

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

CHRISTOPHER M. WILSON

APPEAL CASE NO.: 2D-05-6073

Petitioner,

LT CASE NO.: CF-05-7738

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.

**BRIEF OF AMICUS CURIAE
FIRST AMENDMENT LAWYERS ASSOCIATION, FREE SPEECH
COALITION AND THE AMERICAN CIVIL LIBERTIES UNION
OF FLORIDA**

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STATEMENT OF INTEREST OF AMICUS CURIAE

FIRST AMENDMENT LAWYER'S ASSOCIATION

The First Amendment Lawyer's Association is national organization composed of attorneys whose practices substantially involve issues of free expression including, in very many cases, matters concerning sexually oriented expression.

FREE SPEECH COALITION

The Free Speech Coalition is a nationwide trade association composed of businesses and individuals each of whom is involved in some aspect of the adult entertainment industry. FSC is vitally concerned with the protection of sexually oriented expression among consenting adults.

ACLU OF FLORIDA

The ACLU of Florida is the Florida affiliate of the American Civil Liberties Union, a nationwide, public interest organization with approximately 500,000 members (including almost 26,000 in Florida) dedicated to advancing and preserving constitutional protections found in the Bill of Rights and, in particular, the First Amendment. The ACLU is active in addressing issues concerning free expression over the Internet.

SUMMARY OF ARGUMENT

Sexually explicit speech is presumptively protected by the First Amendment to the United States Constitution and by the Declaration of Rights in the Florida Constitution. The explicit images found on the Petitioner's website are similar to those found on thousands of similar websites across this nation. Thus, the unique government pressure brought to bear against Mr. Wilson in this case stands to chill the speech of citizens throughout the United States.

There can be no doubt that the crime of obscenity is unique in American jurisprudence. In no other case is a fully protected constitutional right subject to prosecution based on standards of decency which vary from one community to another. The trial Court below revoked bail on the mere allegation that Petitioner had distributed obscene materials; there has been no adjudication of that fact by a jury. Under these circumstances, that action imposes an actual prior restraint on presumptively protected speech. Moreover, given the worldwide reach of the World Wide Web, no webmaster in this country can be secure against prosecution and incarceration on a mere allegation of criminal speech. Unless checked by this Court, the chilling effect on speech will be dramatic and universal.

ARGUMENT

I. THE REVOCATION OF BAIL BASED UPON A PRE-ADJUDICATION CLAIM OF OBSCENITY IMPOSES A PRIOR RESTRAINT ON PRESUMPTIVELY PROTECTED SPEECH AND WILL RESULT IN AN UNACCEPTABLE CHILLING EFFECT ON INTERNET COMMUNICATIONS ACROSS THE NATION.

STANDARD OF REVIEW: With respect to the First Amendment issues addressed in this amicus brief, this Court will review the ruling of the lower Court *de novo* as the constitutional issues are facial in nature and independent of the particular facts of the Petitioner's case. This Court will apply heightened scrutiny to determine whether the revocation of bond on the basis of a pre-adjudication claim of obscenity violates the First Amendment by imposing an unconstitutional prior restraint.

Because the State Attorney's unprecedented theory and the trial court's precipitous action fly in the face of so much basic, settled First Amendment law, the instant Amici feel compelled to offer the following short brief in support of Wilson's immediate release. Amici are additionally concerned about the chilling effect which the State Attorney's novel theory would have on the willingness of speakers to disseminate sexually explicit but constitutionally protected expression over the Internet and, indeed, in any manner or form. In the end, too, this matter involves more than the

rights of the instant Petitioner. The website involved in this case obviously attracted a worldwide audience, and the rights of each member of that audience are imperiled by unprecedented proceeding and ruling below.

Unlike any other criminal offense, the components of an obscenity violation are not pre-defined. That is, material is transformed from being expression protected by the First Amendment to contraband only upon a jury verdict of guilt. Because the definition of obscenity compelled by the opinion in *Miller v. California*, 413 U.S. 15 (1973) contains subjective community standard components, there can never be predictability. On recent occasions American jurors have acquitted images of bestiality, urination, defecation, fist insertion, as well as extremely aggressive, misogynist depictions. This unpredictability is aggravated by the multiplicity of jurisdictions in which any “adult” website can be prosecuted. There are thousands of separate communities in the United States, each capable of having a separate legally cognizable “community standard” against which to evaluate obscenity.

Because of this inherent lack of consistency and predictability, any of the hundreds of thousands of United States-based, English language websites containing images of sexually explicit imagery is subject to an

obscenity prosecution in any of those numerous jurisdictions. No one can design a website immune from those extraordinary and unique risks of criminal prosecution, so long as there is at least one sexually explicit image. Yet, despite the infinite flexibility which the obscenity laws offer prosecutors, there are relatively few obscenity prosecutions either by the various states or Federal jurisdictions. Prosecutions of websites on obscenity charges are extraordinarily rare. Only one has involved a traditional commercial distributor of adult materials. In that instance, the case was initially dismissed during pretrial motions, and only recently reinstated by the Third Circuit Court of Appeals (05-1555).¹ See, U.S. v. Extreme Associates, Inc., 352 F.Supp.2d 578 (W.D. Pa. 2005), rev. __ F.3d __, 2005 WL 3312634 (3d Cir. 2005). The uncertainty to which all adult webmasters and owners must acclimate themselves is balanced by how rare such prosecutions are, and the confidence that, during the often lengthy pendency of the proceedings, a webmaster may continue to operate the business,

¹ It is important to recognize that, even with the reversal of the dismissal in Extreme Associates, there still has been no finding of obscenity in that case. Rather, the case is now remanded for a jury trial to determine whether the materials are actually obscene. Mr. Wilson was not given that right in the instant case – he has effectively been deprived of his liberty, without trial for engaging in what must be presumed to be fully protected speech.

communicate ideas, and earn the significant legal fees necessary to put forward an obscenity defense.

It is in this light that the threat to incarcerate an individual pending trial, without any jury determination of an obscenity, becomes so fraught with censorial dangers. Upon accusation of distribution of obscene materials, under the Florida State theory, the defendant would necessarily completely remove any image which could be accused of being obscene.² Any other choice would likely result in indefinite detention, pending trial. That would mean that upon accusation, without any judicial screening mechanism, the webmaster or operator would forfeit all First Amendment rights to sexual free expression without interference from government. Such a result is without precedent in First Amendment jurisprudence.

The membership of the Free Speech Coalition operates tens of thousands of adult websites. The membership of the First Amendment Lawyers Association collectively represents the vast majority of adult website operators in the United States. The American Civil Liberties Union, and its state chapters, are vitally interested in the free speech rights involved

² That is exactly what Mr. Wilson was compelled to do in this case – remove a quarter of a million presumptively protected images.

and with the right of citizens to access that speech without government censorship. It is beyond cavil that the remanding into custody of a person charged with obscenity violations, based upon that person's continuing exercise of their Constitutionally enshrined right to free expression, represents the greatest threat to the adult online industry observed by these organizations since the adult industry's inception.

If the procedures and substantive standards followed in this case are approved by the Courts, the chilling effect on protected speech will be dramatic. A law enforcement agency could effectively prevent sexually explicit speech by bringing a single count of obscenity against a webmaster. If the webmaster failed to do "take down" the site, he or she would risk incarceration on *every* occasion. The risk of a bail revocation is so high that the webmaster would be forced to self-censor in order to preserve his or her liberty pending a trial on the underlying charges.

If remanding a defendant into custody for exercising First Amendment freedoms is upheld, no adult webmaster or operator who is within the physical reach of state or federal government officers can feel safe. Attorneys will advise their clients that they cannot continue to operate an adult website if accused, no matter how baselessly, of distributing obscene

matter. Thus the government will have the power to censor all sexual communication by a defendant during the period between accusation and the end of trial, without any cost or “downside” irrespective of the outcome of the trial. The public will be denied access to this speech.

As a practical problem, such a ban will result in economic catastrophe for a typical commercial website. The vast majority of such a site’s income comes from monthly subscriptions. If the website is shut down solely because of a mere accusation of obscenity, the entire subscriber base will be entitled to reimbursement. It is the policy of all credit card processors for adult websites to decline to service websites with more than a minimal number of refunds or “chargebacks.” Thus even if acquitted, it is unlikely to the point of unimaginable that the accused would have the ability to restart an adult website, because no one will process credit cards for a site with such a history of mandatory reimbursement.

We require an extraordinary standard of care in obscenity prosecutions in order to protect free speech, including speech of a sexually explicit nature. However, that constitutional protection is betrayed by the procedures employed in this case – a procedure that could be quickly duplicated throughout the United States if successful in this instance. Here, a single law

enforcement agency and a single Judge have forced a citizen to cease engaging in presumptively protected speech *before he has been convicted of any crime and before the existence of a crime* has even been established. This latter point is crucial and must be reiterated: until a jury of his peers concludes that materials on Mr. Wilson's website are obscene under prevailing law and applicable community standards, no crime has been committed. Indeed, the opposite is true; Mr. Wilson's speech is completely protected unless it is finally adjudicated to be obscene. That is true both with respect to the depictions which served as the basis for the original charges as well as the depictions which supposedly justified the revocation of bail.

II. THE STATE FAILED TO REBUT THE CONSTITUTIONAL PRESUMPTION THAT THE IMAGES OFFERED BY THE PETITIONER ARE PROTECTED BY THE FIRST AMENDMENT.

The State's Attorney argued below that the trial court could revoke Wilson's bail on a showing - well short of "beyond a reasonable doubt" -that Wilson was committing crimes while released on bail. Whether or not the Eighth and Fourteenth Amendments permit such a theory, and regardless of the extent to which Florida law provides for it, the First Amendment poses a burden in this case which the State Attorney seems to have overlooked and

which the trial court entirely ignored. The continuing crime alleged in this case is obscenity. So, the State Attorney's theory necessarily requires a determination that the expression offered in support of the revocation motion is constitutionally unprotected.

But *all* expression is presumptively protected by the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 817 (2000); *Fort Wayne Books, Inc. v. State of Indiana*, 489 U.S. 46 (1989). To be sure, the United States Supreme Court has recognized that "certain well-defined and narrowly limited classes of speech" are unprotected, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942), and that legal obscenity is one such unprotected category of expression, *Roth v. United States*, 354 U.S. 476, 484-85 (1957); *Miller v. State of California*, 413 U.S. 15, 23 (1973). But the *initial* constitutional presumption remains always in favor of protection. This means that the burden is always on the government to establish that particular expression falls outside of the general rule of constitutional protection and within a narrow exception where the expression is not protected. *Playboy Entertainment Group*, 529 U.S. at 816. Moreover, the boundaries between the vast plateau of protected expression and the

narrow “holes” are abrupt constitutional cliffs, not broad and gentle slopes of decreasing protection. As a result, the question of obscenity *vel non* is answered categorically, and sexually explicit expression which falls on the protected side of the constitutional boundary, even by just a bit, remains fully protected by the Constitution. *Free Speech Coalition*, 353 U.S. 240, 251.

As a result of the forging fundamental constitutional principles, the United States Supreme Court long ago specified what is necessary before the presumption of constitutional protection can be rebutted when expression is challenged as legally obscene. It is not enough that probable cause has been established, as in a standard search warrant proceeding. *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319, 326 (1979). Rather, a judicial finding is required after a rigorous adversary proceeding designed to focus searchingly on the question of obscenity. *Marcus v. Search Warrants*, 367 U.S. 717, 732 (1961). Short of this, constitutional prior restraint principles forbid such government actions as the seizure of more than one copy of allegedly obscene materials (for evidentiary purposes), *Quantity of Books v. State of Kansas*, 378 U.S. 205 (1964), the retention of even unique material without making a new copy available for continued publication *pendente lite*, *Heller*

v. State of New York, 413 U.S. 483 (1973), and the pretrial seizure of expression which might, after conviction, be subject to forfeiture, *Fort Wayne Books, Inc. v. State of Indiana*, 489 U.S. 46 (1989). These same first amendment principles also counsel against the arrest of a motion picture projectionist for showing an allegedly obscene film, *Roaden v. State of Kentucky*, 413 U.S. 496 (1973); and they plainly forbid a blanket injunction against future expression even on the ground that some past expression has been properly determined to be legally obscene, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

These cases articulate the profound and far-reaching principle that the government may not act against anyone on the ground that their expression is legally obscene except upon a proper judicial finding, following a proper adversary proceeding, that the expression in question is unprotected by the First Amendment. The requirement of a judicial determination following a hearing designed to focus searchingly on the question of obscenity thus comes into play whenever the government requests action which requires it to overcome the presumption of constitutional protection.

In *Heller v. State of New York*, 413 U.S. 483 (1973), the United States Supreme Court reiterated that the government may seize a single copy of an

allegedly obscene expressive work in order to preserve it for evidence for trial. *Id.* at 492. If that single copy is unique, however, the government, at the request of the party from which it was sized, must copy it and return the copy to the party for continued dissemination. *Id.* at 492-93 n. 10. This rule aptly illustrates the force of the presumption of constitutional protection in action: while obscenity charges are pending, but before any proper determination concerning obscenity is made, the government must not only permit but sometimes actively facilitate the continued dissemination of that expression.

The Supreme Court's careful and deliberate endorsement of this procedure would make no sense whatsoever if the government could respond to further dissemination by having the court lock up a defendant otherwise properly admitted to bail. *A fortiori*, then, *Heller* stands for the proposition that the government cannot sanction the dissemination of allegedly obscene expression until after a proper determination has been made that the government has shouldered its burden of rebutting the constitutional presumption of protection. The trial court's cursory bond revocation hearing fell far short of the required proceeding and determination.

III. THE TRIAL COURT FAILED TO FOCUS SEARCHINGLY AND PROPERLY ON THE QUESTION OF OBSCENITY.

Despite Wilson's repeated efforts and objections below, the trial court altogether failed to conduct the sort of hearing which is required to focus searchingly on the question of obscenity. It was therefore in no position to make the necessary determination that the Respondents had met their constitutional burden of establishing that the expression offered in support of the motion to revoke *is* – not may be – legally obscene.

At least since the seminal case of *Roth v. United States*, 354 U.S. 476 (1957), it has been clear that the First Amendment requires that any determination of obscenity *vel non* take into account the entire work, not merely isolated portions of a larger whole. The very first time the United States Supreme Court spoke on the subject of obscenity, it expressly rejected what it took to be a contrary English rule derived from *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868). *Id.* at 488-89. Thus no hearing can focus searchingly on the question of obscenity where only portions of a larger work are alleged to be obscene. The question of the scope of the work taken as a whole is itself vital to determining obscenity *vel non*. Not only did the State Attorney altogether fail to carry his burden of establishing that the individual images

offered in support of the motion to revoke were each separate works to be taken as a whole, the hearing record affirmatively establishes that the Respondents removed supporting text from the individual images and thus that no work was, in fact, taken as a whole. Beyond this, it should be presumed, at least in the absence of contrary, detailed, case-specific evidence offered in the government's case-in-chief, that a single website constitutes a work taken as a whole. *See, e.g., Ashcroft v. American Civil Liberties Union*, 03-218 Transcript of Oral Argument at 14-15 available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-218.pdf. The trial court should have followed such a presumption here. The trial court erred in considering separate images in the absence of evidence that each was intended to stand on the website alone as a separate work.

The failure to consider the work taken as a whole directly invalidates any obscenity determination by the trial court. Moreover, since the work as a whole was not put in evidence, the State Attorney should not have been excused from the burden of establishing the content of the applicable contemporary community standards. *Cf. Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56 n. 6 (1993). This he altogether failed to do. And this omission is

fatal here for another reason as well. Even assuming that Florida's obscenity statute were not preempted by federal law as it applies to the Internet, recent United States Supreme Court decisions suggest that the applicable community in any Internet prosecution would be the Nation as a whole. *E.g. Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 586-89 (2002)(O'Connor, J., concurring in judgment).

While it is one thing to rely on a trier of fact, in certain narrow circumstances, to know and apply local contemporary community standards, it is impossible to assume that a local judge will be aware of the breadth of tolerance or acceptance across the entire United States. For this reason, too, the trial court should have required actual evidence of contemporary community standards, and it should have dismissed and denied the State Attorney's motion when he failed to introduce such evidence.

As a result of all of the foregoing, Wilson now sits in jail awaiting trial on account of a few images selected from a large Netherlands-based website even though the State Attorney failed to carry his burden of establishing that the work (or works) from which those images were taken is legally obscene. Under such circumstances, the trial court took adverse action against Wilson even though the constitutional presumption that those

images are protected has not been properly rebutted. For those reasons alone, Wilson must be released immediately. As Amici note above, the interests at stake are not those of Wilson alone, but the thousands of other webmasters and Internet “surfers” who express themselves utilizing depictions very similar to those on Mr. Wilson’s website.

CONCLUSION

The revocation of bail based on the mere accusation that materials are obscene violates fundamental First Amendment principles and threatens to chill speech across a significant sector of the Internet community. Sexually explicit speech is presumptively protected by the First Amendment and no speech is deemed to be obscene until a jury makes that determination in accordance with the “Miller test”.

The revocation proceedings below were deeply troubling for a number of reasons well addressed in the Petitioner’s Brief. Particularly distressing to the Amici is the prior restraint on speech accomplished by the revocation. Mr. Wilson has been denied the ability to distribute presumptively protected works without a full adjudication of the underlying charge, much less a decision as to the validity of the allegations of a continuing violation. The immediate and inevitable result is the loss of the Petitioner’s website. If these procedures are upheld, similar results can be expected by webmasters across the United States. Webmasters will be far less willing to distribute protected speech of an explicit nature if they face both prosecution and the risk of immediate incarceration prior to trial. The First Amendment cannot tolerate a chilling effect of this magnitude.

Respectfully Submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been forwarded 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, by U.S. Mail this ____ day of December, 2005.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

Undersigned counsel certifies that this brief is typewritten using 14 point Times New Roman font and complies with Rule 9.210(a)(2), Fla.R.App.P.

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