Appeal No. 08-15964-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

PAUL F. LITTLE, aka MAX HARDCORE,
aka MAX STEINER, and
MAX WORLD ENTERTAINMENT, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida,
Case No. 8:07-cr-170-SCB-TBM

BRIEF OF DEFENDANTS-APPELLANTS PAUL F. LITTLE AND MAX WORLD ENTERTAINMENT, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1 and 11th Cir. R. 26.1-1, Defendants-Appellants hereby make the following disclosures:

1. Max World Entertainment, Inc. has no parent companies and there is no publicly traded company that owns more than 10% of its stock.

2. The following individuals have a stake in the outcome of this appeal:

   a. Sheryl L. Loesch, Esq. - Trial Attorney for Plaintiff
   b. Robert E. O'Neill, Esq. - Trial Attorney for Plaintiff
   c. David Paul Rhodes, Esq. - Trial Attorney for Plaintiff
   d. Anita M. Cream, Esq. - Trial Attorney for Plaintiff
   e. Edward J. McAndrew, Esq. - Trial and Appellate Attorney for Plaintiff
   f. Jennifer Torrito Leonardo, Esq. - Trial Attorney for Plaintiff
   g. Lisa Marie Freitas, Esq. - Trial Attorney for Plaintiff
   h. James S. Benjamin, Esq. - Trial Attorney for Defendant Paul Little
   i. Jeffrey J. Douglas, Esq. - Trial Attorney for Defendant Paul Little
   j. Daniel R. Aaronson, Esq. - Trial Attorney for Defendant Max World Entertainment, Inc.
   k. H. Louis Sirkin, Esq. - Trial Attorney for Defendant Max World Entertainment, Inc. and Appellate Attorney for All Appellants
   l. Jennifer M. Kinsley, Esq. -Trial Attorney for Defendant Max World Entertainment, Inc. and Appellate Attorney for All Appellants
   m. Judge Susan Bucklew - U.S. District Court Judge

3. There are no victims in this case.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This appeal results from the first federal obscenity conviction against a mainstream adult entertainment producer in decades. In addition to numerous evidentiary and sentencing issues that arose during trial, the case presents a number of important and novel questions regarding the applicability of obscenity laws to the Internet. For this reason, oral argument would substantially assist the Court in resolving the issues on appeal and should be granted.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the federal obscenity statutes violate substantive due process by criminalizing the sale of sexually explicit material for private viewing.

II. Whether the work to be considered in its entirety when the government alleges that isolated website clips are obscene is the individual clip or the entire website.

III. Whether the community standards to be applied in determining whether online material is obscene are local or national.

IV. Whether the government fails to carry its burden of proof in an obscenity case when it publishes to the jury only excerpts of alleged obscenity instead of the works in their entirety.

V. Whether the government fails to carry its burden of proof in an obscenity case when it presents no evidence that the defendants knew of or caused shipment by United States mail.

VI. Whether the government fails to carry its burden of proof in an online obscenity case when it presents no evidence that the defendants knew their website was hosted in the district of prosecution.

VII. Whether the trial court properly instructed the jury as to the definition of obscenity.

VIII. Whether the government committed prosecutorial misconduct in closing argument by encouraging the jury to send a message and to deter future criminal conduct.

IX. Whether the trial court erred in failing to correct jury irregularities throughout the trial.

X. Whether a trial judge biased against Defendants must recuse herself.

XI. Whether a defendant's sentence can be enhanced based on income derived from constitutionally protected conduct.

XII. Whether a defendant's sentence can be enhanced for sado-masochism when the uncontroverted evidence is that the acts were not painful.

STATEMENT OF THE CASE

A. Course of the Proceedings

Defendants-Appellants Paul Little and Max World Entertainment, Inc. were each charged with ten counts of obscenity. R. 1. Five counts for each Defendant involved the distribution of short video clips from a "members only" section of the www.maxhardcore.com website. *Id.* The remaining counts involved the shipment of five full-length DVDs by Jaded Video to an undercover post office box in Tampa. *Id.*; R. 220, pp. 48-51, 59.

Defendants moved to dismiss the charges on the basis that the federal obscenity statutes are unconstitutional; the trial court denied the motion. R. 56, 64. The case was then tried to a jury, which convicted both Defendants on all counts. R. 157, 158. The trial court sentenced Little to 46 months in prison and a $7,500 fine and the corporation to 36 months probation and a $75,000 fine. R. 201, 202. Little is scheduled to begin serving his prison sentence on January 29, 2009.

B. Statement of Facts

Paul Little, aka Max Hardcore, and Max World Entertainment, Inc. produce presumptively protected sexually explicit material which they distribute online through www.maxhardcore.com and

through a distributor, Jaded Video. In 2005, government computer expert James Fottrell became a member of the Max Hardcore website and downloaded its contents, which included approximately 950 short video clips as well as other erotic content and political commentary. R. 217, pp. 70-74, 77-78, 83, 158-59. It was later determined that the website was hosted in Tampa by an independent company, Candid Hosting, with locations in 14 different cities world-wide. *Id.* at 170-76. After reviewing the website as a whole, the government alleged only five of the 950 video clips to be obscene. R. 1.

Postal Inspector Linda Walker then visited the Max Hardcore website and ordered five full-length DVDs that corresponded to the five video clips to an undercover post office box in Tampa. R. 220, pp. 48-51, 59. Before placing her order, Walker was redirected to a website operated by Jaded Video, a separate distribution company. *Id.* Walker placed her orders through Jaded and later received the DVDs directly from Jaded. *Id.* Testifying pursuant to an immunity agreement, Jaded's owner conceded that he alone chose to use the U.S. mail to ship Agent Walker's orders and that he had never communicated that choice to Defendants. R. 219, pp. 111-13, 115-17, 131. In fact, when Defendants shipped product to Jaded in California, they always used UPS and not the U.S. mail. *Id.* at 114-15. Nevertheless, the jury determined that Defendants

possessed the requisite knowledge that the U.S. mail would be used to ship obscenity.

Defendants presented several witnesses suggesting that the five DVDs ordered from Jaded and the five video clips accessed on the Max Hardcore website were not obscene. R. 221. Two private investigators testified to the availability and popularity of similar materials in the Tampa community, and a psychologist explained that the materials targeted a specific deviant group but did not appeal to that group's prurient interest. *Id.* at 51-144. Despite this testimony, the jury found the materials to be obscene and convicted Defendants on all counts. For the reasons that follow, the convictions were in error and should be reversed.

C. Standard of Review

Defendants' constitutional challenges to the federal obscenity laws, claims regarding the sufficiency of the evidence, and all other claims regarding questions of law are reviewed *de novo*. *United States v. Dean*, 487 F.3d 840 (11th Cir. 2007). Defendants' claims of jury irregularities are reviewed for abuse of discretion. *United States v. Dominguez*, 226 F.3d 1235 (11th Cir. 2000). This Court reviews prosecutorial misconduct for prejudicial error. *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983).

SUMMARY OF THE ARGUMENT

Defendants' federal obscenity convictions, the first of their kind in decades, are riddled with constitutional difficulties that

mandate reversal on appeal. Primary among the problems with this prosecution is the application of traditional obscenity doctrine to the Internet. In light of the Supreme Court's recognition of a right of sexual privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003), criminalizing the purchase and display of material online violates the principle of substantive due process. In addition, application of the "as a whole" and "community standards" components of the *Miller v. California*, 413 U.S. 15 (1973), test for obscenity to the Internet violate the First Amendment free speech guarantee. Given these constitutional flaws, the trial court erred in failing to dismiss the charges against Defendants.

The trial court further erred in permitting the government to publish only excerpts of the charged DVDs to the jury, instead of the works in their entirety. *Miller*, 413 U.S. 15, clearly requires that potentially obscene material be assessed as a whole; yet the jury in this case never viewed the full DVDs before determining they were obscene. This error requires reversal.

Additional errors also undermine the validity of the verdict. The trial court was aware of several instances of juror misconduct and jury tampering and did nothing to remedy the situation, much less to inquire into the extent of the problem. The trial court also improperly instructed the jury on the nature of the *Miller* test and other aspects of obscenity. And the prosecutor improperly invited the jury to send a message regarding adult entertainment in

general, rather than considering the character of the specific materials at issue. Most troubling, however, was the fact that Defendants were convicted absent sufficient proof that they had knowledge the materials were being shipped to the Middle District of Florida by U.S. mail and absent any evidence that they purposefully or knowingly distributed their online speech from Tampa. The trial court also improperly increased the offense level at sentencing by one point for pecuniary gain and by four points for sado-masochism.

Given these errors, Defendants' convictions and sentences should be overturned on appeal.

ARGUMENT

I. The Trial Court Erred In Denying Defendants' Motion To Dismiss On The Grounds That The Federal Obscenity Laws Violate The Right Of Privacy.

Although the Constitution does not explicitly guarantee it, the Supreme Court has gradually recognized that privacy is protected by the Fourteenth Amendment Due Process Clause. Substantive due process principles have been utilized by the Court to invalidate laws in a wide array of contexts, including: 1) the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); 2) the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); 3) the right to educate and rear one's children, *Meyer v. Nebraska*, 262 U.S. 39 (1923); *Pierce v. Society of Sisters*, 268 U.S. 390 (1925); 4) the right to marital privacy, *Griswold v.*

Connecticut, 381 U.S. 479 (1965); 5) the right to contraception, *id; Eisenstadt v. Baird*, 405 U.S. 438 (1972); 6) the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); 7) the right to an abortion, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); 8) the right to refuse unwanted medical treatment, *Cruzan v. Dir. of Mo. Dept. Of Health*, 497 U.S. 261 (1990); and, most recently, 9) the right to sexual privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003).

For the past eighty years, the substantive due process right of privacy has restrained the reach of government into the personal lives of its citizens. Long ago, the Supreme Court noted:

> [w]hile this court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause of the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399. Since that time, substantive due process has evolved to specifically include a right of privacy in both private spaces and intimate decision-making. As society's attitudes toward sexuality have become more tolerant, so have the

courts' interpretation of privacy. The liberties guaranteed by substantive due process have thus expanded from marital bedroom to the public sphere of commercial interactions. As the Supreme Court stated in the opening lines of *Lawrence*:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And *there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes* freedom of thought, belief, expression, and *certain intimate conduct.*

Lawrence, 539 U.S. at 562 (emphasis added). As Justice Scalia noted in dissent, the holding of *Lawrence* calls into question laws based simply upon traditional "morals," including, he states, "state laws against... obscenity." *Id.* at 590 (Scalia, J., dissenting). In other words, *Lawrence* "effectively decrees the end of all moral legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, *none of the above-mentioned laws [including obscenity laws] can survive rational basis review.*" *Id.* at 599 (emphasis added).

Thus, the Supreme Court has recognized that the right of privacy is no longer confined, if it ever was, to the sanctity of the home. Rather, "liberty of the person [involves] both ...spatial and more transcendental dimensions." *Id.* at 562.

Furthermore, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 578 (quoting *Planned Parenthood*, 505 U.S. at 847). Given the Supreme Court's holding in *Lawrence*, coupled with the liberalization of society's attitudes and court rulings concerning adult sexuality, this Court should reevaluate the federal obscenity laws and should ultimately hold that such laws violate the substantive due process guarantee.

A. Courts Have Acknowledged a Right to Sexual Privacy.

A substantive due process right to sexual privacy originated in the 1960s with the right to possess and use contraceptives.[1] In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court invalidated a statute criminalizing the sale of contraceptives. The Court held that the law unconstitutionally invaded the privacy of married couples in the marital bedroom, a "right of privacy older than the Bill of Rights--older than our political parties, older than our school system." *Id.* at 486. The opinion acknowledged a zone of privacy created by the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 483-85. Concurrences by

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[1]Under some theories, including that occasionally espoused by the Supreme Court, a general right of privacy existed at the origin of the Republic and was implicitly embodied in the Bill of Rights. *See, e.g., Griswold*, 381 U.S. at 485; *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (holding that the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people").

Justices Harlan and White, however, suggested that the right of privacy originated from the Fourteenth Amendment's Due Process Clause. *Id.* at 500, 502; *see also Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). Several years later, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extended the right to include sexual decisions by non-married persons. Although the Court's opinion was premised on equal protection, the Court also recognized that the law impaired the fundamental, personal right of privacy: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis added).

Griswold and *Eisenstadt* formed the basis for *Roe v. Wade*, 410 U.S. 113 (1973), which struck down Texas' abortion statute because the law violated a woman's right of privacy. The Court stated: "*[t]his right of privacy*, whether it be *founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is*, or...in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153 (emphasis added). However, the Court noted that this "fundamental right" to privacy was not absolute, and that the "compelling state interest" in protecting the mother's health and potential human

life could justify limitations on abortion at later stages of pregnancy. *Id* at 153-63.

In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Supreme Court invalidated a law prohibiting the distribution of contraceptives to anyone under sixteen, the display or advertisement of contraceptives, and the distribution of contraceptives by non-pharmacists. In striking the law, the Court observed that the privacy right protecting marriage, procreation, contraception, family relationships, and child rearing and education derived from the Due Process Clause. *Id.* at 684-685. Importantly, the Court noted that a "*total prohibition against the sale* of contraceptives, for example, *would intrude upon individual decisions* in matters of procreation and contraception *as harshly as a direct ban on their use*" and that "*the same test must be applied* to state regulations that burden an individual's right...by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely...*because such access is essential to the exercise of the constitutionally protected right.*" *Id.* at 687-88 (emphasis added).

The Supreme Court further explained in *Carey*, 505 U.S. at 851:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the

> universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

The Supreme Court's jurisprudence regarding sexual privacy had thus evolved, in less than twenty years, from a tentative right of married couples in the privacy of their bedroom to a right involving almost all sexual decision-making, by married and unmarried persons, adults and minors, regarding one's own sexual existence.

Lawrence expanded the right of privacy by suggesting that practically all choices made by consenting adults regarding their sexual practices are a matter of personal liberty beyond the reach of government. *See Lawrence*, 539 U.S. 558. The Court determined that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct on the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564. Answering this question in the affirmative, the Court held that "petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of government." *Id.* at 578.

In suggesting that the majority may not impose its moral views through criminal statutes without some compelling justification,

the Court reiterated its belief that "*[o]ur obligation is to define the liberty of all, not to mandate our own moral code.*" *Id.* at 571 (quoting *Casey*, 505 U.S. at 833) (emphasis added). Moreover, in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court upheld Georgia's anti-sodomy statute, *Lawrence* noted that the tradition of governmental sexual control was more ambiguous and complicated than previously thought; indeed, "[h]istory and tradition are the starting point but not in all cases the ending point of substantive due process inquiry." *Lawrence*, 558 U.S. at 572 (citation omitted). In "defining the liberty of all," the Supreme Court ultimately concluded that the government could not prohibit consensual sodomy without violating substantive due process. *Id.* at 571. Again, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 578. That realm extends to the private consumption of obscenity.

B. The Fundamental Right to Sexual Privacy Should Encompass the Right to Possess Allegedly Obscene Materials and a Correlative Right to Sell and/or Purchase Such Materials.

It is beyond dispute that sexual privacy is an integral component of liberty guaranteed by substantive due process. Laws banning the possession and distribution of obscenity remain an anomaly, and their constitutionality must be revisited in light of *Lawrence* and its predecessors.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Supreme Court ruled that "the mere private possession of obscene matter cannot constitutionally be made a crime." *Id.* at 559. Although the Court referred to the fundamental right to be free from governmental intrusions into one's privacy, it did not base its decision on substantive due process. Rather, the Court emphasized that the First Amendment's free speech guarantee precluded the state from "telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565. Despite the Court's insistence in *Stanley* that government may not prohibit the private possession of obscenity, the Supreme Court and others have been unwilling to acknowledge a correlative right to receive, transport, or distribute such materials. *See, e.g., United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *see also United States v. Extreme Assoc.*, 431 F.3d 150 (3d Cir. 2005); *accord Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004). *But see Reliable Consultants, Inc. v. Abbott*, 517 F.3d 738 (5th Cir. 2008) (invalidating Texas' obscene devices statutes on substantive due process grounds).

The Supreme Court's decision in *Lawrence*, and the acceptance of sexual practices that has occurred both in society and the courts, demands reconsideration of those cases rejecting a

substantive due process challenge to obscenity laws. As the Court observed, there is "*an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.*" *Lawrence*, 558 at 572 (emphasis added).

In fact, even before *Lawrence*, several lower courts had extended the right of sexual privacy to include a right to buy and sell obscenity. For example, in invalidating the state's pandering statute, the Hawaii Supreme Court held that "*[s]ince a person has the right to view pornographic items* [defined in terms of obscenity] at home, *there necessarily follows a correlative right to purchase such materials* for this personal use, or the underlying privacy right becomes meaningless." *State v. Kam*, 69 Haw. 483, 495, 748 P.2d 372, 380 (1988) (declined to follow and extend by *State v. Mallan*, 86 Haw. 440, 950 P.2d 178 (1998)) (emphasis added).

Although the Hawaii Supreme Court based its decision on the Hawaii Constitution's right to privacy, later Hawaii Supreme Court cases have recognized that the right to privacy is "similar to the privacy right discussed in [federal] cases such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, etc." *Mallan*, 86 Haw. at 444, 950 P.2d at 182 (citations omitted). Because the right to privacy encompasses the right to view obscene materials in the home, the Hawaii Supreme Court reasoned, the state cannot

interfere with the right to purchase such materials absent a compelling state interest. *Id.* In light of the Supreme Court's expanding interpretation of substantive due process, this Court should adopt the Hawaii Supreme Court's rationale and should declare the federal obscenity laws under which Defendants were convicted unconstitutional.

C. This Court Should Declare the Federal Obscenity Statutes Unconstitutional.

The right to privacy derived from substantive due process presumes an autonomy of self that includes one's thoughts, beliefs, expression, and intimate conduct. It protects the individual from unwarranted government intrusions into private places. This situs of this privacy right has moved out of the marital bedroom and into commercial transactions. *See Reliable*, 517 F.3d 738. It involves the liberty of the person in its spatial as well as its more transcendent dimensions. The right of sexual privacy has evolved as society's attitudes about sexuality have evolved. Liberty now gives substantial protection to adult persons in deciding how to conduct their private sexual lives. This protection is broad enough to encompass a right to buy and sell obscene materials. *Id.* As defined by *Lawrence* and its precursors, the substantive due process right to privacy demands a reconsideration of whether the federal obscenity statutes are facially valid. And this liberty demands that the laws be declared unconstitutional. As the *Lawrence* Court noted, "[t]he doctrine of *stare decisis* is essential

to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command." *Lawrence*, 539 U.S. at 577. When a law violates constitutional rights, it must be overturned. The federal obscenity laws violate the right to sexual privacy as derived from the Due Process Clause. As the Supreme Court observed:

> Had those who drew and ratified the Due Process Clauses of the Fifth and Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79. Defendants seek nothing more than to invoke those principles of liberty that already exist. According to those principles, Defendants' convictions violate substantive due process and must be reversed.

II. The Trial Court Erred In Denying Defendants' Motion To Dismiss And In Ruling That The "As A Whole" And "Community Standards" Components Of The *Miller* Test For Obscenity Are Applicable To The Internet.

In addition to recognizing an evolving right to sexual privacy, the Supreme Court has been equally skeptical of federal legislation that burdens online expression. In fact, both of Congress' early attempts to regulate computerized content that is harmful to minors have been invalidated on First Amendment grounds.

The first such statute, the Communications Decency Act ("CDA"), suffered a swift and uncomplicated death. It was declared unconstitutional because it criminalized constitutionally protected speech and was therefore overbroad. *See Reno v. ACLU*, 521 U.S. 844 (1997). Chief among the CDA's deficiencies were its application to broad categories of "indecent" or "patently offensive" material, terms that were undefined in the statute, and its lack of an exclusion for material that contains serious literary, artistic, political, or scientific value as to minors. *Id.* at 870-71, 865. Perhaps foreshadowing later concerns, the Court also observed that access to material posted on the Web cannot be limited to specific geographic areas. *Id.* at 853. The Court then made additional findings regarding the functioning of the Internet, including the fact that websites frequently consist of a number of webpages that are linked together, or perhaps even to other websites, under a single domain name. *Id.* at 852-53.

The factual findings in *Reno* set the stage for additional complications for the CDA's successor, the Child Online Protection Act ("COPA"). Enforcement of COPA was initially enjoined by the district court on the grounds that restricting online content that is lawful for adults is not the least restrictive means of protecting minors. *See Ashcroft v. ACLU* ("*COPA I*"), 535 U.S. 564, 572 (2002) (citing *ACLU v. Ashcroft*, 31 F.Supp.2d 473, 497 (E.D. Pa. 1999)). On appeal, the Third Circuit sustained the injunction,

but on different grounds. *Id.* at 572-73 (citing *ACLU*, 217 F.3d at 175). Rather than conducting the extensive First Amendment inquiry undertaken by the district court, the court of appeals instead relied solely upon COPA's use of community standards to invalidate the law. "Because 'Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users,' the Court of Appeals reasoned that COPA" was likely unconstitutional. *Id.*

In a highly splintered opinion, the Supreme Court reversed. *COPA I*, 535 U.S. 564. A three-justice plurality ruled that the use of localized community standards to define what is harmful to minors on the Internet does not violate the First Amendment. *Id.* at 585. Although concurring in the result, Justice O'Connor wrote separately to advocate a national standard in online obscenity prosecutions. *Id.* at 586-87. Also agreeing with the result was Justice Kennedy, joined by Justices Ginsburg and Souter, who reasoned that additional fact-finding was necessary to determine how large a problem the Act's use of community standards presented. *Id.* at 592-93. Only Justice Stevens believed, on the record presented to the Court, that the community standards issue was sufficient to warrant a preliminary injunction. *Id.* at 603.

On remand, the Third Circuit once again upheld the injunction. *See ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). This time, the court of appeals undertook the extensive review of COPA it had

failed to conduct in its first opinion. It noted numerous constitutional deficiencies with the law, including not only the community standards problem, but also the inability of material on the Internet to be taken as a whole. *Id.* at 252-53; 270. Also fatal to the statute was the fact that it was not the least restrictive means available to protect children from harmful material, given that filters and parental oversight would prove equally, if not more, effective without suppressing lawful speech for adults. *Id.* at 264-65.

The case once again traveled to the Supreme Court. *See Ashcroft v. ACLU* ("*COPA II*"), 542 U.S. 656 (2004). In stark contrast to *COPA I*, the *COPA II* Court upheld the injunction by majority vote. Echoing the Third Circuit's analysis in *COPA I*, the Supreme Court focused on a single problem that served to invalidate the statute: the availability of filters as a less restrictive means of obtaining the government's goals. *Id.* at 660-61. Given that Internet technology had likely changed since the district court's initial fact-finding in 1999, the Court remanded the case to allow the government to present additional evidence on the reliability of filters. *Id.* at 671, 673. Also of note was a strong concurrence by Justice Stevens, joined by Justice Ginsburg, that chastised criminal prosecutions as "an inappropriate means to regulate the universe of materials classified as obscene, since the line between communications which offend and those which do not is

too blurred to identify criminal conduct." *Id.* at 675-76 (Stevens, J., concurring) (citations omitted).[2]

The Supreme Court's decision in *COPA II* did not address the Third Circuit's reasoning regarding either the "taken as a whole" or the community standards issue. As such, at present, the Third Circuit's second COPA decision remains in tact. It is within this backdrop that this Court must analyze the constitutional issues presented here.

A. The *Miller* Test's Requirement that the Material be Taken as a Whole is Impossible in the Context of the World Wide Web.

The Supreme Court's most recent ruling on obscenity came over three decades ago in *Miller v. California*, 413 U.S. 15 (1973). Under *Miller*, a particular work can only be declared obscene, and therefore devoid of First Amendment protection, where: 1) the average person, applying contemporary community standards, would find that the work, ***taken as a whole***, appeals to the prurient interest; 2) the work depicts or describes, in a patently offensive way, sexual conduct as defined by state law; and 3) the work, ***taken as a whole***, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24.

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[2]After additional fact-finding, the Third Circuit again invalidated COPA because the availability of filters offers a less restrictive alternative to meeting the government's objective of protecting minors. *See ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

In the context of traditional obscenity prosecutions, there has been little debate over what constitutes the whole for the purposes of the first and third prongs of *Miller*. Courts have almost universally concluded that, where photographs in a larger publication are alleged to be obscene, the text surrounding the images must also be considered. *See, e.g., United States v. Miscellaneous Pornographic Magazines*, 526 F.Supp. 460, 466 (N.D. Ill. 1981) (requiring Dutch text in publication to be translated so jury could evaluate material as a whole); *see also United States v. Thevis*, 484 F.2d 1149, 1155-57 (5th Cir. 1973) (holding that six of twelve magazines were not obscene because significant portions of literary matter accompanied pictures that, taken alone, would satisfy obscenity test). In a similar vein, courts have also held that videos charged as obscene must also be considered in their entirety to determine whether they appeal to a prurient interest and are without redeeming value. *See, e.g., United States v. Toushin*, 714 F.Supp. 1452, 1460-61 (M.D. Tenn. 1989).

The issue becomes more complicated when online material is the subject of an obscenity prosecution. As foreshadowed in *Reno*, it is an impossible task to determine what constitutes the whole on the Internet, when all Web content is interconnected. *See Reno*, 521 U.S. at 853. This was a particular problem for Justice Kennedy in *COPA I*, as it was "unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire

multiple Web site, or an interlocking set of Web sites." *COPA I*, 535 U.S. at 593 (Kennedy, J., concurring). He therefore suggested that on remand it would be "essential to answer the vexing question of what it means to evaluate Internet material 'as a whole,' when everything on the Web is connected to everything else." *Id.* at 600 (internal citations omitted).

The Third Circuit responded by discussing the question in detail. *See Ashcroft v. ACLU*, 322 F.3d 240, 252-253 (3d Cir. 2003). First, the court observed that COPA defined "material" to include "'*any* communication, picture, image file, article, recording, writing, or other matter of any kind,'" such that a single image on a single Web page could violate the law. *Id.* at 252 (citing 47 U.S.C. § 231(e)(6)) (emphasis in original). The court then interpreted this expansive definition to "mandate[] evaluation of an exhibit on the Internet in isolation, rather than in context." *Id.* at 253. In the Third Circuit's opinion, this approach is particularly problematic because an image considered in its proper context may no longer appeal to the prurient interest or lack serious value. *Id.* Exclusion of context thus destroys the ability of the fact-finder to properly evaluate the material under the *Miller* test as modified for minors. *Id.*

This holding renders not only COPA, but also the federal obscenity statutes, invalid as applied to computerized communications. In the same way that COPA permits a single image

from a website to be criminalized if communicated to minors, the federal obscenity statutes have been applied to Defendants to isolate short video clips from the additional, and less offensive, content provided on the same website. The plain language of the obscenity statutes, 18 U.S.C. § 1461 *et seq.*, permits this result. By defining the material eligible for obscenity prosecutions to include a discrete quantum of items, including a single "book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, case, phonograph recording, electrical transcription or other article capable of producing sound," the statutes preclude consideration of context. The federal obscenity statutes therefore suffer from the same constitutional defect as COPA. As applied to video clips on the www.maxhardcore.com website, the obscenity laws prohibit consideration of the material taken "as a whole," an essential requirement of the first and third prongs of *Miller*. They are therefore unconstitutional, and the district court erred in denying Defendants' Motion to Dismiss on this basis. R. 64.

The district court further erred in failing to instruct the jury to consider the entire www.maxhardcore.com website in determining whether the indicted video clips were obscene. As Justice Kennedy astutely observed in his concurring opinion in *COPA I*, it is conceivable that the "whole" on the Internet could constitute a single webpage, an entire website, or a linked set of

websites. *COPA I*, 535 U.S. at 593 (Kennedy, J., concurring). Thus, given the peculiar functioning of the Internet, "it is essential to answer the vexing question of what it means to evaluate Internet material 'as a whole,' when everything on the Web is connected to everything else." *Id.* at 600.

The Third Circuit's response to this "vexing question" was to invalidate COPA root and branch. *See Aschroft*, 322 F.3d 240. Central to this holding was the court's determination that COPA criminalizes discrete items taken out of context. *Id.* at 252-53. Although the federal obscenity statutes suffer from the same defect, the trial court could have alleviated this concern by ruling that the "whole" to be considered by the jury was the entire Max Hardcore website. Its failure to do so not only violated Defendants' First Amendment rights, but also departed from the evidence presented in the case. The government's computer expert, James Fottrell, testified that the video clips were embedded in a "members only" portion of the website and that he had to access a number of webpages, including one containing an explanation that Defendants were exercising their First Amendment rights, before viewing the clips at issue. R. 217, pp. 157-59. By removing this content from the jury's consideration, the trial court in effect precluded the jury from considering the possible political value of the website itself. This error seriously prejudiced Defendants and should result in reversal of their convictions.

B. The Applicable Community for Determining Community Standards is the Internet.

The federal obscenity statutes are additionally invalid as applied to the Internet because they effectively limit speech suitable for adults throughout the country based upon the community standards of the most puritanical region. Like the "as a whole" conundrum, this argument also draws its support from the Third Circuit's decision invalidating COPA. *Ashcroft*, 322 F.3d at 270. Although the Supreme Court initially reversed the Third Circuit on the community standards issue, *see COPA I*, 535 U.S. 564, the court of appeals on remand determined that the community standards issue, while not enough to strike the statute, could be considered as a factor in assessing the law's constitutionality. *See Ashcroft*, 322 F.3d at 270. To that end, the Third Circuit found COPA impermissibly overbroad based in part upon its use of the term "community standards" to restrict Internet speech. *Id.* By "'essentially requir[ing] that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability,'" COPA mandates that Internet speakers self-censor their expression based upon the attitudes of the least tolerant community. *Id.* (citing *ACLU*, 217 F.3d 162). This violates the First Amendment by reducing the range of online speech that can be communicated and accessed by adults. *Id.*

Much like COPA, the *Miller* definition also mandates that obscenity be assessed based upon community standards. *See* 18 U.S.C. § 1461 *et seq.*; *Miller*, 413 U.S. 15. While this definition makes sense when a speaker directly and purposefully communicates his message to or in a particular community, the term becomes unworkable when applied to Internet communications that can neither be directed at, nor limited to, a specific region. *See Reno*, 521 U.S. at 853. As applied to this case, where five of the ten counts against each Defendant cover online video clips, the community standards element raises the identical overbreadth concerns addressed in *Ashcroft*. Because the www.maxhardcore.com website can be viewed from anywhere in the world, it was impossible for Defendants to limit their speech to certain areas or to restrict those living in certain regions from accessing it. *Ashcroft*, 322 F.3d at 270; *Reno*, 521 U.S. at 853. As the *Ashcroft* court observed, this difficulty renders the statutes unconstitutional. *Id.*

As an alternative to dismissing the case, the trial court could have remedied the problem to some degree by instructing the jury to apply an Internet community standard. The Supreme Court has never mandated a particular geographic locality to which the standards are limited. To be sure, the Court has never ***required*** that the community in an obscenity prosecution constitute a defined geographic region, but has merely ***permitted*** it to be.

See, e.g., Jenkins v. Georgia, 418 U.S. 153, 17 (1974) ("A State ***may*** choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification ... or it may choose to define the standards in more precise geographic terms.") (emphasis added).

In reviewing various states' approaches to community standards, the Supreme Court has approved expansive definitions that allow juries to consider the attitudes and mores of a wide variety of people. *See, e.g., COPA I*, 535 U.S. at 588-89 (O'Connor, J., concurring) (discussing *Miller*'s approval of state-wide standard in California, a large and diverse state with varying beliefs). In fact, a majority of the justices to recently consider the issue have advanced a national community standard in Internet prosecutions. *See COPA I*, 535 U.S. at 587 (O'Connor, J., concurring) ("adoption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity"); *Id.* at 589-90 (Breyer, J., concurring) ("I believe that Congress intended to write the statutory word "community" to refer to the Nation's adult community taken as a whole, not to geographically separate local areas...To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation"); *Id.* at 597 (Kennedy, J., Souter, J., and Ginsburg, J., concurring) ("The national variation

in community standards constitutes a particular burden on Internet speech"); *Id.* at 603 (Stevens, J., dissenting) ("In the context of the Internet, however, community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web."). Moreover, the government itself conceded in *COPA I* that juries in Internet cases should be "'instructed to consider the standards of the adult community as a whole, without geographic specification,'" a position it would be hard-pressed to abandon now. *See COPA I*, 535 U.S. at 576. These authorities all support adoption of a nationalized, Internet-based community standard.

The facts of this case also warrant an expanded treatment of the relevant community. Unlike the 20th Century, when adult material was only accessible from brick-and-mortar stores or mail-order catalogs that were physically possessed in a particular jurisdiction, modern technology allows consenting adults to view pornography[3] without leaving their homes. Accessing the Internet, a computer user in Tampa can now consume materials previously available only in other parts of the country. This consumption includes not only digitized images, text, and video files available online, but also the ability to order adult videos and DVDs into one's home from the Web. Particularly because Internet postings

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[3]Of course, the terms pornography and obscenity are not synonymous. *See Roth v. United States*, 354 U.S. 476, 487 (1957).

cannot be directed to, or excluded from, any particular area, *see Reno*, 521 U.S. at 853, all Internet content is automatically accessible from Tampa. As such, given that the works at issue here were accessed or ordered from the Internet, the community standard in this prosecution should have included cyberspace. The trial court's failure to instruct the jury to consider the Internet community in determining the obscenity *vel non* of the charged video clips therefore violates the First Amendment.

III. The Trial Court Erred In Denying Defendants' Motion For Judgment Of Acquittal.

A. The Government Failed to Meet its Burden of Proof when it Published Only Excerpts of the Indicted DVDs to the Jury instead of the Allegedly Obscene Works in their Entirety.

It is clear that the jury must consider works in their entirety for the purposes of determining whether the first and third prongs of *Miller* are established. Historically, that has required that the jury be shown not only the images or segments the government finds to be obscene, but the surrounding content as well. *See, e.g., Miscellaneous Pornographic Magazines*, 526 F.Supp. at 466; *Thevis*, 484 F.2d at 1155-57. Also supporting the notion that the entire works must be published to the jury is the Sixth Amendment right to a public trial. *See, e.g., Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event."). If the jury is not shown the works in their entirety in open court, there is no

mechanism for assuring their faithfulness to the "as a whole" component of *Miller*.

Contrary to *Miller* and its progeny, the jury was not shown each charged work in its entirety in this case. After reversing itself a number of times, the trial court permitted the government to publish only excerpts of the five DVDs. R. 217, pp. 9, 252; R. 218, p. 8. When the defense attempted to publish the remainder of the DVD content, the court precluded the demonstration. R. 219, pp. 24-25, 35. As a result, the jury considered the obscenity of the materials without having seen the DVDs in their entirety.

Defendants moved the trial court for judgment of acquittal on this basis after the government rested its case. R. 220, pp. 71-85. The court denied the motion without further analysis. R. 221, pp. 7-14. The court's decision, resulting from its failure to require the government and to permit the defense to publish the charged DVDs to the jury in their entirety, directly violates *Miller* and requires reversal.

B. The Government Failed to Carry its Burden of Proof that Defendants Knew the United States Mail Would Be Used to Ship Obscene Material to the Middle District of Florida.

The criminal statute under which Defendants were charged in the DVD counts requires proof beyond a reasonable doubt of knowledge that the U.S. mail would be used as the method of

shipment. *See* 18 U.S.C. § 1461. The statute provides in pertinent part:

> Whoever *knowingly uses the mails* for the mailing, carriage in the mails, or delivery of anything declared in this section to be nonmailable, or *knowingly causes to be delivered by mail* according to the direction thereon...shall be fined under this title or imprisoned not more than five years, or both.

As a general principle of criminal law, the state of mind required for an aider and abettor is the same state of mind required for the principal actor. *See, e.g., United States v. Loder*, 23 F.3d 586 (1st Cir. 1994); *United States v. Valencia*, 907 F.2d 671 (7th Cir. 1990). Where knowledge of a particular circumstance is necessary to convict a principal, the absence of knowledge on the part of an alleged aider and abettor precludes the government from obtaining a conviction. *See, e.g., United States v. Ortis-Loya*, 777 F.2d 973 (5th Cir. 1985) (reversing convictions for aiding and abetting in attempted unlawful deportation of firearms where defendant lacked knowledge firearms would be illegally deported to Mexico).

Consistent with these principles, the Fifth Circuit recently reversed a defendant's conviction for aiding and abetting the mailing of obscene material where the defendant lacked knowledge the U.S. mail would be used as the method of shipment. *See United States v. McDowell*, 498 F.3d 308 (5th Cir. 2007). Defendants moved for judgment of acquittal based upon a similar deficit of proof as

to knowledge of shipment by mail in this case. R. 220, pp. 71-114. Admitting "this is a substantial issue," the trial court ultimately denied the motion on the grounds that this Court's aiding and abetting instruction is broader than the Fifth Circuit's. R. 221, pp. 10, 13-14. The court offered no explanation, however, for its ruling that the government had submitted sufficient proof, much less any evidence at all, that Defendants knew Jaded shipped its DVDs by U.S. mail. *Id.*

Before the trial court, the government attempted to distinguish *McDowell* on several grounds: 1) that it was pursuing a different theory than was discussed in *McDowell*, namely that use of the mail was foreseeable and/or that Defendants caused allegedly obscene material to be placed in the mail; and 2) that the evidence of knowledge in this case was stronger than that presented in *McDowell*. In essence, through these two theories, the government argued below that a defendant need not intend to use the mails in order to be criminally culpable. Neither of these arguments is persuasive.

1. Use of the U.S. mail was not foreseeable.

The government attempted to distinguish *McDowell* below on the grounds that its theory of liability in this case was different from that pursued against McDowell. In this vein, the government claimed that Defendants could be held liable if it was foreseeable that Jaded Video, the actual vendor of the material in question,

would use the U.S. mail to distribute the product to the end consumer.

Contrary to the government's position, there was not even a scintilla of evidence to support the notion that use of the U.S. mail was foreseeable. To the contrary, the only evidence in this case regarding the anticipated method of shipment supports the conclusion that use of the mail was not only unforeseeable, but wholly unanticipated. James Komurek, the owner and operator of Jaded Video, testified that he exercised sole control over the method of shipment once Defendants provided product to him. R. 219, pp. 111-113. He further conceded that he had not informed Defendants that he would be shipping Max Hardcore DVDs via the U.S. mail and that, as a result, neither Little nor the corporation would have had any means of knowing that the U.S. mails were his preferred method of shipment. *Id.* at 115, 117, 131. Further telling is the fact that Jaded Video's purchase orders to Max World requested that product be shipped using UPS ground. *Id.* at 114-15. Under even the most generous view of the proof for the government, the only carrier Little or Max World had ever employed to provide product to Jaded Video was United Parcel Service in compliance with Jaded Video's request for UPS ground shipment. *Id.* As such, it was wholly unforeseeable that Jaded Video would use the U.S. mail to ship DVDs to the end consumer when it repeatedly insisted that Max World deliver its product using a private common carrier. If

anything was foreseeable, it was that Jaded Video would employ UPS, and not the U.S. mail, to ship orders to consumers.

The fact that only two methods of shipment were available, U.S. mail or common carrier, i.e. FedEx, UPS, DHL, does nothing to alter this conclusion. As noted above, the fact that Jaded Video and Defendants had a lengthy business relationship in which the only method of shipment was UPS ground undermines this contention. R. 219, pp. 114-15. Moreover, the fact that Jaded Video had only two basic shipping options at its disposal -- common carrier or the U.S. mail -- makes it no more foreseeable that it would choose the mail than if there were twenty options, particularly when for years Jaded had done nothing to demonstrate its preference for the mail in its transactions with Defendants. The government also argued that the mere fact that Defendants' materials were available commercially and promoted from their website somehow translates to knowledge that an arms-length distributor would use the mail to ship them to consumers. To be sure, neither Defendant denied that the charged DVDs were available for sale through Jaded's website; that, however, is not the issue. The issue is whether Defendants knew Jaded would deliver the DVDs to consumers in Tampa using the U.S. mail. The evidence plainly shows they did not.

Taken collectively, the evidence presented by the government is even less tenuous than the proof in *McDowell*, where the defendant was part of the same corporate venture with the principal

actors, had filled orders for shipment in the past, and had access to an e-mail account in which shipment using the U.S. mail was discussed. Also of note is the fact that the insufficient evidence argument was not preserved in *McDowell*, meaning that the case was reviewed under the strict manifest miscarriage of justice standard rather than *de novo*. *McDowell*, 498 F.3d at 312-13. If evidence that McDowell had previously shipped material, had access to customer emails discussing use of the mail, and participated in the same small company as his co-defendants was insufficient to demonstrate knowledge, the even more scant evidence presented by the government in this case hardly rises to the level of foreseeablility.

Moreover, the government's theory of foreseeability in this case is not materially different from the arguments pursued by the prosecution in *McDowell*. In that case, the government argued that the evidence gave rise to an inference that McDowell knew the mail would be used. The court uniformly rejected this contention, finding the piling of inference on inference impermissible. *Id.* at 315. The government similarly saught to pile on inferences in this case, using the nomenclature of foreseeability in place of the inferences discussed in *McDowell*. The essence of the government's position here, similar to that advanced by the *McDowell* prosecution, was that because the use of the mail may have been remotely possible, it was therefore foreseeable. However, under

the *McDowell* court's logic, this argument turns the requirement of proof beyond a reasonable doubt on its head and should therefore be rejected.

2. Defendants did not knowingly cause use of the U.S. mail to distribute the charged DVDs.

The government also argued that the knowledge requirement was satisfied if Defendants caused the material at issue to be placed in the mail, even if the Defendants did not know the mail would be used. In support of its position, the government cited the trial court to *Pereira v. United States*, 347 U.S. 1 (1954), and its progeny from the Sixth and Eighth Circuits for the proposition that causing the mailing of obscene material is sufficient to satisfy § 1461's mens rea requirement. However, the definition of "causing" the mailing incorporates the requisite mental state of knowledge:

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can be reasonably foreseen, even though not actually intended, then he "causes" the mails to be used.

Pereira, 347 U.S. at 8-9. Thus, even under the standard announced in *Pereira* and advocated by the government, the prosecution was still required to prove knowledge that the mail would be used to ship the DVDs in question to obtain a conviction.

This conclusion is strengthened by the Eighth Circuit's opinion in *United States v. Kuennen*, 901 F.2d 103 (8th Cir. 1990), a case heavily relied upon by the government below. In *Kuennen*,

the defendant ordered an international magazine alleged to contain child pornography to a post office box under his control. *Id.* at 104-05. This fact is significant because, despite the defendant's arguments that it was the government and not he who selected use of the U.S. mail as the method of shipment, common carriers do not deliver to post office boxes. Thus, by providing a post office box as the place of receipt, the defendant in *Kuennen* all but assured that the U.S. mail would be the sole method of delivery available and therefore had the requisite knowledge of the mail to support a conviction. *Id.*

Each of the remaining cases relied upon by the government at trial employs a similar analysis, namely that it is sufficient if a defendant knew the mail would be used rather than placing the material in the mail himself. *See, e.g., United States v. Ross*, 131 F.3d 970, 985 (11th Cir. 1997) (finding knowledge where defendant knew use of mail would follow or was foreseeable). In this regard, the causation element of § 1461 liability is intended to target those defendants who knowingly cause an item to be mailed through the United States Postal Service, in addition to those who physically place illegal items in the mail. Indeed, both of the major authorities advanced by the government -- *Pereira* and this Court's pattern jury instructions -- require proof that the defendant had *knowledge that the use of the mails will follow in the ordinary course of business* or *where the use of the mails could*

reasonably be foreseen. *See Pereira*, 347 U.S. at 5-9 (finding that there was "substantial evidence to show that the check was mailed from Texas to California, in the ordinary course of business" because that was how such checks were ordinary endorsed for collection between banks in different states); Eleventh Circuit Pattern Jury Instructions § 53, at 307. As noted above, however, there was insufficient evidence that *any* of these elements were present in the instant case - knowledge, ordinary course of business, or reasonable foreseeability. In fact, there was *no* evidence that Defendants had knowledge that the mails would be used in the ordinary course of business or that such use would or could reasonably be foreseen. To the contrary, there was significant evidence that Defendants regularly used UPS to deliver their merchandise, and there was testimony that Jaded never even discussed using the U.S. mail with them. R. 219, pp. 114-15, 131. As such, the use of the mails to deliver allegedly obscene materials was neither "in the ordinary course of business" nor "foreseeable" to Defendants. Thus, even under the more expansive definition of knowledge advanced by the government below, there was insufficient proof to sustain a conviction.

The government's second theory of 18 U.S.C. § 1461 liability is no more availing. Essentially, the government suggested that Defendants could be convicted based on the evidence presented at trial because "the government has charged Defendants with aiding

and abetting the 'use[]] of the mail by Jaded in delivering the DVDs to Inspector Walker." R. 144, p. 3. While this second argument by the government would have some merit if Defendants were charged with *conspiracy* to mail obscene materials, a charge of aiding and abetting does not relieve the government of proving each essential element of the substantive offense beyond a reasonable doubt. For example, in *United States v. Massey*, 827 F.2d 995, 999-1001 (5th Cir. 1987), the court held that government did not meet its burden of proving that the defendants used the mails to commit mail fraud where usual office procedures included use of private carriers as well as mail.

In fact, this second argument of the government was the exact type of argument rejected in *McDowell*. As the court there explained, "to convict [defendant] for aiding and abetting a co-defendant's charged § 1961 offense...the Government was required to prove [defendant] shared a co-defendant's criminal intent; i.e., that he *knew* the United States mail would be used to deliver the obscene material at issue." *McDowell*, 498 F.3d at 314 (emphasis in original). In short, the court explained, "[f]or the conviction under 18 U.S.C. § 1461, the Government was required, but failed, to show [the defendant] not only knew [the company] was selling obscene material, but also that the material was being delivered through the United States mails." *Id.* at 316. This is nothing more than a restatement of the principle enunciated in *Pereira* that

in order to convict, the government must prove that the defendant had knowledge that the mails would be used, which could be circumstantially proven through a reasonable foreseeability test or through evidence regarding the usual course of business. *See Pereira*, 347 U.S. at 8-9. Simply put, when nothing in the record demonstrates the defendant was notified of, or otherwise knew about, the use of the mails to deliver the allegedly obscene material, and there is not evidence that the use of the mails was reasonably foreseeable or used in the ordinary course of business, there is insufficient evidence to convict under § 1461. That is precisely the situation that exists here. The trial court therefore erred in denying Defendants' motion for judgment of acquittal and should be reversed. The convictions should also be overturned on the basis of insufficient evidence.

C. The Government Failed to Carry its Burden of Proof that Defendants Knew Their Website was Hosted in the Middle District of Florida.

As a corollary to the knowledge element required by § 1461, the government was additionally required to prove knowledge as to venue. Given the First Amendment concerns involved in any obscenity prosecution, and the inherent problems with the community standards test discussed in § II(B), *supra*, courts have consistently required that a defendant purposefully direct his speech to a particular community to be charged with obscenity. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492

U.S. 115 (1989). There was insufficient evidence in this case to show that Defendants knowingly or purposefully distributed their speech to or from the Middle District of Florida. With respect to the website counts, there was no evidence that Defendants knew or had any reason to know that the server hosting their website was in Tampa. R. 217, pp. 170-76. Little had never been to the server warehouse and had never met the individual who owned it. *Id.* As such, Defendants had no knowledge their online speech was being distributed from Tampa and venue in the Middle District of Florida was therefore inappropriate.

IV. The Trial Court Erred In Instructing The Jury.

The Sixth Amendment right to trial by jury includes the right to proper jury instructions. *Cheek v. United States*, 498 U.S. 192, 203 (1991). In addition, the issuance of improper instructions to the jury violates due process. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Particularly where First Amendment rights are at stake, it is essential that the jury instructions fairly direct the jury regarding the definition of obscenity. *See, e.g., Pope v. Illinois*, 481 U.S. 497 (1987). The trial court made significant errors in instructing the jury on the elements of obscenity and the mens rea required for a conviction, each of which requires reversal.

A. Knowledge of the Mail

Particularly problematic was the court's charge equating knowledge with reasonable foreseeability in violation of *McDowell*, 498 F.3d 308. R. 221, pp. 171-77. Both the statute under which Defendants were charged and the First Amendment require a strict definition of knowledge as to the method of shipment. *See id.*; 18 U.S.C. § 1461 ("whoever knowingly uses the mails..."). The court's instruction therefore deviated from the statute and was unconstitutional.

B. Knowledge of Obscenity

In addition, the court refused to instruct the jury that Defendants must have knowledge of the obscene character of the material to be convicted. *Id.* at 164-65. This is contrary to the First Amendment. *See Hamling v. United States*, 418 U.S. 87, 106 (1974); *Smith v. California*, 361 U.S. 147 (1959); *State v. Pendergrass*, 13 S.W.3d 389 (Tenn.Ct.Crim.App. 1999).

C. Community Standards

Despite Defendants' repeated requests, the trial court refused to instruct the jury to consider the Internet in its determination of community standards. R. 100, pp. 18, 21-23; R. 221, pp. 179-82. For the reasons set forth in § II(B), *supra*, this violates the First Amendment.

V. Prosecutorial Misconduct In Closing Argument Prejudiced Defendants' Right To A Fair Trial.

Prosecutorial misconduct in closing argument prejudices a defendant's right to a fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). In determining whether such misconduct rises to the level of reversible error, this Court considers: 1) whether the remarks were improper, and 2) whether they prejudicially affected the defendant's substantive rights. *United States v. Vera*, 701 F.2d 1349, 1361 (11th Cir. 1983). Prosecutors must limit their comments to the evidence. *United States v. Cole*, 755 F.2d 748, 767 (11th Cir. 1985). In addition, prosecutors must refrain from arguments designed to inflame the passions and prejudices of the jury. *United States v. Tisdale*, 817 F.2d 1552, 1556 (11th Cir. 1987).

The prosecutor in this case made several inappropriate and prejudicial remarks in closing argument that prejudiced Defendants' right to a fair trial. For example, after previously representing that he would not argue that the jury should send a message regarding the acceptability of adult entertainment, the prosecutor invited the jury to consider the implications of its verdict: "If you stop Paul Little, you stop Max Hardcore. On the other hand, if you stop Jaded, Paul Little finds another distributor and goes on..." R. 222, p. 55. He later stated: "If this material is okay in your community, he's going to continue pushing the limits." *Id.*

at 69. He also discussed the use of children in sexually explicit material and its appeal to pedophiles, both concepts that were clearly irrelevant and prejudicial. *Id.* at 65. These comments had no purpose in the trial other than to inflame the jury's attitudes towards pornography in general, rather than to focus on the question of whether the materials in this case were obscene. Defendants' convictions should accordingly be reversed.

VI. Irregularities In The Jury Process, Including The Trial Court's Failure To Disclose And Act Upon A Juror's Report That She Had Been Terminated From Her Job During Deliberations, Prejudiced Defendants' Right To Trial By Jury And To A Fair Trial.

The Sixth Amendment safeguards the right to trial by jury. U.S. Const. amend. VI. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Where a juror's ability to fairly and impartially resolve the case is overcome by extrajudicial commentary, these rights are unduly compromised. *See, e.g., Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam); *Stockton v. Virginia*, 852 F.2d 740, 743-46 (4th Cir. 1988). Because the potential for mischief is so great when a third party establishes extrajudicial contact with a juror, the Supreme Court has adopted the rule that "any private communication [or] contact...with a juror during a trial about the matter pending

before the jury is...presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002) (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). The government bears the burden of rebutting the presumption of prejudice by demonstrating that "such contact with the juror was harmless to the defendant." *Id.* In addition to outside contact or circumstances undercutting the jury's impartiality, premature deliberations between jurors also violate the Sixth Amendment and due process. *See United States v. Bertoli*, 40 F.3d 1384, 1393 (3d Cir. 1994).

To avoid the prejudice that may result when a juror's ability to remain fair and impartial has been compromised by either outside influence or premature deliberations, the trial court is required to conduct an inquiry when it becomes aware of the possibility that prejudicial communications have occurred. *See, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 (4th Cir. 1986); *Herring v. Blankenship*, 662 F.Supp. 557, 562 (W.D. Va. 1987). In this regard, the trial court must voir dire the affected juror; relying on outside information that the juror can remain impartial is insufficient. *See United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001).

In this case, the trial court failed to conduct the proper inquiry into whether irregularities with the jury that occurred during the trial and jury deliberations prejudiced individual jurors' ability to remain fair and impartial, thus violating Defendants' Fifth and Sixth Amendment rights. In this regard, three separate incidents arose in which the court should have, but did not, voir dire the affected jurors to determine the impact of their respective situations upon them. Considered alone and collectively, the impact of extrajudicial influence on the jury undermined the validity of the jury's guilty verdict and requires reversal on appeal.

A. The Juror's Note Requesting to View Video Clips Instead of the Entire DVDs

The first incident arose during the government's case in chief, when a juror delivered a hand-written note to the bailiff requesting to view the charged DVDs as clips, rather than in their entirety. Indeed, a central issue in this trial was whether the government was required to publish the allegedly obscene DVDs in this case to the jury in their entirety. As Defendants repeatedly argued, both the *Miller* standard for obscenity and this Court's pattern jury instructions require the trier of fact to consider the works ***as a whole*** in order to determine their obscenity *vel non*. Because the material must be judged in its entirety, and because Defendants have a right to a public trial, the jury was required to view the works as a whole in open court.

The trial court initially agreed with Defendants and refused to permit the government to play excerpts of the works that represented a mere fraction of the entire running time of the DVDs. R. 219, p. 9. However, after viewing a portion of one DVD in open court before the jury, the court inexplicably changed its mind and agreed that it was sufficient for the government to play only a small portion of each DVD instead of the whole. *Id.* at 252; R. 218, p. 8. In explaining its ruling, the court continued to agree that the jury must judge the material in its entirety, but offered no explanation for how its rulings would ensure that the jury would view the whole DVDs, much less judge the material as a whole in reaching a verdict. *Id.*

Based upon the court's faulty ruling exempting the government from satisfying its burden and precluding the jury from fulfilling its role as the trier of fact, Defendants elected to publish the entire DVDs to the jury on cross-examination of the postal inspector who purchased them. R. 219, pp. 24-25. While Defendants were in the process of publishing the entire DVDs, a juror sent a handwritten note to the court requesting to view only clips and not the movies as a whole. R. 218, pp. 28-29. Based on the court's inquiry of the court security officer, this note was written by the juror in the jury room where other jurors may have been present. *Id.* Defense counsel repeatedly requested that the court voir dire the juror to determine: a) whether the comment reflected a

prejudgment of the evidence that the material is obscene, and b) whether his note, or the contents of it, had been shared or discussed with other jurors, thus tainting the entire jury. *Id.* at 29. Even though it did inquire of the juror as to whether his signature appeared on the note, the court refused the defense's requests for additional voir dire. *Id.*

What little inquiry the court undertook was insufficient to discover potential bias on the part of the juror who wrote the note or whether the note represented the collective viewpoint of other jurors and was thus indicative of improper premature deliberations. *See Carpa*, 271 F.3d at 967. This violates Defendants' Sixth Amendment rights and deprived them of a fundamentally fair trial.

B. The Assistant United States Attorney's Comment to a Juror

In addition to the note sent by a juror, there is evidence in the record of improper extrajudicial communications with a juror during the government's case in chief. To that end, midway through the trial, an Assistant United States Attorney reported that he engaged in an inadvertent, but prejudicial dialogue with a juror in the elevator. R. 218, p. 42. The attorney questioned whether the juror was going upstairs to "watch that porn," and the juror affirmed that he was. *Id.* Although there was no apparent motive on the part of the attorney to taint the jury, the fact remains that the juror was chided by a government lawyer for being exposed to the allegedly obscene materials in this case. Under *Carpa*, the

court was required to conduct its own inquiry into the juror's state of mind to determine whether the conversation had influenced him in any way and could not merely accept the Assistant United States Attorney's view of the conversation. The court's failure to do so -- or even to identify the juror who was involved -- violated Defendants' Sixth and Fourteenth Amendment rights.

C. The Court's Failure to Respond to or Disclose to Counsel a Note from a Juror who was Fired from her Job during Deliberations

The most egregious and troubling incident involving extrajudicial influence on a juror occurred on the morning of June 5, 2008, the final day of jury deliberations. At 9:45am that morning, the court's bailiff accepted a note from a juror requesting to speak to the court because she had been fired from her job the night before. R. 168, Ex. 1. On two separate instances in her communication, the juror requested to talk with the court regarding the incident. *See id.* ("I wanted to know if I could speak to you regarding a matter that happened last night;" "I was hoping we could talk about this."). The note reported that the juror was fired for her participation on the jury, but was silent as to what impact the termination may have had on her ability to continue deliberating.

Although the court received the note on the morning of the second day of deliberations, the court did not speak with the juror as she had requested until ***after*** a guilty verdict was returned in

the case. *Id.*, Ex. 2. Even more suspect is the fact that the court ***never*** notified Defendants or their counsel about the note's contents or how the court intended to address the situation. This is particularly problematic in light of the fact that the jury indicated that same afternoon that it was likely deadlocked as to ten of the twenty counts and then orally requested a break in court, suggesting that deliberations had become "emotion[al]." R. 223, p. 10. Equally troublesome is the fact that, when the jury finally did reach a verdict several hours later, the juror who was terminated was crying as the verdict was read. R. 168, Ex. 2.

The facts known to the court at the time were clear: 1) the juror wanted to speak with the court the morning of the verdict about her situation, 2) the deliberations were heated and the jury was nearly deadlocked, and 3) the juror was emotional about the verdict in the courtroom. Under these circumstances, the court had an obligation to bring the issue to the attention of Defendants and their counsel and to inquire with the juror herself as to what impact her termination may have had on her ability to continue to deliberate. *See Carpa, supra.* The options available to the court were numerous; it could have disclosed the note to the parties and allowed them to individually voir dire the juror or it could have questioned her itself to assess her ongoing ability to be fair and impartial. Inexplicably, however, the court elected to do nothing, concealing the note from counsel and ignoring the juror's requests

to talk. This is a clear violation of Defendants' Sixth Amendment rights that mandates reversal of Defendants' convictions.

VII. The Trial Court Erred In Denying Defendants' Motion For Recusal.

Two federal statutes mandate recusal when the court is biased against a party. *See* 28 U.S.C. §§ 144, 455. Under § 144, recusal is required when a judge is personally biased either for or against a party. Under § 455, a judge must recuse herself when her impartiality might reasonably be questioned. Whereas the statutes generally apply to extrajudicial situations giving rise to bias or a question of impartiality, "when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party," the judge must be recused. *Hamm v. Members of the Bd. of Regents of the State of Florida*, 708 F.2d 647, 651 (11th Cir. 1983). In addition, "[p]rejudgment as to the facts giving rise to liability or reason to believe such exist, if fairly supported, would, in the court's view, satisfy" the statutory provision mandating recusal based on bias. *Bradley v. School Bd. of City of Richmond*, 324 F.Supp. 439, 445 (E.D. Va. 1971). To be sure, a defendant is entitled to the cold neutrality of an impartial judge; the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. *United States v. Orbiz*, 366 F.Supp. 628, 629 (D. Puerto Rico 1973).

After seeing portions of the one DVD the court permitted Defendants to publish in its entirety, the court confronted defense counsel and inquired why they insisted on showing the jury the material as a whole. R. 218, pp. 67-68. When defense counsel explained that their decision was a matter of trial strategy, the court commented that there was nothing it had seen in the small amount of material it had viewed that was of educational, artistic, scientific, literary, or political value. *Id.* This comment reflects that the court had prejudged the evidence and determined, prior to the government's case in chief, that the third prong of the *Miller* obscenity test - that the material taken as a whole lacks serious scientific, artistic, political, or literary value - had been satisfied. Ironically, at that point, the court had not seen four of the five charged DVDs in their entirety to assess their individual value. Given that the court had formed such a strong opinion prior to the conclusion of the trial, in violation of its own instruction to the jury not to do the same, the court should have granted Defendants' motion for recusal. Its failure to do so mandates reversal here.

VIII. The Trial Court Improperly Calculated The Offense Level And Therefore Improperly Sentenced Defendants.

A. The Trial Court Improperly Enhanced Defendants' Sentence on the Basis of Income Derived from the Sale of Protected Expression.

At sentencing, the trial court increased Defendants' offense level by one point based on over $40,000 of income derived from the sale of the five obscene DVDs throughout the country. R. 224, p. 14; *see also* USSG § 2G3.1(b)(1)(A). This addition was incorrect because there was insufficient evidence to support the finding and because the increase in the offense level substantially overstated the specific offense conduct. The five DVDs were only found to be obscene in the Middle District of Florida. Because two of the three prongs of *Miller* are dependent upon contemporary community standards (*see Miller*, 413 U.S. at 24), it cannot be presumed that these materials would be considered obscene in other jurisdictions. Other than the proceeds from the five specific DVDs that were delivered to the government, there was no evidence that any of the $40,340.50 collected by Defendants originated from or even passed through the Middle District of Florida. Therefore, there was insufficient evidence that the pecuniary gain associated with the DVD retail sales was the result of illegal activities. The one-point increase for pecuniary gain was therefore in error.[4]

B. The Trial Court Improperly Enhanced Defendants' Sentence on the Basis of Sado-Masochism.

In addition to improperly enhancing Defendants' sentence on the basis of pecuniary gain, the trial court also incorrectly

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[4]Defendants concede that a five-level increase based on generic pecuniary gain was appropriate, but object to the additional point for $40,000 in DVD sales.

sexual acts were consensual and the participants experienced no actual pain, degradation, or humiliation. R. 220, pp. 29-39. In other words, just as Hollywood movies contain fictional death scenes, the ostensible pain and humiliation portrayed here was the result of role-play. *Id.; see also People v. Freeman*, 46 Cal.3d 419, 758 P.2d 1128 (Cal. 1988). Therefore, the trial court's four-level increase for sado-masochistic conduct was inappropriate and should be reversed.

CONCLUSION

For the foregoing reasons, Defendants' convictions and sentences were in error and should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word count limitation contained in Fed.R.App.P. 32(a)(7)(B) and that the number of words in the brief, as counted by the Word Perfect 12.0 Word Count tool, is 13,085.

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I hereby certify that an exact copy of the foregoing brief was provided via regular U.S. mail to Edward McAndrew, U.S. Department of Justice, 1007 Orange Street, Suite 700, Wilmington, Delaware 19899, on the 20th day of January, 2009.

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