial Court.

Accordingly, the Trial Court departed from the essential requirements of law by remanding Petitioner WILSON to pretrial detention with no bond, with no required findings as mandated by §901.041(4)(i), *Fla. Stat.* (2005). Such findings are mandatory and must be rendered within twenty four (24) hours of the pretrial detention hearing. *Id.*

Had the Trial Court conducted the proper inquiry on the issue of pretrial detention, it would have been forced to conclude that Petitioner WILSON should be released on bond. There is no evidence that Petitioner WILSON is a flight risk, and he has made all of his court appearances. There has been no allegation that Petitioner WILSON constitutes a threat of physical harm to the community, as required by § 907.041(1), *Fla. Stat.* (2005) to justify pretrial detention. That section states: “It is the intent of the legislature that the primary consideration be protection of the community from the risk of physical harm to persons.” See also, *Lepore v. Jenne*, 701 So.2d 980, 981 (Fla. 4th DCA 1998). In *Lepore*, the court addressed a Writ of Habeas Corpus filed on behalf of a defendant charged with aggravated stalking. The court found that the defendant had “willfully and substantially” violated the terms of pretrial release, and ordered him held without bond pending trial. The defendant’s violation related to his repeated telephone contact with the alleged victim. The Fourth District observed that in order to order

pretrial detention based on a threat of harm, the State must prove, and the trial court must find, that:

[T]he defendant is presently charged with a dangerous crime, that there is a substantial probability that the defendant committed such crime, that the actual circumstances of the crime indicated disregard for the safety of the community, and that there are no conditions or release reasonably sufficient to protect the community from the risk of physical harm to persons.

The *Lepore* court ultimately concluded that a substantial probability of physical harm was not present, and that “[I]t is hard to understand how telephone contact, no matter how unpleasant, can constitute *physical* harm to the victim or anyone else in the community.” *Lepore*, 708 So.2d at 981. The State’s burden of proof on the issue of physical danger is “beyond a reasonable doubt” *citing Fla.R.Crim.P.* 3.132(c)(1).

Applying the relevant standard to the instant case, it could not be logically argued that the continued operation of a website constitutes a threat of physical harm to the community. Respondent STATE ATTORNEY has made no such allegation, and no proof of physical harm was submitted at the hearing. SA. The Trial Court therefore committed clear legal error when it ordered pretrial detention of Petitioner WILSON, in the absence of any proof of physical harm, and silencing Petitioner WILSON’s counsel and denying him even the opportunity submit argument or proof on that critical issue.

C. The Trial Court Erred in Determining That the Bond Conditions Were Breached Absent any Evidence of Intent or Knowledge.

Petitioner WILSON strenuously argued in his Affidavit, and through counsel during the bond revocation argument, that he had no intent to violate the law or to breach any condition of pretrial release. A 130-131. Specifically, the unrefuted testimony of Petitioner WILSON, in his Affidavit, established the following:

1. He diligently attempted to comply with all conditions of release of which he was aware. A 130.

2. He did not understand or have any reason to believe that continued operation of the website, from outside the jurisdiction of Polk County or the Tenth Judicial Circuit, would put him at risk of violating any condition of bond or having his bond revoked, or being remanded to custody pending trial. A 130.

3. He was unaware of any other case in the country where this had occurred. A 130.

4. No law enforcement personnel ever advised Petitioner WILSON to stop distributing sexually oriented images on the website, or to stop distributing the specific images at issue in the bond revocation proceeding. A 130.

5. Petitioner WILSON would have removed all sexually-oriented images from the website if he had been advised that there was any risk of pretrial detention without bond, or revocation of his existing bond. A 130-131.

6. He attempted to obtain clarification from Respondents as to what categories of images could be safely distributed on the website, to no avail. A 131.

7. Petitioner WILSON removed all sexually-oriented images from the subject website shortly after the State filed its Motion to Revoke Defendant's Bond. A 130.

8. Petitioner WILSON was not aware of the existence of the specific images at issue in the bond revocation proceeding, did not create those images, did not post those images, and could not possibly have reviewed every image posted by users throughout the world on the website which contained over 250,000 images at any given time. A 130, 133, 134-35.

In addition to the above, it is important to note that none of the activities occurred within Polk County, Florida, or the Tenth Judicial Circuit.<sup>7</sup> A 132. The

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<sup>7</sup> Notably, the State also failed to establish venue in its case in chief, or at any time in the revocation proceedings. The un-rebutted testimony of Petitioner WILSON established that he moved out of Polk County and the Tenth Judicial Circuit, immediately after his arrest. A 132. Moreover, the images at issue were posted by individuals throughout the world, without prior knowledge or approval of Petitioner WILSON. A 133-135. The website, itself, is hosted in The Netherlands, A 132, and Petitioner WILSON maintains no business contacts relating to the website in Polk County, or the Tenth Judicial Circuit. A 132. The only connection between this case and Polk County was the downloading of the content from the server in Amsterdam by Investigator Gates, who is the only known person to access the images in Polk County. SA. Therefore, Respondent STATE ATTORNEY failed to establish that any offense occurred in Polk County, Florida thereby failing to meet the venue requirement for criminal offenses. *Croft v. State*, 139 Fla. 711, 191 So. 34 (1939); *Pennick v. State*, 453 So.2d 542 (Fla. 3d DCA 1984); *Brown v. State*, 728 So.2d 335 (Fla. 4<sup>th</sup> DCA 1999).

website is hosted in The Netherlands, A 132, and had no connection with Polk County until it was brought there by Investigator Gates in the course of his investigation. A 132; 57-59. It was therefore not reasonable for Petitioner WILSON to be legitimately concerned about being remanded to custody, with no bond, based on the unknown postings of website members, of which he was unaware and which he had not approved, which members acted unilaterally from areas throughout the world, to post images to a website hosted in The Netherlands, while Petitioner WILSON resided outside the jurisdiction of Polk County, Florida.

Under Florida law, Petitioner WILSON may not be held responsible for violating a condition of release, of which he was unaware. Respondent STATE ATTORNEY was required to introduce credible evidence that Petitioner WILSON was informed of the relevant conditions of pretrial release that he refrain from certain conduct, and that the violation of the condition was willful. *Pilorge v. State*, 876 So.2d 591, 591-592 (Fla. 5th DCA 2004). The fact that a condition of pretrial release is deemed “mandatory” is insufficient to establish the presumption that the defendant was aware of the condition. *Id.* at 592. For example, requiring the defendant not to engage in employment connected with obscene material is not a standard, mandatory condition of pretrial release of which one would be aware. *Carter v. Carson*, 370 So.2d 1241, 1242 (Fla. 1st DCA 1979). Such a condition does not bear any relationship to a legitimate purpose of bail, i.e., ensuring the

defendant's appearance at future court proceedings. *Id.*, citing *Ladoga Canning Corp. v. McKenzie*, 370 So.2d 137 (Fla. 1979).

Respondent STATE ATTORNEY offered no evidence to establish that Petitioner WILSON was aware that the continued distribution of images from his website could possibly result in a revocation of his bond or imposition of pretrial detention. Both the facts and the law establish the reverse: Petitioner WILSON made every effort to comply with the law, inquire about its requirements, and address the concerns of Respondents in regards to distribution of material from his website. He received no advance warning or guidelines to govern his conduct in regards to operation of the website. Under First Amendment principles, all sexually-oriented images of adults are presumed to be constitutionally protected. *Reno v. ACLU*, *supra*. Moreover, Petitioner WILSON is entitled to continue distributing materials alleged to be obscene, pending a final determination of obscenity by the trier of fact at the conclusion of the case. *Heller v. New York*, 413 U.S. 483 (1973); *State v. U & L Theaters, Inc.*, 307 So.2d 879, 881 (Fla. 3d DCA 1974). In light of this presumption of protection that is carried with sexually-oriented materials throughout the conclusion of an obscenity case, Petitioner WILSON had no reason to believe that continued operation of his website, in the same manner as it had been when he was originally charged, could result in a revocation of his bond or in pretrial detention. A 130. Since the images at issue

were posted by website users throughout the world, without any prior knowledge or approval from Petitioner WILSON, there is no evidence that he willfully violated any conditions of pretrial release, even assuming, *arguendo*, that probable cause exists to find the images obscene.<sup>8</sup> Therefore, Respondent STATE ATTORNEY failed to meet its burden of proving “willfulness” in connection with the commission of new crimes. Accordingly, the Court’s determination that a violation occurred in the absence of the required evidence of intent, renders the finding of a violation of the terms of pretrial release, clearly erroneous.

D. The Trial Court’s Failure to Consider the Allegedly Obscene Materials “As A Whole” Constitutes Fundamental Error Requiring Reversal.

As noted in the Statement of the Facts, the Trial Court determined that a collection of isolated images, and several video clips, extracted from Petitioner WILSON’s website, met the probable cause standard for obscenity, thereby justifying a finding that Petitioner WILSON committed new crimes while on pretrial release. A 231. Instead of considering the website, from which the materials were taken, as a whole work, the Trial Court allowed the State to present individual images and video clips extracted from the hundreds of thousands of images appearing on the website. SA. Moreover, the Trial Court allowed the State to present this evidence in isolation from the comments, posted by users, and

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<sup>8</sup> Petitioner WILSON does not concede that any content from the website is obscene.

associated with the images. These comments often contained humor, or quality evaluation associated with the images. A 174-188; A 200. In addition, the images forming the basis for the bond revocation allegations appeared to be part of a series or set of images, however the entire set of images was not provided to Judge Durrance, to evaluate the “whole” work. A 177; SA.

Investigator Gates confirmed under cross examination that the images presented appeared to be taken from a series of related images. SA. The failure to consider the series of images “as a whole” in the context of the associated comments dramatically affected the impact of the content on the viewer, and prevented a proper evaluation of the serious literary, political, scientific, or artistic value associated with the work as required under the Florida obscenity statute and the *Miller* test. A 200. As argued by counsel for Petitioner WILSON, considering only selected images taken from certain pages of the entire website without the associated comments is tantamount to extracting a sentence, from a paragraph, from a chapter, of a book, and claiming that the sentence is, on its own, obscene. SA. This is not permitted under the Florida Statutes or the First Amendment.

Examination of isolated portions of larger works to determine the question of obscenity constitutes fundamental error, in light of the test announced in *Miller v. California, supra*. There, the Court announced a stringent set of criteria, which has become the “*Miller* Test,” and which requires the following evaluation:

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller, supra*, at 415 U.S. 24.

Each prong of the *Miller* Test must be considered; in order for the evaluation to meet constitutional standards. See: *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 132 L.Ed.2d 403 (2002) (Court struck down portions of the Child Pornography Prevention Act due to, *inter alia*, its failure to consider all prongs of the *Miller* Test when evaluating the legality of virtual child pornography). Since sexually-oriented materials appearing on the Internet are presumptively deserving of full First Amendment protection, *ACLU v. Reno*, 521 U.S. 844, 112 S.Ct. 2329, 138 L.Ed.2d 874 (1997), the materials published on Petitioner WILSON's website are presumed to be constitutional unless each prong of the *Miller* Test is properly applied, and the material found to be obscene, as a whole.

While very early cases allowed for segmented review of individual items, in determining obscenity, that approach was decisively rejected in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1301, 1 L.Ed.2d 1498 (1957). There, the High Court

adopted the requirement that "...books, pictures, and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion." 354 U.S. at 490. Likewise, in *Penthouse v. McAuliffe*, 610 F.2d 1353 (5<sup>th</sup> Cir. 1980), the court reaffirmed the "as a whole" requirement, and ruled that magazines must be considered in their entirety, and not as a volume of separate 'works' in the form of individual pictures. *Id* at 1367. The Fifth Circuit concluded that the Supreme Court intended magazines to always be considered as whole works, even though made up of individual articles and pictures. *Id* at 1368. The only conceivable exception would be where unrelated "value" material is inserted as a "sham" such as where hardcore materials were interspersed throughout the Bible. *Id*. Importantly, "[t]he inclusion of serious literary matter in significant proportions may preclude a finding that a magazine is obscene even though the magazine contains items, photographs for example, which standing alone would be found obscene under the *Miller* test." *City of Urbana v. Downing*, 539 N.E. 2d 140, 148 (Ohio 1989). The Florida Supreme Court agreed with this analysis in *Ladoga Canning Corporation v. McKenzie*, 370 So.2d 1137, 1141 (1979), wherein it held:

The *Miller* Court made it clear that the portrayal of sexual conduct, without more, does not render a publication obscene. The determination of obscenity must be based upon an examination of the work as a whole, rather than isolated passages.

*Id* at 1141 [emphasis added; citations omitted].

In light of the above, the Trial Court erred in considering only portions of the “whole” work at issue in the instant case, and basing its obscenity determination on isolated images and video clips, without reference to the remainder of the graphic material, and without consideration of the text and comments associated with the content. This error was compounded by the fact that the comments associated with the images are critical for purposes of evaluating the final prong of the *Miller* Test, i.e., the existence of serious literary, artistic, political, or scientific value. A 174-188; A 200. Considering only certain images also ignores the significant literary and political value associated with the War Images. A 135-139; 200-201. Since the Trial Court’s obscenity determination was fundamentally flawed due to failure to properly apply the *Miller* Test, the determination that Petitioner WILSON committed new crimes while on pretrial release was clearly erroneous and must be reversed.

E. Federal Law Preempts Application of State Obscenity Law to the Internet.

As noted above, Petitioner WILSON timely sought to have various constitutional challenges heard prior to determining whether Petitioner WILSON had committed new obscenity violations, implicating bond revocation. One of the constitutional challenges raised, in defense of the underlying charges, is that of federal preemption under the Commerce Clause. A 83-97. The Trial Court

refused to consider Petitioner WILSON's previously-filed constitutional challenges, before applying Florida's obscenity law to Petitioner WILSON, in the bond revocation proceeding. A 111. Had it done so, it would have been forced to conclude that Florida's obscenity statute cannot be applied to Internet content, consistent with the "dormant" Commerce Clause.<sup>9</sup>

The instant case – one of distinct first impression – involves the application of Florida's obscenity law, Chapter 847, *et. seq.*, *Fla. Stat.* (2005) to online media. Therefore, unique and unsettled issues of law are implicated. One of those issues involves the interplay between state and federal regulation of Internet commerce, and the State's ability to criminalize distribution of online media. This appears to be a matter of first impression anywhere in the United States.

The Internet has been called "the most participatory form of mass speech yet developed." *Reno, supra*, 521 U.S. at 863 (citation omitted). The United States Supreme Court identifies the web as a "unique and wholly new medium of worldwide human communication. *Id.*, 521 U.S. at 850. Online communications have historically been regulated at the federal, as opposed to the state level. The

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<sup>9</sup> It should be noted that the facial invalidity of a statute under the Commerce Clause can be raised at any time, including the first time on appeal. *State v. Johnson*, 616 So.2d 1, 3 (Fla. 1993); *Trushian v. State*, 425 So.2d 1126, 1129 (Fla. 1982); *Harvey v. State*, 786 So.2d 28 (Fla. 1<sup>st</sup> DCA 2001) *rev. granted* 797 So.2d 585 (Fla. 2001). In addition, once an Appellate Court has jurisdiction it may address any item which affects the case. *Whitted v. State*, 362 So.2d 668 (Fla. 1978); *Miami Gardens, Inc. v. Conway*, 102 So.2d 622 (Fla. 1958); *Vance v. Bliss Properties, Inc.*, 109 Fla. 388, 149 So. 370 (1933).

Communications Decency Act of 1996 contains the federal regulations for obscenity distributed on the Internet.

Online communications are contemporaneously available in all states – and throughout the world. In order to attempt to comply with each individual state’s laws, an online business would need to negotiate a “mine field” of potentially inconsistent and widely varying regulations and prohibitions. Imposing such burdens on website operators would cause the Internet to grind to a halt, since it would be virtually impossible to research and comply with fifty (50) sets of different regulations for the distribution of a particular image or movie on the Internet.<sup>10</sup>

As a result of these concerns, and others, the courts have uniformly struck down any attempt of state-level regulation of sexually-oriented, online content, even where such regulation was supported by a compelling government interest such as the protection of minors. See, *American Book Sellers Foundation for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F.Supp. 878 (W.D. Pa. 2001), question certified, 317 F.3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Libraries*

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<sup>10</sup> The problem would be compounded in those states whose obscenity laws are determined by community standards in counties or some other inferior political subdivision. Notably, some states such as Oregon and Hawaii do not regulate obscenity at all.

*Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 2006 (E.D. PA 2004); *Southeast Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773 (D.S.C. 2005). Each of these cases recognized the need for uniform regulation of online content, and the incompatibility of state-level regulation of Internet communications and the federal uniformity goals established by years of Commerce Clause jurisprudence.

The “dormant” Commerce Clause restricts the powers of states to regulate interstate commerce. *Barclays Bank, PLC v. Franchise Tax Board of California*, 512 U.S. 298, 310 Fn. 9, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994). State laws that regulate activity requiring a national regulatory scheme, but which impose multiple inconsistent burdens on interstate commerce are generally found invalid. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-90, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987); *Southern Pac. Co. v. State of Ariz., ex. rel. Sullivan*, 325 U.S. 761, 767, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1945). In addition, state laws that regulate activities outside the state’s borders may also be invalid since a state may not export its own domestic policies onto other states by enacting laws regulating activities occurring outside its borders. *Edgar v. Mite Corp.*, 457 U.S. 624, 641-43, 102 S.Ct. 26, 29, 73 L.Ed.2d 269 (1982); *Baldwin v. G.A.F. Seelag, Inc.*, 294 U.S. 511, 521, 55 S.Ct. 497, 79 L.Ed. 1032 (1935). Even if a state law is

not invalid under the foregoing test, it may still be invalid under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The *Pike* test is only used if the statute passes the discriminatory test and the inconsistent burden test. *Campeau Corp. v. Federated Dept. Stores*, 679 F. Supp. 735, 738-39 (S.D. Ohio 1988). Under the *Pike* balancing test, the court balances the burden placed on interstate commerce based on the state law against the local benefit derived from the law. *Pike, supra*, 397 U.S. at 142. The state law is invalid if the burden on interstate commerce is clearly excessive compared to the putative local benefit. *Id.*

All of the aforementioned decisions evaluating the constitutionality of state laws regulating the availability of sexually explicit materials to minors on the Internet have concluded that the statutes at issue violate the Commerce Clause, in addition to First Amendment principles. *Dean, supra; PSI Net, supra; Engler, supra; Johnson, supra; Pataki, supra*. Florida's obscenity Statute suffers from precisely the same constitutional deficiency when applied to online communications. The Internet is distinctly different from other modern media such as radio and television (cable or satellite). Online communications are not "broadcast" into one's home or community. A 132-133. Instead, computer users must request access to online files that are stored on host computers located in remote places – in this case, The Netherlands. A 132-133. Website operators

cannot block users in geographic locations. A 133. Therefore, operators cannot be constitutionally subjected to the vagaries of fifty (50) different states' laws relating to the distribution of online content. With obscenity regulation, the constitutional problems are compounded: Obscenity is purportedly regulated by "local" community standards. Website operators would therefore not only be expected to comply with multiple inconsistent statewide regulations, but further required to discern the distinctions between each community's standards, within each state, without the ability to block receipt of the website material by users in specific geographic areas, unlike radio or television stations, which can readily avoid such markets. These factors create unique concerns that are applicable exclusively to publishers and distributors of online materials.

The *Pataki* decision is of particular relevance to the instant case. There, the Court concluded that since the Internet has become an important conduit for commercial activity, virtually any regulation affecting its operation is subject to Commerce Clause scrutiny. *Pataki, supra*, at 969 F.Supp. 169-173.

The Statute at issue in the instant case violates the Commerce Clause in several respects: Initially, the obscenity Statute purports to regulate conduct occurring outside Florida's borders. It should be noted that the website at issue in the instant case is hosted outside of the United States' borders; in Amsterdam, Netherlands. A 132. Users can submit content from anywhere in the world without

prior approval from Petitioner WILSON. A 133. Chapter 847, *Fla. Stat.* (2005), does not contain any limiting language designed to curtail the application of Florida's obscenity laws only to activities occurring in the State of Florida. The obscenity statutes purportedly regulate the online distribution of any obscene materials to any resident in the State of Florida, regardless of where the website is hosted, and irrespective of the location from which the materials originate.

The courts have noted that website operators have no reliable means of limiting the geographic distribution of erotic materials on the Internet. *ACLU v. Reno*, 217 F.3d 162, 175 (3d Cir. 2000) ("Web publishers are without any means to limit access to their sites based on geographic location of particular Internet users."); *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002) (plurality opinion, *Nitke v. Ashcroft*, 253 F.Supp.2d 587, 603 (S.D. NY 2003). This was confirmed by Petitioner WILSON, in his Affidavit. A 133. Many of the images contained on the website came from end users in other countries, such as Iraq and Afghanistan. A 135-136. The images at issue in the bond revocation matter could have come from anywhere in the world. Interestingly, given the fact that Petitioner WILSON had moved outside of Polk County, and the Tenth Judicial Circuit, Respondents are purportedly attempting to regulate online activity that has no connection with Polk County Florida, other than the fact that Investigator Gates decided to download certain materials onto his computer. There is no rational basis to apply Florida

law, or Polk County community standards, to this international distribution of images subject only to federal law. The Commerce Clause was included in the United States Constitution just to avoid such anomalies.

Since distribution of adult-oriented material on the Internet is, by its very nature, interstate commerce,<sup>11</sup> a cohesive national scheme of regulation is required, and the Statute is subject to “dormant” Commerce Clause analysis. International commerce is subject to Commerce Clause restrictions just like interstate commerce. *Walbash, ST. L. & P. RY. CO. v. Illinois*, 118 U.S. 557, 574-75, 7 S.Ct. 4, 30 L.Ed. 244 (1886) (“For the regulation of [commerce with foreign countries and among the states] there can be only one system of rules, applicable alike to the whole country.”). By allowing state-level obscenity laws to be applied to Internet media, this Court would be authorizing inconsistent regulation of interstate commerce in precisely the way that the Commerce Clause forbids.

Even if the Statute does not inconsistently regulate interstate commerce, it fails the “Pike Test” since the burdens on interstate commerce outweigh any putative local benefits conferred by the Statute. See *Pike, supra*. Given the

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<sup>11</sup> *Reno v. ACLU, supra, American Book Sellers Foundation for Free Expression v. Dean, supra; PSI Net, Inc. v. Chapman, supra; Cyberspace Communications, Inc. v. Engler, supra,; ACLU v. Johnson, supra,; American Libraries Association v. Pataki, supra,; Center for Democracy & Technology v. Pappert, supra,; Southeast Booksellers Ass’n v. McMaster, supra.*

existence of several federal obscenity statutes<sup>12</sup> that already regulate the online distribution of obscene materials, any additional benefits derived by the almost identical state level of regulation is *de minimis* at best. Any allegedly obscene content distributed via Internet websites could be readily addressed by the United States Department of Justice, which boasts in news reports that it has recently created a well-funded group of investigators and trial attorneys to investigate and prosecute obscenity violations by commercial adult websites.

The Florida obscenity Statute regulating obscene materials on the Internet provides little in terms of local benefit,<sup>13</sup> given the existence of the federal legislation. When balanced against the burden on interstate commerce that is created by the existence of a state statute, seeking to regulate international online commerce, the Statute must fall under the *Pike* Test.

Finally, the application of Chapter 847, *Fla. Stat.* (2005) to the Internet has the effect of exporting Florida's domestic policies (or as here those of a distinct and unique county) onto other states. As observed in *Pataki* at 177, an Internet user or webmaster may not intend for his website to be accessible to Florida customers, but cannot prevent Floridians from accessing his messages or content, and cannot prevent such content from passing through Florida computers. Thus,

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<sup>12</sup> 18 U.S.C. §§ 1462, 1463 & 1465.

<sup>13</sup> In fact, the Record reflects no impact on Florida (or Polk County) from the website other than that caused exclusively by Investigator Gates' deliberate accessing of some of its images.

by allowing the State of Florida, and in this case, Polk County, to export its domestic policies with regard to obscenity into other states, the Statute is rendered *per se* invalid under the extraterritoriality analysis espoused in *Edgar, supra* and *Healy v. The Beer Institute*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

Free expression would be impermissibly curtailed if Internet users were required to comply with multiple inconsistent state obscenity regulations. Just like the rail and the highway regulations in earlier cases, the Internet would be severely burdened if users were “lost in a welter of inconsistent laws imposed by different states with different priorities.” *Pataki, supra* at 182. Inconsistent state regulations of the Internet forces website operators into the “Hobson’s Choice” of: 1.) Complying with the most censorial community standard; or, 2.) Forgoing communications protected in the user’s state (and many others); or, 3.) Risking prosecution based on the geographic<sup>14</sup> fortuity of the unknown recipient. “Further development of the Internet requires that users be able to predict the results of their Internet use with some degree of assurance. Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace.” *Pataki* at 183.

Aside from the “dormant” Commerce Clause concern, Chapter 847, *Fla. Stat.* (2005), is also specifically preempted by federal Internet obscenity law,

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<sup>14</sup> Again, the geographic fortuity here is that of a single county or judicial district.

where online distribution is concerned. When the federal government decides to regulate a specific field or industry, any inconsistent state laws may be rendered invalid to the extent they attempt to regulate that same field.<sup>15</sup> Federal preemption can be explicitly stated in the statute's language, or implicitly contained in the structure and purpose of the regulatory scheme.<sup>16</sup>

In the field of obscenity regulation, Congress has adopted the comprehensive Communications Decency Act of 1996. This Statute evidences a clear intent to regulate a specific activity or industry, i.e. the commercial distribution of obscene materials on the Internet. Moreover, Congress' intent to preempt state law is evident from Section 230 of the Act, which provides for express preemption of any inconsistent state laws:

**Section 230. Protection for private blocking and screening of offensive material**

\* \* \*

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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<sup>15</sup> Preemption derives from the Supremacy Clause, Article VI, Clause 2 of the United States Constitution; see, *English v. General Elec. Co.*, 496 U.S. 72, 70-79, 110 S.Ct. 2270, 110 L.Ed. 2d., 65 (1990) [Enumerating the three circumstances in which state law is preempted under the Supremacy Clause as: 1) where Congress explicitly defines the extent to which its enactments preempt state laws; 2) where a state law regulates conduct in a field that congress intended the federal government to occupy exclusively; and 3) to the extent that state law actually conflicts with federal law.]

<sup>16</sup> *Moralis v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of -

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph.<sup>17</sup>

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

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<sup>17</sup> So in original. Probably should be "subparagraph (A)."

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law...[Emphasis Added]

As is evident by the above-quoted language, Congress has specifically preempted the states from enforcing inconsistent state law. A host of cases have recognized Section 230 preemption, including the Florida Supreme Court in *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001). There, a parent sought to hold America Online, Inc., an Internet Service Provider, responsible for allowing a user to market obscene photographs and videotapes of the parents' minor son. The court concluded that Section 230 of the Communications Decency Act (CDA) preempted all Florida law causes of action. *Id.* at 1017.

A significant body of case law has developed since the enactment of the CDA, affirming the preemptive effect of Section 230 immunity on state laws. E.g., *Associated Bank-Corp v. Earthlink, Inc.*, 2005 WL 2240952 (W.D. Wis. September 13, 2005); *Barrett v. Fonorow*, 799 N.E.2d 916 (Ir. Ct. App. 2003); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D. D.C. 1998); *Corbis Corp v.*

*Amazon.com, Inc.*, 351 F.Supp.2d 1090 (W.D. Wash. 2004); *Does v. Franco Prods*, 347 F.3d 655 (7th Cir. 2003); *Doe v. Oliver*, 755 A.2d 1000 (Conn. Super. Ct. Mar. 7, 2000); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. Jan. 31, 2002); *Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907 (E.D. La. Dec. 17, 2002); *Batzel v. Smith*, 2003 WL 21453358 (9th Cir. June 24, 2003); *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Hart v. Internet Wire, Inc.*, 145 F.Supp.2d 360 (S.D. NY June 14, 2001); *Novak v. Overture Servs., Inc.*, 309 F.Supp.2d 446 (E.D. NY 2004); *OptInRealBig.com, LLC. v. Iron Port Sys., Inc.*, 323 F.Supp.2d 1037 (N.D. Cal. 2004); *Stoner v. eBay, Inc.*, 2000 WL 1705637 (Cal. Super. Ct. Nov. 7, 2000). While little has been written about the effect of Section 230 on inconsistent state criminal laws, it appears that criminal laws are not excluded from the scope of the preemption. While Congress specifically mentioned in the legislation that Section 230 had no effect on federal criminal law relating to obscenity or sexual exploitation of children, or any other “federal criminal statute” [emphasis added], no such limiting language can be found with regard to the preemptive effect on state criminal law. The section merely states:

No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this Section. Section 230(d)(3).

In light of the clear overlap and inconsistent regulation of state and federal obscenity matters, there can be no doubt as to Congress' intent to preempt inconsistent state obscenity regulations. Section 230 is designed to prevent the imposition of liability on those who do not create content posted on a website, such as Petitioner WILSON. A 133. Yet Respondents are trying to do exactly that, using the state obscenity laws. This renders Florida's obscenity inconsistent laws inconsistent with the effect of Section 230's immunity provisions. Given the consistent preemptive effect on other similar state laws, as interpreted by the courts across the country, this Court should find that Chapter 847, *Fla. Stat.* (2005) is preempted by Section 230 of the Communications Decency Act of 1996.

As a result of the above, any attempt to invoke Florida's obscenity prohibitions to regulate Internet transactions must be dismissed based on inconsistency with the Commerce Clause and federal preemption.

In light of the above, Petitioner WILSON has established that Florida's obscenity statute is preempted with regard to its application to distribution of online content. Therefore, this law could not form a valid basis for the underlying violation, let alone bond revocation in the above-styled case.

F. The Evidence Against Petitioner WILSON was Seized in Violation of the Fourth Amendment, Under Binding Precedent From This Court, and Should Have Therefore Been Suppressed.

The evidence introduced against Petitioner WILSON in this case was obtained by Investigator Gates by becoming a member of the website, and copying the images and video clips at issue in the bond revocation proceedings. SA. Investigator Gates admitted that no warrant had been sought, nor obtained, prior to copying the materials for use in the bond revocation hearing. He did not contend that he received any prior permission to do so, but instead relied upon his status as a member of the website which authorized him to view the materials posted on the website. SA.

This case is on all fours with this Court's decision in *Miragaya, supra*. There, the defendant, who owned a video store, was charged with possession of obscene video tapes with intent to sell or deliver. *Id.* at 263. The Sheriff's Officers obtained a membership card from the defendant's video store authorizing rental of video tapes for a twenty four hour period, and thereafter rented three (3) video tapes for the Sheriff's Department and made copies thereof. The copies were made to preserve evidence to be presented to the State Attorney for possible charges. *Id.* No warrant was obtained prior to making the copies. This Court held that the officers' act of copying the rented video tapes constitutes a seizure of the defendant's property, without a warrant. The lawful retention of materials alleged

to be obscene depends on the issuance of a warrant for the materials prior to the officers' obtaining them. "Only when a warrant has been issued is the retention not a prior restraint." *Id.* at 264. The Court therefore ordered suppression of the video tapes based on violation of the Fourth Amendment.

The holding in *Miragaya* is directly applicable with the instant case. Respondent SHERIFF's act of copying the images and video clips after becoming a member of Petitioner WILSON's website, but prior to seeking a warrant, constitutes an illegal seizure under the Fourth Amendment, and a prior restraint on protected speech under the First Amendment. Therefore, Petitioner WILSON's objection to the introduction of the evidence in support of the obscenity allegations should have been sustained, under the exclusionary rule, and the evidence suppressed. Failure to honor binding precedent from this Court in a factually indistinguishable situation constitutes a departure from the essential requirements of law.

## V. CONCLUSION

This case illustrates one of the clearest and most egregious examples of how the obscenity statute can be misused by law enforcement seeking to interfere with First Amendment rights. Petitioner WILSON remains incarcerated based solely on his continued distribution presumptively protected speech, before any final judicial determination that anything is obscene, and without any indication that he presents

a danger to the community. Given the strong Florida constitutional right to bail, and the myriad of constitutional violations committed throughout the proceedings below, Petitioner WILSON's continued incarceration under these circumstances is patently unlawful and unconstitutional.

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Attorneys for Petitioner WILSON

**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

**CERTIFICATE OF TYPE SIZE AND STYLE**

The type size and style for this Petition is 14 point Times New Roman.

A handwritten signature in blue ink, consisting of a large, stylized initial 'L' followed by a horizontal line extending to the right.

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Lawrence G. Walters