IN THE CIRCUIT COURT OF THE NINETEENTH JUDICAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PEOPLE of the STATE of ILLINOIS	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 01 CF 488
	)	
MICHAEL A. JONES,	)	
	)	
Defendant.	)	

DEFENDANT'S POST-HEARING BRIEF
IN SUPPORT OF HIS
MOTION TO QUASH SEARCH WARRANT AND TO SUPRESS EVIDENCE

On November 6, 2001, the Defendant filed, pursuant to Section 114-12 of the Illinois Code of Criminal Procedure, as amended, 720 ILCS 5/114-12 (2002), his amended motion to quash the search warrant which had been issued in this matter and to suppress the fruits of the search which had been conducted pursuant to that warrant. On September 4 and 5 and again on October 27 and 28, 2003, this Court conducted an evidentiary hearing on that motion. Pursuant to prior orders of this Court, the Defendant now files his post-hearing brief in support of his motion to quash the warrant and suppress the fruits of the search.

Factual Background

The evidence adduced at the hearing on the instant motion indicates that the relevant facts are almost entirely undisputed. The Defendant, Michael A. Jones, is a professional photographer. Among other things, he produces sexually explicit photographs, (Def. Ex. 3, 5), for sale to and use by other persons who themselves produce, present, and host various world wide web sites on the internet, (Def. Ex. 8, 47 at 1), which web sites present material produced by Jones and many others to the willing adult patrons of those web sites. Jones has been producing such photographs for this purpose at least since 2000. (Def. Ex. 1, 3, 5). In late April of 2000, then-Detective James Wagner of the McHenry County Sheriff's Department was assigned to investigate anonymous information, (Def. Ex. 3), suggesting that Jones was producing and distributing child pornography. (Def. Ex. 2 ¶ 2). Detective Wagner naturally took such a charge seriously, and he proceeded to investigate it vigorously. (Def. Ex. 1 through 6, 8). He talked to several persons who had worked for Jones. (Def. Ex. 1, 5). He visited the world wide web site which Jones had established, (Def. Ex. 2 ¶ 2; Def. Ex. 3, 8, 47 at 2), to market photographs to other web masters who operate web sites which present pornographic materials directly to their own patrons,

(Def. Ex. 8, 47 at 1). He downloaded some of the images displayed on Jones' web site for further investigation, (Def. Ex. 4). In addition, he interviewed Jones himself. (Def. Ex. 3). Jones told Wagner that he did not photograph minor models, (Def. Ex. 3 at 1; *see also* Def. Ex 1, 5 (corroborating Jones' statement)), and that, in fact, federal law required that he maintain records showing the actual identities and proper ages of his models, (Def. Ex. 3 at 1). Jones showed Wagner the files containing "several hundred" such records, (Def. Ex. 3 at 1-2), but Wager never asked to see any of the specific records concerning any of the models whom Jones had photographed or whom he displayed on his web site. While it had always been clear the Jones' web site contained "adult pornographic material," (Def. Ex. At 2 ¶ 2), by late June, Detective Wagner concluded that there was no probable cause to believe that Jones had or was engaged in producing or distributing child pornography, and he closed the investigation. (Def. Ex. 47 at 2 ("As of 06/22/00 no evidence for the Criminal Charge of Child Pornography had been discovered. This investigation is considered to be unfounded. [¶] No further action taken or required. [¶] STATUS: INVESTIGATION UNFOUNDED")).

In October 2000, the McHenry County Sheriff's Department received a further complaint about Jones from Anthony Nettis, (Def. Ex. 7 at 1), a politically active resident of the Village of Greenwood, Illinois. Although Nettis bought forth no new evidence or allegations concerning child pornography, (Def. Ex. 7 at 1 (Nettis was concerned about "offensive pictures" and the proximity of Jones studio to a school)), Wagner reopened his investigation. As a result of conversations with personnel associated with the Village of Greenwood, (Def. Ex. 7 at 1 (Village Attorney Michael Chimiel)), Wagner realized that Jones might be guilty of obscenity even if he did not produce or deal in images involving minors. With this possibility in mind, he downloaded additional images from Jones' web site. (Def. Ex. 2 ¶ 6; Def. Ex. 7 at 1). Although he had repeatedly visited the web site, (Def. Ex. 3, 7, 47), and was aware that Jones had carefully grouped the images on his website and that Jones sold images in sets, (*cf.* Def. Ex. 47), Wagner downloaded individual sample images, (Def. Ex. 2 ¶ 6), which, in his view, represented the most extreme images posted on or sold through Jones' web site, (*see* Warr. Ex.[1] 4 through 7). Wagner also reopened his investigation of the old child pornography charge. He took two downloaded images, (Def. Ex. 7 at 1), at least one of which he had originally downloaded in April, (*compare* Def. Ex 4 at 2, *with* Warr. Ex. 2), to an emergency room physician, George Gallant, whom he knew from previous police investigations. Wagner showed Gallant two printouts of images which appeared on Jones' web site (Def. Ex. 7 at 1-2), and he asked Gallant if he could tell how old the models depicted in the printouts had been at the time they were photographed. Gallant first told Wagner that he should find out who the models were and

[1] "Warr. Ex." Refers to the exhibits attached to the affidavit which then-Detective Wagner submitted in support of his complaint for the search warrant. The warrant application materials have been filed by the Clerk of this Court under docket No. 00 MR 236, and they were available to this Court at the hearing on the instant motion.

establish their ages that way. Gallant subsequently told Wagner, though, that the model in one printout was likely between 15 and 16 years of age, although she could be as old as 19, (Def. Ex. 7 at 2; *see also* Def. Ex. 2 ¶ 7), and that the other printout depicted a model who was likely between 14 and 17 years old, (Def. Ex. 7 at 2; *see also* Def. Ex. 2 ¶ 7).[2] Although Wagner later told Judge Haskell Pitluck, the magistrate from whom he sought the search warrant, that Gallant had reached these conclusions by applying the "Sexual Maturity Rating (Tanner staging)" Scale, (Def. Ex. 2 ¶ 7; *see also* Def. Ex. 7 at 2 ("Tanner Staging table")) Wagner did not tell Judge Pitluck anything more about the Tanner Scale itself nor about anything which Gallant may have said about the scale and its use. Nor did Wagner mention to Judge Pitluck the fact that Gallant had initially told him to establish the model's respective ages by specifically identifying them or the fact that Wagner knew that Jones kept detailed federally-required records concerning the identity and ages of the models he photographed or depicted on his web site. (*Cf.* Def. Ex. 3 at 1). Similarly, Wagner told Judge Pitluck nothing about the structure of Jones' web site or the fact that Jones displayed and sold images to web masters in specific sets. (*Cf.* Def. Ex. 47). There is no evidence that Judge Pitluck himself visited Jones' web site or that Wagner invited Judge Pitluck to do so or informed him about how easily that could be accomplished.

Thus on October 28, 2000, at ten minutes past midnight, Judge Pitluck issued a search warrant directing, *inter alia*, officers of the McHenry County Sheriff's Department to search two separate premises which were then in the Jones' possession and control. The first was his family residence, located at 5010 Greenwood Road in unincorporated McHenry County, Illinois.[3] The second was Jones' professional studio, which is located at 4315 Greenwood Road, Suite C, in the Village of Greenwood, Illinois, although the search warrant describes it as located in McHenry, Illinois. The warrant described the two places to be searched and expressly authorized and directed the seizure of: "any personal computer, keyboard, monitor, printer and accessories and all things therein and thereon including any hard disc and electronic storage media containing obscene materials or child pornography; any photographic material including but not limited to developed and undeveloped films, movies and VHS videocassettes containing obscene materials or child pornography; magazines, printed digital images, books containing any obscene materials or child pornography; any business records and documents related to the manufacture, purchase, production, sales or distribution of obscene materials or child pornography; any indicia of occupancy, ownership or residency therein or thereon and any and all instruments, articles and things designed for, intended for use in or which have been used in the commission of or which may constitute evidence of the offense of OBSCENITY or CHILD PORNOGRPAHY and or other criminal

[2] The two models in question were, in fact, each 19 years old at the time they were photographed. (Def. Ex. 52, 53).

[3] Six months earlier, Jones had told Wagner that he would soon remove his business from his residence in favor of a studio. (Def. Ex. 3 at 1).

offenses . . .." The warrant then repeated the foregoing list of items to be searched for and seized but included in that second enumeration "and other things criminally possessed . . .." It reiterated that it included "the removal of any aforementioned computer or related accessories, equipment, software or other item relating to a computer for the submission to a forensic expert for forensic examination."

Later on October 28, 2000, a large force of McHenry County Deputy Sheriffs, apparently together with Assistant State's Attorney Daniel Regna, arrived at the Jones' family residence, and, in the absence of the both Jones (who was attending a professional conference) and his of wife (who had taken a child to an emergency room on account of a cut), took charge of the house and household. They thoroughly searched the house and its most private places and contents, including its bedrooms and closets therein. From the residence they seized:

a. Nonobscene videotapes from a high shelf in the closet of the bedroom which Jones shared with his wife;

b. Nonobscene videotapes from the television and VCR in the bedroom of Jones' eighteen year old daughter;

c. Every computer in the house (together will all components and accessories), including, one from the eighteen year old daughter's bedroom, one computer used by Jones' fourteen year old daughter for her schoolwork, and one used by Jones' wife for the management of their domestic affairs; and

d. A substantial portion of Jones' family financial records.

In addition, the search party segregated Jones' minor children, including his fourteen year old daughter, and questioned them about sexual matters in the absence of any parent.

After they searched the Jones' family residence, the members of the search party searched his professional studio. Since they chose to conduct this search on a weekend afternoon, no one was present at the studio when they arrived, and they forced entry in order to execute the search. As a result of this search, which lasted for hours, the search party seized, *inter alia*, numerous expressive items and devices for the reproduction of images, text, and other information in digital form including videotape cassettes, CD-ROM disks, undeveloped rolls of film, still photographic prints, and computers with digital storage devices. (Def. Ex. 51; *see also* Def. Ex. 9 through 45). Wagner repeatedly testified that virtually all of this material was seized without even a cursory inspection of its actual contents. The search party made no effort to determine what images, if any, were stored on the computers they seized. And with respect to storage media such as CD-ROM disks, the search party seized *all* of them except those whose covers or containers showed that they contained commercially distributed computer software. (*Cf.* Def. Ex. 55 through 70). Thus many, if not all, of these items were seized without any particularized suspicion or belief that they contained anything in any way illegal. In addition, the search party seized the means and

instrumentalities by which Jones produces his constitutionally protected expression, including computers with a CD-ROM write device for the creation of data discs, a video capture card, and videocassette recorders, (Def. Ex. 51), and the State held these means and instrumentalities for many days, and in some cases, even moths. Indeed, Wagner testified that the search party *first siezed* materials and only *then searched* them; for, in Wagner's view, the search continued once the seized items were brought into the Sheriff's office; where it lasted for an unspecified number of weeks or months.

Argument

The activities of the search party, described at 4-5 *supra*, plainly amounted to searches, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)(reasonable expectations of privacy infringed), and seizures, *Ibid* (meaningful interference with individual's possessory interest in property), within the meaning both of Section 6 of Article 1 of the Illinois Constitution of 1970 and of the Fourth Amendment to the United States Constitution, which applies to the search party and the prosecution through the due process clause of the Fourteenth Amendment thereto, *Wolf v. Colorado*, 338 U.S. 25 (1949). Section 6 and the Fourth Amendment guarantee the right of persons, such as Jones and his family, to be secure from unreasonable search and seizure of their persons and property, U.S. Const. Amend 4; Art. 1 § 6 Ill. Const. (1970); and the exclusionary rule articulated in *Mapp v. Ohio*, 357 U.S. 643 (1961), prohibits the introduction into evidence of the direct and indirect products of unreasonable searches and seizures. In addition, the First Amendment to the United States Constitution, which similarly applies to the search party and prosecution as it does to all state actors, *see Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931), strictly limits the circumstances and extent to which the State may seize presumptively protected expressive materials in advance of an adversary determination that they are legally obscene or otherwise unprotected. *Roaden v. Kentucky*, 413 U.S. 469 (1973); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961)[4]

On June 21, 2001, a McHenry County grand jury handed up an indictment charging Jones with five counts of Child Pornography, 720 ILCS 5/11-20.1 (2000), and nine counts of Obscenity, 720 ILCS 5/11-20 (2000). Each count of this indictment is based solely upon evidence seized as a sole and direct result of the warrant and the search and seizure activities referred to at 3-5 *supra*. (Def. Ex. 51). Yet the warrant issued in this case was invalid both because it was not supported by probable cause and because it was overbroad on its face. In addition, the searches and seizures executed in this matter were improper because they did not in fact search for and focus upon the materials described in the warrant, because they were entirely too broad, and because the seizures imposed an impermissible prior restraint upon the pre-

[4] Section 2 and 4 of Article 1 of the Illinois Constitution of 1970 similarly limit search and seizure of presumptively protected expression.

sumptively protected expression of Jones, his customers, and his customers' audience. For these reasons, as detailed *infra*, the search warrant must be quashed and the direct and indirect fruits of the searches and seizures must be suppressed.

I. The Search Warrant Was Invalid Because It Was Not Supported by Probable Cause and Because It Was Overbroad on Its Face.

Both the Fourth Amendment and Section 6 protect persons such a Jones and his family from unreasonable searches and seizures. *Minnesota v. Carter*, 525 U.S. 83 (1998). Where, as here, there is no basis, such as exigent circumstances or plain view, for an unwarranted search or seizure, both the search and the seizure must be supported by a search warrant. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *New York v. Belton*, 453 U.S. 454 (1981). Such a search warrant must be supported by probable cause, *Steagald v. United States*, 451 U.S. 204 (1981), and it must particularly describe the places to be searched and the items to be seized, *Maryland v. Garrison*, 480 U.S. 79 (1987); *Dalia v. United States*, 441 U.S. 238 (1979). The warrant issued in this case failed both requirements.

A. The Warrant Issued Without Probable Cause to Believe that Evidence of Any Crime Would Be Discovered at the Places to be Searched.

The searches and seizures described in this motion were unlawful and unconstitutional because neither the warrant nor the subsequent searches were predicated upon probable cause to believe either that Jones had committed any crime or that evidence of any crime would be found in the particular locations to be searched. Judge Pitluck issued the search warrant at issue here upon a complaint for the same sworn out by then-detective James Wagner of the McHenry County Sheriff's Department. The warrant does not in terms aver that it is supported by any sworn matter more specific than the complaint, which is itself cloaked in generality. Furthermore, no affidavit is expressly incorporated into the search warrant. The warrant thus fails on its face to establish that it is supported by the required probable cause. The warrant itself would hardly persuade a person of reasonable caution that Jones had committed or was committing either the crime of child pornography or that of obscenity. *Cf. Brinegar v. United States*, 338 U.S. 160 (1949)

Nor does the matter improve when the details of Wagner's investigation are considered. In the first place, before he swore out the complaint for the search warrant and executed an affidavit in support of that request, Wagner had previously unlawfully accessed and trespassed upon the world wide web site which Jones had established and maintained specifically and solely to inform other web masters of the expressive content available for their use on their own web sites. Cf. 720 ILCS 5/16D-3 (2002), Wagner used observations he made as a result of his illegal access to further his investigation and ultimately to support the allegations contained in his complaint for the search warrant. Virtually all of the facts and

conclusions contained in Wagner's affidavit followed directly or indirectly from his repeated unauthorized access to Jones' web site. Matters discovered as a result of an officer's idle and unwarranted trespass cannot supply the basis for probable cause to issue a search warrant.

1. Wagner's Investigation Did Not Produce Probable Cause to Believe that Jones Had Committed Any Child Pornography Offence or that Any Evidence of Such Offenses Would Be Found at the Places to Be Searched.

After a thorough investigation lasting over two months, Wagner himself initially and quite properly concluded that there was no reason to believe that Jones was producing or distributing child pornography. Although he carefully refrained from mentioning it to Judge Pitluck when he sought the warrant, (*cf*. Def. Ex. 2), Wagner had interviewed at least two of Jones' former models. One, Naomi T. Cultler, had also worked for Jones in an office capacity. She was thus familiar with the way Jones conducted his business and with the images he produced. Even though she left Jones' employ on "bad" terms, she unequivocally told Wagner that none of Jones' images depicted underage models. (Def. Ex. 1). The other former model, Vanessa J. Campbell, who may also have left Jones' employ on bad terms, (Def. Ex. 1), told Wagner that she had been Jones' first erotic model and that she had helped him recruit other models to pose for him. Thus she, too, was familiar with Jones business practices. And she, too, unequivocally told Wagner that Jones was careful to make sure that no children were present during his photo "shoots" and that Jones used only "models who were over 18 years-of-age." (Def. Ex. 5). Wagner also failed to mention to Judge Pitluck that Jones had explained to Wagner that federal law, *cf*. 18 U.S.C. § 2257, requires that Jones keep detailed records documenting the identity and age of the models he photographs or displays on his web site. Indeed, Jones had generally shown Wagner a file containing "several hundred," such records, (Def. Ex. 3 at 1), but Wagner never sought to examine individual records concerning particular models. Finally, Wagner never told Judge Pitluck that he, too, had concluded, after numerous visits to Jones' web site, that "no evidence for the Criminal Charge of Child Pornography had been discovered." (Def. Ex. 47 at 2). Wagner realized that there was no probable cause to believe that Jones had committed any child pornography offense, and he closed the investigation in June of 2000.

Only after a community political activist, Anthony Nettis, wrote a letter to Village of Greenwood President Evelyn Nash about Jones some three and a half months later did Wagner reconsider the matter. (Def. Ex. 7 at 1). *Then* Wagner moved very rapidly, in stark contrast to his earlier careful and deliberate investigation, which had turned up nothing. (Def. Ex. 1 through 5, 8, 47 at 2). At about 3:00 p.m. on October 25, 2000, Wagner "was requested" to interview Nettis. (Def. Ex. 7 at 1). He did so about two and a half hours later. (*Ibid*). Nettis made no new allegations concerning child pornography. He was concerned generally about "offensive pictures" and specifically about the proximity of Jones' studio to a school. (*Ibid*). Wagner expressly noted at the time that he considered the latter issue to be a zoning

matter, not a criminal one. Nevertheless, Wagner renewed his efforts to investigate Jones for child pornography violations. On the next day, he downloaded and printed two images from Jones' web site, at least one of which he had seen before closing his first investigation, (*compare* Def. Ex 4 at 2, *with* Warr. Ex. 2), and, about an hour later, he took them to George Gallant, an emergency room physician with whom he was familiar from previous police investigations. (Def. Ex. 7 at 1). When asked if he could tell how old the models depicted in the printouts had been at the time they were photographed, Gallant first told Wagner that he should establish their ages by identifying the specific models. Gallant subsequently told Wagner, though, that the model in one printout was likely between 15 and 16 years of age, although she could be as old as 19, (Def. Ex. 7 at 2; *see also* Def. Ex. 2 ¶ 7), and that the other printout depicted a model who was likely between 14 and 17 years old, (Def. Ex. 7 at 2; *see also* Def. Ex. 2 ¶ 7). Less than three hours later, Wagner was at work on an application for a search warrant. (Def. Ex. At 2).

Had Wagner's second child pornography investigation of Jones been remotely as thorough and deliberate as his first, he might well have avoided the fatal mistakes and omissions which then ensued. He might have avoided concluding that nineteen-year-olds, (Def. Ex. 52, 53), were as young as 14 and 15 years of age, (Def. Ex. 2 ¶ 7; Def. Ex. 7 at). Wagner freely testified, for instance, that he failed to notice the nipple piercing on one of the models and the tattoo around the navel of the other,[5] so he could not have asked Gallant whether the piercing and tattoo called the age estimates into question and he could not have considered whether underage girls would likely have such body modifications in light of the prevailing laws. *See*, *e.g.*, 720 ILCS 5/12-10 (anyone other than a medical doctor who tattoos a person yonger than 21 commits Class C misdemeanor); 5/12-10.1(anyone who pierces body of minor without paraent's written consent commits Class C misdemeanor). Wagner might also have carefully considered whether, in light of what Gallant initially told him about identifying the models, he should proceed to examine Jones' model records to verify Gallant's age estimates.[6] He might also have realized that Gallant had a good reason for preferring actual knowledge to an age estimate from photographs: if Gallant in fact used the Tanner Staging scale as Wagner has suggested, he used it *backwards*. The scale is designed to determine whether an adolescent patient of *known age* is at a normal or abnormal stage of physical development. Furthermore, the scale is designed for use in connection with a physical examination rather

[5] Since Jones was prevented from calling Gallant and Judge Pitluck, there is no evidence that they saw them either. They are nevertheless unmistakable in Exhibits 2 and 3 which supported Wagner's request for the search warrant.

[6] This is not to suggest that Wagner is wrong in asserting essentially that he does not have to take a suspect's word for a matter critical to a criminal investigation or tip a suspect off to details of an investigation. Wagner already possessed irrefutable evidence that Jones had displayed the images which Wagner was able to download on October 27, 2003. If Wagner had thereafter approached Jones for the records, Jones could not have avoided prosecution by destroying those images. Nor could Jones have altered the original identity documents in the hands of public officials through which Wagner, using established police channels, could have ascertained the models' true ages once he identified them from Jones' records.

than a photographic observation since, in the case of females, breast contour must be established from different angles and breast development should be evaluated through palpation. Also, a physical rather than photographic examination is required to determine whether an absence of pubic hair indicates that it has not yet grown in or that it has been shaved away.[7] *See generally* David McQuoid-Mason, *et al. Crimes Against Women and Children: A Medico-Legal Guide* Ch. 10 "Applied Reproductive Anatomy and Physiology" at 227, Table 10.1, *available at* http://www.dundee.ac.uk/forensicmedicine/Crimes_ against_ Women_and_Children/D10-Anatomy.pdf (University of Dundee [U.K.] web site). Finally, Wagner certainly might have taken the weekend to consider carefully whether he should mention any of these matters to the magistrate from whom he would request a search warrant.

Instead, Wagner wound up proceeding recklessly the second time around. Wagner had already obtained the suspicious images, and he could establish that he had gotten them from Jones' website no matter what Jones did over the coming weekend. There was thus no need to rush this investigation. The remaining question, as Wagner concluded his second investigation, was whether the images were criminal at all. Before he asked a magistrate for a warrant at midnight, Wagner should at the very least have looked at his printouts closely enough to see everything they depicted. And he should have very carefully weighed against his reluctance to ask Jones for his model records what Gallant had expressly told him about determining age as well the perils of using the "reverse Tanner scale" from photographs. His failure to do these things amounted to "reckless disregard" within the meaning of the constitutional doctrine articulated in *Franks v. Delaware*, 438 U.S. 154 (1978). He simply disregarded known risks in an effort to quickly resolve an investigation which had been reopened in response to community leaders or political activists. And these matters are all the more troubling in this case because our system does not leave it to Wagner to struggle with these weighty matters alone. It was vital that he mention them to Judge Pitluck so that the magistrate could evaluate them dispassionately. Yet he altogether failed or refuse to do so. He told Judge Pitluck that Gallant had estimated the models' ages without telling the magistrate that Gallant had first articulated a better way of establishing them. Wagner told Judge Pitluck that Gallant had used the Tanner Staging scale without telling the magistrate that he *mis*used it. And he asserted his own belief, apparently *independent* of Gallant's, concerning the models' ages, (Def. Ex. 2 ¶ 6), without telling the magistrate any of the reasons which had initially led him to close the first investigation. Because these partial statements and partial omissions thus left Judge Pitluck in the dark about matters which had a direct bearing upon the issue of probable cause, Wagner deprived our system, to say nothing of Jones, of an important independent check on the criminal investigation process. For this reason, this case falls

[7] As Jones' offer of proof shows, he fully expected that Gallant would reveal these difficulties had Jones been allowed to call him to testify. The affidavit of Arlen L. Rosenbloom, M.D., which Jones attached in support of the instant motion, also rejected as evidence at the hearing, readily establishes that these are indeed matters of very serious concern.

squarely within the first exception articulated in *United States v. Leon*, 468 U.S. 897 (1984), to the general rule requiring substantial deference to a magistrates probable cause determination. *Id*. at 914 (deference to magistrate does not preclude inquiry into reckless falsity in affidavit offered to magistrate), *citing Franks*, at 165; *see also Leon* at 923 (suppression required where magistrate was misled by reckless affidavit), and this Court must now suppress the warrant for want of probable cause.

2. Wagner's Affidavit Did Not Establish Probable Cause to Believe that Jones Had Committed Any Obscenity Offence or that Any Evidence of Such Offenses Would Be Found at the Places to Be Searched.

Neither the warrant itself nor the complaint seeking its issuance nor even Wagner's affidavit supporting his request for a warrant establish probable cause to believe that Jones was disseminating unlawful obscenity from his web site. To be sure, Wagner's investigation of Jones for child pornography early established that Jones' web site contained adult pornographic images. (Def. Ex. 2 ¶ 2; Def. Ex. 6). But much adult pornography is constitutionally protected expression, which cannot be banned by the government. Even hard core pornography, *cf. Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974)(material is not obscene *unless* it is "hard core pornography" *and* satisfies additional constitutional test), remains protected against state proscription unless the government proves that, according to contemporary community standards, the work, taken as a whole, appeals to a prurient interest and depicts or describes particular sexual activity in a patently offensive way and further that, according to a reasonable person, the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973); *see also* 720 ILCS 5/11-20(b) (2000)(defining "obscene").

In his affidavit, Wagner suggests nothing at all establishing his familiarity with the applicable contemporary adult community standards, *People v. Ridens*, 59 Ill. 2d 362, 371, 321 N.E.2d 264, 268-69, (1974) (statewide community standard governs obscenity prosecutions in Illinois); *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 1063, 495 N.E.2d 1292, 1298 (2nd Dist. 1986)(same); *cf*. 720 ILCS 5/11-20(c)(4) (suggesting same), governing the first two elements of an obscenity determination. (Def. Ex. 2). He says nothing, for instance, concerning his knowledge or awareness of the contemporary community understanding of "prurient interest" or "patent[] offensive[ness]." This is particularly troubling since Wagner had apparently begun considering and investigating the *obscenity* charge less than 36 hours before he sought a search warrant from Judge Pitluck. (Def. Ex. 7). Wagner's "specialized training in computer crimes and child pornography," [8] (Def. Ex. 2 ¶ 1), would not have covered these matters because those contemporary community standards are altogether irrelevant to questions concerning child

[8] Wagner testified that, when it comes to obscenity, his "extensive training and experience," (Def. Mem. 2 ¶ 1), consisted on participating in one previous obscenity prosecution and, perhaps, knowing about others.

pornography. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002); *New York v. Ferber*, 458 U.S. 747, 761 (1982). Furthermore, neither the complaint nor the affidavit presents any work taken as a whole and in context, as is required in determining whether each of the elements of legal obscenity is present. *Cf. Miller v. State of California*, 413 U.S. 15, 24 (1973). In fact, Wagner's affidavit says virtually nothing about Jones' web site at all. He mentions the site as Jones' admitted vehicle for selling the pornographic materials which he produced, (Def. Ex. ¶ 3), and he states that he "conducted periodic monitoring" of the site since April of 2000, (*Id*. ¶ 6). He also states that Jones' web site provided the source for the printouts of "various sample pornographic images" which are attached to the affidavit as exhibits. (Def. Ex. 2 ¶ 6). Beyond this, he says only that:

> Your Affiant accessed the website cdbabes.com via the Internet to investigate the complaint. Your Affiant determined that the website cdbabes.com led to another website being "wysiwyg://8/http://www.xconnex.net/lment/content/index.html" [*sic*] (hereinafter "L&M website"). L&M website contained adult pornographic material offered for sale. Further, L&M Enterprises located at 5010 Greenwood Road, Woodstock, Illinois purportedly operated L&M website. The L&M website offered an index of various sexual topics leading to a selection of various pornographic material offered for sale. (see attached Exhibit 1)

(Def. Ex. 2 ¶ 2). Aside from attaching a printout of the web sites' front page, (Warr. Ex. 1), Wagner does not further describe the organization of the web site. And beyond attaching printouts of six individual images plucked from the site, (Warr. Ex. 2 through 7), he does not specify its content either. In particular, Wagner does not assert that he had examined and evaluated the web site "as a whole;" and he does not come remotely close to establishing that the site is organized in such a way as to contain multiple separate works which can properly be "taken as a whole."[9] *Cf. New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986) (affidavits established that affiant had viewed each separate work in its entirety and each affidavit fully described each separate work, including its length). It appears that Wagner simply – and recklessly – ignored the established requirement that a work be taken and evaluated as a whole when evaluating it for obscenity. For these reasons, Wagner's affidavit fell far short of putting Judge Pitluck in any proper position to "focus searchingly on the question of obscenity." *Marcus v. Search Warrants*, 367 U.S. 717, 732 (1961). Yet that is precisely what the affidavit was required to do. *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968).[10] A searching focus on obscenity would have included an inquiry and a deter-

[9] Even if the front page index could establish as much, Wager does not state that he examined any of the indicated subcategories "as a whole."

[10] As it reflects upon the character and overall content of Jones' web site, Wagner's sworn statement that "[b]ased upon your Affiant's training and experience, these various printed pornographic images [Warr. Ex 2 through 7] depict either children under the age of eighteen years or obscene material," (Def. Ex. 2 ¶ 6), is considerably less clear, (". . .either . . . or . . ."), and certainly no less conclusory than the affidavit rejected as insufficient in *Lee Art Theatre*.

mination by the magistrate about what work formed a proper "whole" for obscenity purpose. For all Wagner's affidavit shows, however, Wagner did nothing more than (in a "virtual" sense) tear six isolated pages from a book, or magazine, or a multi-volume encyclopedia or merely peak in on a few scenes of a long motion picture and report them to the magistrate. This is simply not enough to establish probable cause that Jones had committed or was committing any obscenity crime or that any evidence of such crimes would be found at Jones' home[11] or at his professional office.[12] For this reason, too, this Court must now quash the warrant.

B. The Warrant Altogether Failed to Sufficiently Specify the Items to be Seized.

The Warrant carefully described, in considerable detail, the places to be searched; and no confusion arose on that score during the search. But constitutional protections also require that warrants particularly describe the items to be seized if discovered. *Maryland v. Garrison*, 480 U.S. 79 (1987); *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319 (1979). In this respect, the warrant in this case fell far short of the constitutional mark. The warrant expressly authorized and directed the seizure of: "any personal computer, keyboard, monitor, printer and accessories and all things therein and thereon including any hard disc and electronic storage media containing obscene materials or child pornography; any photographic material including but not limited to developed and undeveloped films, movies and VHS videocassettes containing obscene materials or child pornography; magazines, printed digital images, books containing any obscene materials or child pornography; any business records and documents related to the manufacture, purchase, production, sales or distribution of obscene materials or child pornography; any indicia of occupancy, ownership or residency therein or thereon and any and all instruments, articles and things designed for, intended for use in or which have been used in the commission of or which may constitute evidence of the offense of OBSCENITY or CHILD PORNOGRPAHY and or other criminal offenses . . .." The warrant then repeated the foregoing list of items to be searched for and seized, but it

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[11] The authorization for the search of Jones' home presents additional problems. Wagner's affidavit supporting the request for the warrant did not adequately establish probable cause to believe that any evidence of crime was to be found in the Defendant's home at the time of the search. That affidavit avers no observation of any business activity or other alleged illegal activity or contraband at Jones' home after April 20, 2000, (Def. Ex 2 ¶ 3), some six months before the application for a Warrant was made. In addition, Wagner knew that Jones' was planning to move his operation to a professional studio, (Def. Ex. 3), and he had reason to believe that he had done so, (Def. Ex 2 ¶ 4). Finally, Wagner appears to have completely ignored the fact that even legally obscene materials are constitutionally protected in a private, home setting. *Stanley v. State of Georgia*, 394 U.S. 557 (1969).

[12] Nothing in Wagner's affidavit connects any of the exhibits with the *places to be searched* at all. To be sure, Wagner had downloaded the images from the Internet, but he suggested no reason to believe the unlikely proposition that the world wide web server which hosted Jones' web site was physically located in Jones' home or at his studio. Indeed, Wagner suggests no reason to believe that the images he printed out, (Warr. Ex. 2 through 7), were taken or processed at either of the locations to be searched.

included in that second enumeration "and other things criminally possessed . . .." It then reiterated that it included "the removal of any aforementioned computer or related accessories, equipment, software or other item relating to a computer for the submission to a forensic expert for forensic examination."

In the first place, the warrant made no distinction between obscene items to be seized from Jones' studio and obscenity to be seized from his home although the applicable constitutional law makes a sharp distinction about the scope of constitutional protection for obscenity in the different locations. *Cf. Stanley v. State of Georgia*, 394 U.S. 557 (1969). Indeed, both Wagner and Jones testified that the search of Jones' home resulted in the seizure of videotapes of an erotic nature, without sufficient examination, from such places as bedrooms and bedroom closets without any suggestion that they were held for purposes other than private viewing and even, in at least one case, without any indication that they belonged to Defendant Jones at all.

More importantly, the warrant utterly failed to describe the class of items to be seized at all. It was not expressly confined to, and did not even mention or include (as attachments), any of the exhibits, (Warr. Ex. 2 through 7), presented in support of the warrant. *Cf. New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986)(warrant and seizures were strictly confined to items described in affidavits supporting warrant application). Indeed, the warrant used the terms "obscenity" and "child pornography" without any example and without any further definition, description, or explanation. It set forth no criteria by which the executing officers might determine whether an image or other item was to be identified and seized as either obscenity or child pornography under the warrant. The warrant thus contained nothing to limit the search and seizure it authorized to anything short of all erotica, much of which is constitutionally protected. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002). It "left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure." *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319, 325 (1979). But it has long been settled that "[t]he Forth Amendment does not permit such action" *Ibid.*[13] Indeed, by its general and unfettered terms, the warrant unconstitutionally purported to permit exactly what happened upon its execution: an unguided, practically unconstrained, and freewheeling grab for erotic materials at Jones' home, *cf. Stanley v. State of Georgia*, 394 U.S. 557 (1969), and at his place of business, *cf. People v. Eagle Books, Inc*., 151 Ill.2d 235, 602 N.E.2d 798 (1992).

To make matters worse, at least in Wagner's view, the search warrant also authorized and directed the seizure of all computers and computer components found in Jones' home and studio. In fact, all were seized without examination before seizure, without any particularized showing that any of them

Comment [JDO1]: In fact still photo prints were examined before seizure.

[13] In *Lo-Ji Sales*, the United States Supreme Court reached this independent and sufficient conclusion about the warrant, *Lo-Ji* at 325, *before* it went on to evaluate other problems with the warrant, *Ibid* (it contained blank spaces when issued which were later filled in during the search) and the resulting search, *Id.* at 326-28 (the magistrate became a part of the search team while continuing to make probable cause determinations).

likely contained obscenity or child pornography, and indeed without reason to believe that some of the components could store any images at all. Wagner read the warrant[14] as calling for the removal of all computers for forensic examination without any specific probable cause to believe that any of them actually contained any illegal image and even without any particularized determination by the search party concerning the likelihood that they contained illegal lewd images of children or obscenity possessed with intent to distribute. None of the facts available to the executing officers supported the proposition that any of the items described in the affidavit supporting the search warrant, or which were attached to the affidavit, were present in any computer – let alone all of them – at either of the locations at the time of its execution. Beyond this, the search warrant specifically included within its ambit such items, as "any" keyboard, monitor, printer and accessories, without any suggestion in the warrant itself or in any of the supporting materials that any of these items contained any illegal matter or any evidence of illegality.

Comment [JDO2]: But the items could also be seized if they are the fruits, instrumentalities, or evidence of crime. This is a difficult issue because the items are part of the distribution mechanism of presumptively protected expressive images and because of the countervailing principle protecting free expression. Their seizure interferes with expression even if they otherwise could be seized under general search and seizure principles. Which legal principle is to yield is in issue here.

Since the warrant did not describe with sufficient particularity the things to be searched for or seized, it amounted to a general warrant prohibited by the Fourth Amendment and by Section 6 of the Illinois Bill of Rights. *See Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319, 325 (1979). Indeed, the warrant included express language establishing that it was a general warrant for the search not only for legally obscene material and child pornography, but for evidence of unspecified "other criminal offenses" and seizure of unspecified "other things criminally possessed." As former Chief Justice Warren Burgen once wrote for the United States Supreme Court, "[o]ur society is better able to tolerate the admitted pornographic business of petitioner than a return to the general warrant era; violations of law must be dealt with within the framework of constitutional guarantees." *Lo-Ji Sales* at 329. For all of the forgoing reasons, this Court must quash the warrant here and suppress the fruits of the search, just as the United States Supreme Court did in *Lo-Ji Sales*.

[14] It is certainly possible, perhaps even preferable, to read the warrant more narrowly than Wagner did. The recurring phrase "containing obscene materials or child pornography" could be read to modify the description of all items to be seized, and that would free the warrant from the overbreadth addressed in *this* paragraph of text, though *not* the fatal problems identified in the previous paragraph. Of course, it is difficult to see how such items as a "keyboard" could "contain[] obscene materials or child pornography," so even this much narrower reading is problematic. But even if the warrant were to be read narrowly, it would merely exacerbate the problems, identified at 15-17, *infra*, with the *execution* of the search. What is important for the purposes of the instant motion is that there is simply no way to rescue both the warrant and the search simultaneously.

II. The Fruits of the Search Must Be Suppressed Because, Quite Apart From Any Problems With the Warrant Itself, the Search Exceeded the Scope and Ignored the Terms of the Warrant and Amounted to an Unconstrained Foray and Because the Seizures Imposed an Unconstitutional Prior Restraint Upon Presumptively Protected Expression.

On Saturday, October 28, 2001, several hours after the warrant issued, a large force of McHenry County Deputy Sheriffs together with Assistant State's Attorney Daniel Regna arrived at Jones' home and professional studio. Before setting out, the members of the search party had met with Wagner, who headed the party and supervised a substantial portion of the search. Although Wagner testified about this meeting in some detail, there is no evidence that he or anyone else instructed the search team members about the law relating to obscenity or child pornography, *cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969), about the special constitutional concerns surrounding searches involving expressive materials, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Roaden v. Kentucky*, 413 U.S. 469 (1973); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961), or even about the proper interpretation of the warrant itself, *see supra* at 14 n. 14. As a result of this lack of preparation, the search party wound up ignoring the proper terms of the warrant and reversing proper and constitutionally required procedures by seizing items first and searching them later. The search itself turned into an unguided, practically unconstrained, and freewheeling grab for erotic materials both at Jones' home, *cf. Stanley v. State of Georgia*, 394 U.S. 557 (1969), and at his place of business, *cf. People v. Eagle Books, Inc*., 151 Ill.2d 235, 602 N.E.2d 798 (1992). And, in several respects, the resulting mass seizures amounted to an effective prior restraint on the presumptively protected expression which Jones produced and disseminated. For all of the reasons detailed *infra*, the Constitution simply does not tolerate such searches or seizures.

A. The Officers Executing the Search Ignored the Proper Terms of the Warrant When They Altogether Failed to Make Any Effort to Determine the Content of Expressive Materials Before Seizing Them.

Even if the warrant had been properly supported by probable cause, even if it had properly particularized the obscenity and child pornography to be seized, and even if it is to be read narrowly so as not to direct the seizure of computers and digital storage media not containing any illegal matter, the fruits of the search would still have to be suppressed in this case because the search party simply and completely ignored the proper terms of the warrant in conducting their search and seizures. *Horton v. California*, 496 U.S. 128, 140 (1990)(seizure exceeding scope of warrant is unconstitutional). Wagner supervised the most critical portion of the search: that which occurred at Jones' professional studio. He has now testified, repeatedly and unambiguously, that he and the search party members seized a number of computers,

with their hard drives, and a large number of removable digital storage devices (chiefly CD-ROM disks), (*cf*. Def. Ex. 51; *see also* Def. Ex. 9 through 45) without even a cursory inspection of any of their contents. In so doing, the search party not only ignored the proper terms of the search warrant (directing seizure only of computers and storage devices "containing obscene materials or child pornography," *see supra* at 14 n. 14), but it effectively reversed the constitutionally accepted search and seizure by procedures by *seizing first* and asking the necessary questions, that is, *searching later*.

Wagner justified this process on the grounds that it would be less disruptive of Jones' business. The idea seems to be that if the search party merely seized nearly everything in sight rather than properly searching the items at the studio, it would not have to stay more than the three hours that the raid in fact lasted. There would be time enough back at the station, Wagner reasoned, to determine whether anything seized actually fit the search warrant's bill. In the first place, Wagner's peculiar theory did *not* achieve its purpose. While it may have shortened the seizure process by gathering every computer present and every CD-ROM in sight which was not obviously storing commercially distributed software, (*cf*. Def. Ex. 55 through 70), it did not, in fact, shorten the search process at all. Wagner repeatedly admitted that *that* process continued for a long, long while after the search party left Jones' studio. It is indeed telling that Wagner never even testified as to when, on his theory, the search in this case actually concluded. But, in any event, since Wagner's procedures resulted in the mass seizure of the equipment and files, much of which had to be returned over the ensuing weeks and months, it did *not* avoid disrupting Jones' expressive operations at all. To be sure, the search party was no longer in his studio after October 28, 2000, but nothing much else was either. And a nearly empty studio posed no less obstacle to Jones than one filed with an active search party. Ironically, Jones testified that since the raid occurred on a Saturday and he was attending a professional conference, the search party could have taken considerably more time on premises, searched more and seized less, and ultimately imposed far less serious disruption on Jones and his expression.

Wagner's unprecedented 'seize first, search later' theory not only stands constitutional procedures on their head, it ignored what Judge Pitluck plainly expected the search party to do. The warrant directed that the executing officers *search* the described premises for specified items "containing obscene materials or child pornography" and to seize *only* them. While Illinois State Trooper Kaiton Bulloch testified at the hearing that, at the time of the search in this case, Illinois law enforcement officers lacked the wherewithal to produce *forensic images* of hard drive at a search scene, he did not indicate that the search party in this case would have been incapable of *examining* the items to be searched at the scene of the search. With respect to the very large number of CD-ROMs and similar devices seized, for instance, the search party members had only to bring along one or more laptop computers of their own and use them to peruse, at least casually, the contents of a disk before seizing it. And with respect to the computers,

Bullock had the equipment, at that time, to *examine* them on the scene even if he could not make a full forensic copy without knowing beforehand how large an external hard drive to bring along on which to store the copy. Thus the search party could easily have accomplished the very minimum tasks required of a proper search for obscenity or child pornography: (in this case, the virtual equivalent of) flipping through a pornographic magazine or using a projector to view a motion picture. Even the search parties in *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319, 322-23 (1979), and *People v. Eagle Books, Inc.*, 151 Ill.2d 235, 239-41, 602 N.E.2d 798, 799-800 (1992), whose searches were invalidated as excessive, did these things before seizing any expressive materials. It has indeed been difficult to find a reported case in which law enforcement officers entered, for instance, an adult bookstore and seized magazines without even bothering to look at them first.[15] But this is precisely what Wagner and his search party did here. In so doing, he not only ignored the sensitive issues raised by searches of expressive materials, he also exceeded the scope of the warrant he had obtained from Judge Pitluck.

B. The Search Exceeded the Scope of the Warrant and Amounted to an Unconstrained Foray Into Jones' Home and Studio, and the Resulting Seizures Effectively Imposed an Unconstitutional Prior Restraint Upon Jones' Expression.

Neither Jones nor his wife was at home when the search party arrived there. Jones was at a professional conference, and his wife had taken a minor child to a doctor. The executing officers nevertheless entered and took complete charge of Jones' home, which was also the residence of his fourteen-year-old daughter, they took charge of her bedroom, they went into her bedroom and seized therefrom a computer used for her school homework and containing digital files of her school work. In addition, the search party seized nonobscene videotapes from the television and VCR in the bedroom of Jones' eighteen-year-old daughter, as well as nonobscene videotapes from a high shelf in the closet of the bedroom which Jones shared with his wife. Finally, the search party seized every computer in the home (together will all components and accessories): one from the eighteen year old daughter's bedroom, one computer, previously mentioned, used by Jones' fourteen year old daughter for her schoolwork, and one used by Jones' wife for the management of their domestic affairs. Neither Wagner nor anyone else has explained why so much material was seized from Jones' home and, in particular, why so many computers containing no unlawful matter and a number of *non*obscene videotapes were seized on what was, after all, an *obscenity* raid.

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[15] The seizure of *all* of the boxes brought in from the van in *Eagle Books* perhaps comes closest, but even there the search party in that case examined at least a few of the magazines in a couple of the boxes. *Id.* at 241, 602 N.E.2d at 800. That seizure was, of course, suppressed as unconstitutional for precisely the reasons raised here. *Id.* at 247, 602 N.E.2d at 803 (general search and prior restraint). *A fortiorari*, the fruits of the instant search must be suppressed.

Because it was Saturday, the studio entirely was unoccupied at the time the search party arrived there. So the search party forced entry by breaking into it and they stayed there for more than three hours. As noted at 15-16, *supra*, the search party did very little actual searching beyond merely gathering up items to be seized. But seize it did! The search party at the studio seized therefrom every computer, every CD-ROM disc with data which did not contain obvious commercial software, every videotape, all financial records, a videotape recorder, stage props, all keyboards, all scanners, all monitors, all printers, all CD-ROM writing drives, undeveloped rolls of film containing family pictures, and numerous images which had never been commercially released, distributed, or published in any fashion. (*See* Def. Ex. 51). One of the computers seized contained the only device by which Jones could digitize videotaped images for Internet distribution. Numerous perfectly legal, nonobscene photographs were also seized from the studio just as nonobscene expression had been seized from the home. The records which the Defendant is required to maintain under Section 2257 of Title 18 of the United States Code were also seized and taken from him without authority and effectively in violation of the Supremacy Clause of the United States Constitution, U.S. Const Art. 6 cl. 2, and the First and Fourth Amendments thereto, *Id*. Amends. 1, 4. By Wagner's own admission, the search party had absolutely no basis for concluding that any of the seized computers or any of the seized CD-ROMs contained either obscenity or child pornography, and there was simply no cause to believe that many of the other seized items contained or amounted to the fruits, instrumentalities, or evidence of crime. The scope and intensity of the search exceeded those in *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319, 322-23 (1979), and *People v. Eagle Books, Inc*., 151 Ill.2d 235, 239-41, 602 N.E.2d 798, 799-800 (1992)(nearly three-hour long search, seizure of hundreds of expressive items including magazines from apparently unopened boxes), and the extent of the seizures here was, *a fortiorari*, palpably unreasonable.

Even beyond their sheer intolerable extent, the search party's seizures in this case effectively imposed an unconstitutional prior restraint upon the presumptively protected expression produced by Jones and disseminated to those who would use it to produce their own web sites and then disseminate it to their willing adult patrons. Indeed, the search party undertook a blanket seizure of expressive materials and the means to produce and disseminate them, and it did so without any prior adversary proceeding to determine whether the seized expression was legally obscene.[16] Wagner full well knew, (Def. Ex. 2 ¶ 3;

[16] As noted at 13, *supra*, the search warrant was not confined to the images which had been presented to the magistrate, (Warr. Ex. 2 through 7), and Wagner gave no indication whatsoever that the search party was even looking for those *particular* images at all. In any event, it is not surprising that the search party did not find them because, as noted at 12 n. 12, *supra*, there was no reason to belief that the server which held *those* images was physically located on any of Jones' premises. One is left to wonder, in fact, why Wagner ever thought he needed a search warrant at all. He already had images which he ultimately concluded were unlawful. (Def. Ex. 2 ¶ 6). He could have initiated a prosecution based on them. But since the State ultimately decided *not* to charge Jones on the basis of a single one of *those* images, Wagner's over all efforts appear as nothing more than a fishing expedition.

Def. Ex. 3 at 1), that Jones is and was a professional photographer and that he produces and distributes expressive photographic images. One need not question Wagner's characterization of those photographs as "adult pornographic material," (Def. Ex. 2 ¶2), in order to conclude that they nevertheless remain presumptively protected by the First Amendment and by Section 4 of the Illinois Bill of Rights. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Even though Wagner apparently suspected, by the time of the search, that some of the images on Jones' web site transcended the bounds of constitutional protection, he neither had nor suggested any reason whatsoever to believe that *all* of the images in Jones' studio did so as well. Yet he and the search party grabbed virtually everything that they thought might contain a pornographic image. For more than forty years, the United States Supreme Court has made clear that such wholesale seizures of presumptively protected pornographic materials violate the constitution unless they are preceded by an adversary determination that each of the seized items is legally obscene. *Heller v. State of New York*, 413 U.S. 483 (1973);[17] *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961). There was, of course, no prior adversary proceeding at all in this case, and *none* of the expressive materials actually seized by the search party had ever even been submitted *ex parte* to any magistrate.

All of the pornographic images seized by the search party (that is, aside from the family photographs seized) were produced and disseminated for use by world wide web site designers in the creation of nonobscene web sites which are then viewed by the general adult public throughout the nation and indeed the world. These images are typically created in digital format for dissemination on the Internet or, if they are first created in an analog medium, they are subsequently digitized using computer equipment before or at the time of Internet distribution or publication. Jones knows and is known by many such webmasters, and they depend upon his photography and production in order to obtain content for their websites and thus to convey the erotic and other themes they wish to present and express to their adult audience. The seizure of Jones' digital images and also of the computers and his CD-ROM writing drives left him altogether without the means to disseminate these images, and it was the equivalent of the wholesale seizure of a printing plant, its presses, binding equipment, typesetting equipment, and halftoning equipment. *Cf. Roaden v. Kentucky*, 413 U.S. 496 (1973)(seizure of motion picture then being exhibited to public imposed unconstitutional prior restraint). Similarly, the seizure of his scanners left Jones altogether without the means to digitize analog images in order to include them on CD-ROM disks or to distribute them directly over the Internet, just as the seizure of connectors for his digital cameras left him without any means of copying or moving the digital images which he had produced or obtained for

[17] According to Wagner, the search party made no effort to avoid seizing multiple identical copies of the same CD-ROM. Indeed, Wagner and the search party seem to this day to be blissfully unaware of the serious constitutional problems raised by such multiple seizures.

the Internet or other distribution. And the seizure of the large number CD-ROM disks which he had already produced or obtained obviously left him without the immediate means to copy or distribute those disks or their contents.

Jones testified that the seizure of his principal computer left him without the means to digitize video images. That seizure also deprived him of the means to distribute his expression in an orderly fashion, because that computer contained his only copies of license agreements by which he limits the use and reuse of his images. And the seizure of every one of his studio and home computers also left him without the means to alter, add, or remove the contents of his own website, which, as Wagner plainly understood, (Def. Ex. 2 ¶ 3), was Jones' chief means of displaying his wholesale images to his web-masters customers. The seizure of all of these computers even left him without his principal means to receive or send e-mail, an essential component of any operation involving the Internet and the world wide web. By depriving Jones of his production equipment and of tens of thousands of presumptively protected images otherwise in his possession, the seizures effectively deprived Jones of his right to disseminate them and his webmaster customers of the right to use them in designing and posting their own web sites. In many cases, this prior restraint on the distribution of those images lasted for many months, and the State still holds, as the fruits of the search, many thousands of images which it has not charged as illegal nor ever presented for any neutral determination – let alone an adversary one – concerning their constitutional protection. Similarly, the State held much of the seized production equipment for weeks, and it retains some of it, too, to this very day.

Comment [JDO3]: Not, strictly speaking, accurate. He retained possession of a laptop that was with him and away from the premises and never seized.

A warrant and a search, such as that conducted here, which does not respect the presumption that expression is constitutionally protected and which authorizes the wholesale seizure of expressive materials imposes an unconstitutional prior restrain upon expression. *See generally Heller v. State of New York*, 413 U.S. 483 (1973); *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *People v. Eagle Books, Inc*., 151 Ill.2d 235, 602 N.E.2d 798, (1992); *People v. Kimmel*, 34 Ill. 2d 578, 217 N.E.2d 785 (1966).[18] The search at issue here also violated constitutional free expression guarantees because less intrusive means than the wholesale seizure of Jones' expression and production apparatus were plainly available to Wagner and his party. They could have actually searched before seizing, as the warrant directed them to do. A more limited warrant, confined to the works which had been presented to the magistrate and to

[18] Section 108-12 of the Illinois Criminal Code, as amended, 725 ILCS 5/108-12 (2002), was not designed to remedy wholesale seizures of multiple copies of expression. The constitutional damage is done by *that* kind of seizure at the time the expression is unnecessarily taken out of circulation. But even if the search party had carefully refrained from seizing multiple copies, that section could not have helped Jones here. By Wagner's own admission his search lasted many weeks after the seizure, so Jones would not have been in a position to seek the return of the seized items until Wagner knew what was in them. This is another reason why Wagner should have ascertained this *before* seizing a particular item. But in any event, the very weakly supported allegations concerning child pornography, *see* at 7-10, *supra*, would have removed this case from the section's express scope.

those which had been described in detail by affidavit, *cf. New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), would also have minimized the impact of the search on the Jones' free expression rights. So, too, would the simple inspection of scrupulous records, (Def. Ex. 52, 53), which Wagner knew, (Def. Ex. 3 at 1), Jones maintained, and *had* to maintain pursuant to Section 2257 of Title 18 of the United States Code. Finally, Wagner could have simply prosecuted with the images he had already obtained. But that prosecution would have fallen apart when the models whom Wagner and his informant guessed to be as young as 14 and 15 years old turned out to have been nineteen at the time they were photographed. Small wonder Wagner concluded that he needed to go fishing. But as the United States Supreme Court, *per* then-Chief Justice Burger has reminded us in this very context, "violations of law must be dealt with within the framework of constitutional guarantees." *Lo-Ji Sales* at 329. It is not yet clear, of course, that Jones has violated any law at all. It is abundantly clear after the hearing, though, that the search in this matter ran roughshod over fundamentally important constitutional rights. This Court must now suppress the fruits of that search.

Conclusion

For all of the foregoing reasons, the warrant issued without probable cause to suspect that Jones had committed any crime or that evidence of any crime would be discovered in his home or at his studio. The warrant also failed to properly particularize the items to be seized, especially in light of the fact that it authorized the search and possible seizure of expressive material. Furthermore, the actions of the Wagner and the search party violated Jones' right to be free from unreasonable searches and seizures of expressive materials under the First, Fourth, and Fourteenth Amendment to the United States Constitution and under Sections 2, 4, and 6 of Article 1 of the Illinois Constitution of 1970. The Defendant in this case, Michael A. Jones, thus respectfully requests that this Court quash the search warrant which issued in this matter and suppress and bar the State from using or introducing into evidence in this case any materials, evidence, or knowledge acquired during or as the direct or indirect result of the search and seizure conducted at the Jones' home and professional studio on October 28, 2000.

Respectfully submitted,
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Certificate of Service

I certify that on, Wednesday, November 26, 2003, I served a true and correct copy of the foregoing Defendant's Post Hearing Brief in Support of His Motion to Quash Search Warrant and Suppress Evidence upon the following-named Assistant State's Attorney by telefaxing it to him (by prior arrangement) at the following telephone number as well as by sending it to him by private overnight courier in a sealed envelope, with all necessary fees prepaid, addressed as follows:

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