Case No: _____

IN THE UNITED STATES SUPREME COURT

WISCONSIN *ex rel.* JOACHIM DRESSLER, Petitioner,

vs.

RACINE CIRCUIT COURT, Et. Al, Respondents.

On a Petition For a Writ of Certiorari To
The Wisconsin Supreme Court

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

Joachim Dressler, 230174
Petitioner *pro se*
Waupun Correctional Institution
P.O. Box 351
Waupun, Wisconsin 53963-0351

Appendix – Table of Contents

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DISTRICT II

June 12, 2018

To:

Hon. Gerald P. Ptacek
Circuit Court Judge
Racine County Courthouse
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Racine, WI 53403

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Joachim Dressler 230174
Waupun Corr. Inst.
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Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following opinion and order:

2018AP1030-W State of Wisconsin ex rel. Joachim Dressler v. Circuit Court for Racine County (L.C. # 1990CF584)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Joachim E. Dressler has filed a petition for a writ of mandamus. In it, he asks this court to order the circuit court to convene an adversary hearing regarding certain materials seized at his home and used in his homicide prosecution. Dressler asserts that he had a First Amendment right to possess such materials and, therefore, they should not have been used against him as evidence.

We must deny Dressler's petition, as we already rejected his First Amendment argument in a previous appeal. *See* ***State v. Dressler***, No. 2004AP1497, unpublished slip op. (WI App

App. A

March 8, 2006). We will not revisit that decision. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

Dressler also moves for a stay of his case. Because we deny his petition, we also deny his motion as moot. Therefore,

IT IS ORDERED that the petition for a writ of mandamus is denied without costs.

IT IS FURTHER ORDERED that the motion for a stay is denied as moot.

Sheila T. Reiff
Clerk of Court of Appeals

App. A

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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August 1, 2018

To:

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Joachim Dressler 230174
Waupun Corr. Inst.
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Waupun, WI 53963-0351

You are hereby notified that the Court, by its Clerk and Commissioners, has entered the following order:

No. 2018AP1030-W Dressler v. Racine County Circuit Court L.C.# 1990CF584

On June 12, 2018, the court of appeals denied Petitioner Joachim Dressler's petition for writ of mandamus. The petitioner filed a motion in this court seeking an extension of time to seek review of that decision. By order dated June 26, 2018, this court advised Mr. Dressler that it would construe his motion as a timely but nonconforming petition for review and further advised him that he was required to file a statement in support of the petition by September 10, 2018. On July 23, 2018, Mr. Dressler filed a document captioned "Petition for a Writ of Mandamus and Stay," which this court construed as the statement in support of the petition for review.

On July 30, 2018, Mr. Dressler filed a letter stating that his July 23, 2018 filing was not a statement in support of his pending petition for review, but rather a petition for writ of mandamus and stay.

We have reviewed the document and conclude that it was appropriately construed as the statement in support of a petition for review of the court of appeals' June 12, 2018 decision. The July 23, 2018 filing contained the court of appeals' and circuit court's case numbers and attaches the court of appeals' June 12, 2018 order.

Upon the foregoing,

IT IS ORDERED that no action will be taken on petitioner's filing.

Sheila T. Reiff
Clerk of Supreme Court

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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October 9, 2018

To:

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Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following order:

No. 2018AP1030-W Dressler v. Racine County Circuit Court L.C.# 1990CF584

Petitioner-petitioner, Joachim Dressler, pro se, has filed a document captioned "Petition for Writ of Mandamus and Stay." It has been docketed as a petition for review of the court of appeals' June 12, 2018 decision and considered by this court.

IT IS ORDERED that the petition for review/"Petition for a Writ of Mandamus and Stay" is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

App. C

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Sheila T. Reiff
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JOACHIM DRESSLER #230174
WAUPUN CORR. INST.
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WAUPUN, WI 53963-0351

State of Wisconsin ex rel. Joachim Dressler,
Petitioner,
v.
Circuit Court for Racine County and Racine County District Attorney,
Respondents.

Date: July 24, 2018

District: 2
Appeal No. 2018AP001030 W
Circuit Court Case No. 1990CF000584

Dear Joachim Dressler:

This will acknowledge receipt of the **Statement in Support of the Petition For Review** which has been filed in the above matter pursuant to this court's order, Wis. Stats. §§ 808.10 and 809.62. Please note that the case number and the designations of the parties will remain identical in the Supreme Court to the designations in the Court of Appeals, other than the party filing the petition for review should add **Petitioner** to the previous designation; see Rule 809.81(9). If the petition for review is granted and additional briefs are required, the briefs will be filed pursuant to Rule 809.19(9) and will therefore have the same color covers as the briefs which the parties filed with the Court of Appeals.

Because the Court of Appeals may reconsider its decision within 30 days of the filing of a petition for review, we will be furnishing the Court of Appeals with a copy of your statement in support of the petition for review. Also, please note the $195.00 filing fee required under Rule 809.25(2)(a)1, Rules of Appellate Procedure, is not refundable and does not ensure that the petition will be granted.

If you have any questions regarding procedures on the petition for review, please do not hesitate to contact this office.

Sheila T. Reiff
Clerk of Supreme Court

WISCONSIN COURT OF APPEALS
DISTRICT II

State of Wisconsin ex rel.
JOACHIM DRESSLER,
Petitioner,

v.

Case No: 2018 AP 001030 -W
Racine Case: 1990CF584

RACINE COUNTY DISTRICT ATTORNEY, and
RACINE COUNTY CIRCUIT COURT,
Respondent.

PETITION For a WRIT OF MANDAMUS and STAY
Ch. 783 and §809.51, Wis. Stats.

Joachim Dressler petitions this court for a writ of mandamus to compel the Racine District Attorney and the Racine Circuit Court for a stay, and to convene an adversary hearing and immediate appellate review pursuant to *Freedman v. Maryland*[1], State *v. I, A Woman-Part II*[2], *McKinney v. Alabama*[3], and *City of Littleton, Colo. v. Z. J. Gifts D-4*[4]. As grounds therefore Petitioner states:

[1] Infra, *Freedman v. Maryland*, 380 U.S. 51 (1965).
[2] Infra, *State v. I, A Woman-Part II*, 53 Wis.2d 102 (Wis. 1971).
[3] Infra, *McKinney v. Alabama*, 424 U.S. 669 (1976).
[4] Infra, *City of Littleton, Colorado. v. Z.J. Gifts*, 541 U.S. 774 (2004).

Facts

This court noted its familiarity with this case in 2004AP1497, March 8, 2006. The facts necessary for this Petition for Mandamus and Stay are:

Exercising their rights guaranteed by the First and Fourteenth Amendments, Mr. and Mrs. Dressler merely possessed articles from magazines such as *Time* and *Newsweek*, some of which depict violence; commercially produced erotica of both heterosexual and homosexual variety; and three commercial videos entitled *The Faces of Death*.[5] They were kept in their home out of the reach of their children. All are available in a public library or to adults in bookstores or video outlets. It is undisputed that all are protected by the First Amendment.

Commercial publication pre-dated the crime by a minimum of two years. None of the materials depict the victim or crime charged. Mr. Dressler did not distribute, author, or produce the materials at issue. He did not take the witness stand at his jury trial. The record is void of any evidence that he advocated, expressed an opinion, or espoused the ideas contained or depicted in them. The trial court lacked any evidence from which to make a finding of how the materials came into his possession; under what circumstances; or when, how, or by whom the materials were compiled. (Exh. C: R117, 54-55)

Investigating the death and disappearance of James Madden, Racine officials sought a search warrant for plaintiff's home. A lengthy affidavit dated July 28, 1990, indicated that the Dresslers possessed three videos entitled *The Faces of Death*. (Exh. A, ¶37) Words such as "homosexual" or "pornography" do not appear in the affidavit.

The resulting search warrant for the Dressler home failed to specify any publications whatsoever. It authorized *carte blanche* seizure of any and all:

[5] *The Faces of Death*, a "Grade B" video (at best), is available at most video outlets. It depicts violence and is fully protected by the First Amendment. *Winters v. New York*, 333 U.S. 507, 510 (1948); *U.S. v. Stevens*, 559 U.S. 460 (2010).

7. Written materials, photographs, video tapes, or other materials including but not limited to sado-masochism pornography, "snuff films" depicting torture or death scenes;

Warrant, July 28, 1990 (Exh. B: ¶7)

Once officials discovered *homosexual* erotica in the Dresslers' home, all bets were off. The state offered the publications seized from plaintiff's home as "other acts" evidence for its case-in-chief. It asked the court to review the *content* of the First Amendment-protected publications in chambers, *ex parte*, and rule them admissible:

> THE COURT: We'll take about a ten-minute recess here. I am going to read the facts and law again in the *Evers* case, and I also want to take a look at the items that Mrs. Weber wants me to look at. I will take those into chambers with me and be back in about 10 minutes.
>
> (Recess had)
>
> All right. The record will show that the appearances continue as they were, that we have been in recess for about fifteen or twenty minutes, that in chambers I had a chance to review the materials presented by the State in the briefcase, on the placards and the six paperback books that were presented... The issue is whether or not the State should be allowed to offer information into the record that consists of videotapes, and as referred to in the defendant's motion, collected published materials that some of which were mentioned orally on the record and others which I was able to review.
>
> (Exh. C: R117:43-44)

The trial court reasoned: "The State's case is in fact by agreement by the defense a weak case. It's a circumstantial case, and that, therefore, this type of evidence is important for the presentation for the State's case, ...it's important to the State's case in order for them to meet their burden of proof." *Id*, at 51. It noted that the published materials were lawfully possessed, specifically denied an adversary hearing, and construed and applied Wis. Stat. §904.04(2) as urged by the state:

> THE COURT: Well, certainly as the statute defines the terms, there's no crime here. We have all agreed to that. The State hasn't suggested there's a crime in the possession of these materials. Other wrongs, I don't know. **I guess I don't want to get into litigation whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession, although again that's a matter of state and national import**, so I'm not making a judgment as to whether or not those are crimes to possess the materials. I don't think I am in a position to do that. I am not being asked to do that.

MR. MATHIE (Defense Counsel): [I]s the only act or wrong or crime, whatever you define it, is the possession of those materials, is that what the court's ruling is?

THE COURT: **Yes.** *Id*, at 53-54 (Emphasis added)

Demonstrating its content-based reasoning, the court stated: "there was homosexuality on the part of the defendant. He possessed those materials. They clearly depict homosexuality." (Exh. D: R131: 27)

The state never sought adversary hearing compliance pursuant to *Freedman v. Maryland,* 380 U.S. 51, 58 (1965), and *State v. I, A Woman-Part II*, 53 Wis.2d 102 (Wis. 1971).

> [A]n invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First-Amendment protection. *I, A Woman*, at 112-113.

That prior restraint remains in effect to this day. No further facts are necessary or relevant to grant a Stay and a Writ of Mandamus.

Petitioner is Entitled to a Writ of Mandamus

When mandamus relief is sought against a judge presiding over a criminal trial, the action is a "procedural step" in the criminal litigation. *Martin v. U.S.*, 96 F.3d. 853, 854 (7th Cir. 1996). A petition for a writ of mandamus does *not* review a criminal trial. It is *not* a form of appeal. It is *not* a post-conviction motion. It is *not* a civil rights suit.

Mandamus is an extraordinary writ that may be employed to compel public officers to perform a duty that they are legally obligated to perform. For the writ to issue, petitioner must establish that: (1) he possesses a clear right to the relief sought; (2) that the duty he seeks to enforce is positive and plain; (3) he will be substantially damaged by nonperformance of such duty; and (4) there is no other adequate remedy at law. *State ex rel. Robins v. Madden in re Doe),* 2009 WI 46 ¶10.

Petitioner Has a Clear Right To An Adversary Hearing and Prompt Judicial Review

1. Seizure of Expressive Materials Mandates an Adversary Hearing

States must provide procedures amply adequate to safeguard against invasion of speech that the Constitution protects. Because the line between speech *unconditionally guaranteed* and speech that may legitimately be regulated, suppressed, or punished is finely drawn, where the transcendent value of speech is involved, Due Process requires that the state bear the burden of proving that the appellant engages in criminal speech. Speech must be unencumbered until the State comes forward with sufficient proof to justify its inhibition. *Speiser v. Randall*, 357 U.S. 513, 524-529 (1958).

A system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965). Therefore:

> [B]ecause **only** a judicial determination in an adversary hearing ensures the necessary sensitivity to freedom of expression, **only** a procedure **requiring** a judicial determination suffices to impose a **valid** final restraint. *Id.* (Emphasis added)

The Court mandates an adversary hearing before speech materials may be subject to seizure. "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *A Quantity of Books v. Kansas,* 378 U.S. 205, 213 (1964). Accord, *Marcus v Search Warrants,* 367 U.S. 717, 736 (1961); *Alexander v. U.S.*, 509 U.S. 544, 577 (1993) (Kennedy, dissenting).

Significantly, the United States Supreme Court specifically held that mere probable cause to believe that a crime has been committed is not adequate to remove books or films from circulation:

> Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause, ...it is otherwise when materials presumptively protected by the First Amendment are involved. It is the risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials that motivates this rule. ...[M]ere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation. ... [The First Amendment] presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 64 (1989) (Citations and quotations omitted).

Wisconsin recognized these safeguards and applied a limiting construction to (now) §968.13, Stats, to cure that statute's facial overbreadth – and to forbid warrants and seizures of First Amendment *protected* printed and filmed materials:

> The words "lewd, obscene, or indecent" in the Wisconsin contraband statute **must** be interpreted in the constitutional sense as including **only** printed and filmed materials that are **not** protected by the First Amendment to the United States Constitution as interpreted by the United States Supreme Court. *State v. Voshart*, 39 Wis.2d 419, 429 (1968) (Emphasis added).

"It is clearly established that under federal law a motion picture cannot be seized without a prior adversary hearing." *Detco, Inc. v. Neelen*, 356 F.Supp. 289, 290 (E.D. Wis. 1973). "The same is obviously true for books or any other expressive materials." *Ft. Wayne Books*, supra, at 63.

2. Admission of Expressive Materials Mandates an Adversary Hearing

The Constitution has never permitted an Orwellian concept of "guilt by book association." When Georgia admitted publications that Angelo Herndon possessed as evidence in prosecuting for inciting insurrection, the Court ruled that the strict vagueness standards of the First and Fourteenth Amendments forbid *any* inference from their content:

> **No inference can be drawn from the possession of the books mentioned**, either that they embodied the doctrines of the Communist Party or that they represented the views of the appellant. ... The question thus proposed to a jury involves pure speculation as to future trends of thought and action ...[and] licenses a jury to create its own standards in each case. *Herndon v. Lowrey*, 301 U.S. 242, 249, 263 (1937) (Emphasis added).

A decade later the Court ruled that "collections of stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes" are fully protected by the First Amendment. *Winters v. New York*, 333 U.S. 507, 510 (1948). Relying heavily on *Herndon*, it explained why their admission as criminal evidence is unconstitutional:

> [W]e think fair use of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier of fact to know where this new standard of guilt would draw the line between allowable and forbidden publications. ...Collections of tales of war horrors, otherwise unexceptional, might well be found to be so "massed" as to become "vehicles for inciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Winters*, at 519-20.

Any regulation in the First Amendment area must strictly be limited to conduct that is "specifically defined by the applicable state law, as written or authoritatively construed." *Miller v. California*, 413 U.S. 15, 23-24 (1972). The doctrine forbidding unbridled discretion requires laws applicable to speech to be "explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). Statutes must be carefully drawn or be authoritatively construed to apply only to unprotected speech "and not be susceptible of application to protected expression." *Gooding v. Wilson,* 405 U.S. 518, 522 (1972).

With *Speiser v. Randall*, supra, the Court mandated that the *State* must assume the burden to prove that speech is unprotected, because "where particular speech falls close to the line separating lawful and unlawful, the possiblility of mistaken fact-finding – inherent in all litigation – will create the danger that the legitimate utterances may be punished," and "can only result in a deterence of speech which the Constitution makes free." *Id,* at 526.

The Supreme Court artculated its strict procedural safeguards in *Freedmant v. Maryland,* 380 U.S. 51 (1965) and repeatedly explained what is now unequivocally clear:

> We held in *Freedman*, and reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, **must** rest on the censor. Second, **any** restraint prior to judicial review can be imposed **only** for a specified period, and **only** for the purpose of preserving the status quo. Third, a prompt final judicial determination **must** be assured. ...
>
> And if judicial review is made unduly onerous, by reason of delay or otherwise, the [censor's] determination in practice may be final. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559-560 (1975). (Emphasis added)

Applying *Freedman* to Wisconsin, our Supreme Court declared that:

> [A]n invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First-Amendment protection. *State v. I, A Woman*, supra, at 112-113.

It mandated strict procedural safeguards under the Wisconsin Constitution to insure that its courts can never impose, or maintain, any prior restraint of free speech:

- The Legislature determined that (now) §806.05 is the exclusive means to declare printed and filmed materials "obscene" – thus unprotected by the First Amendment – and "that all possible alternate common law or equitable *in rem* proceedings have been suspended." *Id,* at 109.

- A statute that *permits* an interlocutory order that admits expressive materials into evidence in a criminal trial – where they could have evidentiary weight – is unconstitutional and authorizes an impermissible and unconstitutional prior restraint. "In addition, *the mere issuance* of the interlocutory judgment, *even without its subsequent use in a criminal trial*, constitutes an impermissible chilling of First Amendment rights where there has been no prior adversary adjudication of obscenity." *Id,* at 113-114. (Emphasis added)

- A statute that is interpreted to relieve the state of its burden of proving that the material is an unprotected form of expression is unconstitutional. "Since the public interest is affected in the process of finding any matter not protected by the First Amendment, the [state] is obligated to assume its burden of presenting a *prima facie* case, default or not." *Id,* at 115 (Emphasis added).

- Interlocutory orders not in compliance with the above are void – and are not subject to merits review. *Id.* The court specifically warned Wisconsin judges not to enter such orders because of their constitutional infirmity. *Id,* at 119.

- The "strict procedural safeguards" the I, *A Woman* Court announced are jurisdictional. *Id,* at 110 and 121.

- The *Freedman* adversary hearing provides the constitutionally required element of scienter or *mens rae*. *Id,* at 116.
- The *I, A Woman* Court mandated "prompt judicial review." *Id,* at 115, 116, and 119.

Since such interlocutory orders are void and lack jurisdiction, the doctrine of void judgments controls. Void judgments are legal nullities; it is a *per se* abuse of discretion for a court to deny a motion to vacate a void judgment. *U.S. v. Indoor Cultivation Equipment,* 55 F.3d 1311, 1317 (7th Cir. 1995). "Judgements entered contrary to due process are void." *Neylan v. Vorwald,* 124 Wis.2d 85, 95 (Wis. 1985). When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time. They cannot be validated by consent, ratification, waiver, or estoppel. *Id,* at 97.

> A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective. ... The judgment may also be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in subsequent proceedings. ... And the substance of these principles are equally applicable to a void state judgment.
> *Id,* at 99.

A censor's refusal to license signifies the censor's view that a film is unprotected. *Freedman,* at 58. Accordingly, Wisconsin noted that the ruling it declared void "calls into question whether material is to be given the benefit of the protections of the First Amendment to the Constitution of the United States and section 3, of article I, Wisconsin Constitution." *I, A Woman* at 111. "[B]ecause **only** a judicial determination in an adversary hearing ensures the necessary sensitivity to freedom of expression, **only** a procedure **requiring** a judicial determination suffices to impose a valid final restraint." *Id,* at 114. **Only** an adversary hearing constitutionally suffices to make this determination – and it confers jurisdiction that empowers a court to act.

After *Freedman, Blount,* and *I, A Woman,* Wisconsin judges lack jurisdiction – and are simply not empowered to declare: "***I guess I don't want to get into litigation* whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession.**" (Exh. C, R117:53)

Pornography is fully protected speech. The trial court's belief that "pornographic materials ... might be prohibited in terms of its possession," *Id,* is "manifest error" – a wholesale disregard, misapplication, or failure to recognize a controlling legal precedent. *Oto v. Metro Life Ins. Co.,* 224 F.3d 601, 606 (7th Cir. 2001). Indeed, "listeners for whom, if the speech is unpopular or indecent, the privacy of their own home may be the optimal place of receipt." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000).

It's ruling lacks the compulsory adversary hearing pursuant to *Freedman* that requires the state to prove – to a jury [6] – that presumptively protected materials do not qualify for First-Amendment protection. *I, A Woman,* at 113.

Importantly, its act of reviewing the content of publications in chambers necessarily "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion," and satisfies all the elements of prior restraint. *Southeastern Promotions,* supra, 420 U.S. at 554. (Citing *Cantwell v. Connecticut,* 310 U.S. 296, 305 (1940)) It is by necessity content-based and presumptively invalid:

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. ...Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.
> *Regan v. Time, Inc.,* 468 U.S. 641, 648-49 (1984).
>
> . . . . .
>
> Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption... This is for good reason...

[6] See *Court v. State,* 51 Wis. 2d. 683, 699 (Wis. 1971).

> It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the government the benefit of the doubt when it attempted to restrict speech we would risk leaving regulations in place that sought to shape our unique personalities or silence dissenting ideas. **When First Amendment compliance is the point to be proved, the risk of nonpersuasion – operative in all trials – must rest with the Government, not with the citizen.** *U.S. v. Playboy*, 529 U.S. at 817-818 (Emphasis added, internal citations and quotations omitted).

The requirement of an adversary hearing, and the right to be free of prior restraint and content-based discrimination – guaranteed by the First and Fourteenth Amendments and the Wisconsin Constitution – is a clearly established right.

The Duty to Enforce is Positive and Plain

In Wisconsin, "decisions interpreting the United States Constitution are binding law in Wisconisn until this court or the United States Supreme Court declares a different opinion or rule." *State v. Ward,* 2000 WI 3, ¶39.

Because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts. *U.S. ex rel Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970). "[A]lthough at times they may be informative, we are in no way bound by decisions of the federal circuit courts even if they are on all fours with the case before us." *State v. Harris,* 199 Wis.2d 227, 254 n.10 (Wis. 1996).

The U.S. Supreme Court's prior restraint cases have identified two evils it termed "constitutionally intolerable:"

> First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "It is settled by a long line of recent decisions of this Court that an ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a license which may be granted or withheld at the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

> Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible. *Freedman*, supra, at 59; *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (striking statute on ground that it restrained speech for an "indefinite duration.")
> *FW/PBS v. City of Dallas*, 493 U.S. 215, 225 (1990)

Both the unlimited discretion – and the indefinite duration of the restraint of protected speech – remain as intolerable, unresolved prior restraints in this case.

The Court found prior restraint where denial of municipal facilities for a play failed to provide *Freedman* procedural safeguards: The "system did not provide a procedure for prompt judicial review." *Southeastern Promotions*, 420 U.S. at, 561. "The standard, whatever [the board applied], must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances." *Id.*

The Court has insisted that denial of a group's First Amendment right of free speech is unconstitutional without the requisite procedural safeguards of appellate review:

> If a state seeks to impose a restraint of this kind, it must provide strict procedural safeguards, *Freedman v. Maryland* [supra], including immediate appellate review. Absent such review, the State must allow a stay. *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (Internal citations omitted).

Consistently, where a state's highest court has refused to either lift a challenged prior restraint, or to provide for immediate appellate review, that failure indicates that the state's highest court has decided to finally maintain the restraint – warranting a stay by a single Justice of the Court. *M.I.C. v. Ltd. v. Bedford Township,* 463 U.S. 1341, 1343-44 (1983).

Further, the Court resolved a circuit split, and rejected a misreading of *FW/PBS v. Dallas* that *Freedman's* "prompt judicial review" is satisfied by a mere <u>possibility</u> of review. Rather, because undue delay results in the unconstitutional suppression of protected speech, the First Amendment requires a *prompt merits decision* – and immediate judicial oversight and intervention if there is delay:

> Freedman's "judicial review" safeguard is meant to prevent "undue delay," including *judicial* as well as *administrative* delay. ... Thus we read [*FW/PBS's*] reference to "prompt judicial review," together with similar references to Justice Brennan's opinion, as encompassing a prompt judicial decision. ... We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." *FW/PBS,* supra, 493 U.S. at 228. *City of Littleton, Colo. v. Z.J. Gifts*, 541 U.S. 774, 781-82. (2004) (Emphasis original)

"If there is evidence of foot-dragging, immediate judicial intervention will be required, and judicial oversight and review at any stage of the proceedings must be expeditious." *Id.* at 787 (Souter, J. and Kennedy, J. concurring).

In Wisconsin: "Since the public interest is affected in the process of finding any matter not protected by the First Amendment, the [State] is obligated to assume its burden of presenting a prima facie case, **default or not**." *I, A Woman*, supra, at 112-118 (Emphasis added).

Petitioner Will be Substantially Damaged By Non-performance

The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Each passing day of a prior restraint is irreparable and constitutes a separate and cognizable infringement of the First Amendment. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (1975).

An individual's right to speak is impacted when information he or she possessed is subjected to restraints in which information might be used or disseminated. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). Prior restraints on speech and publication are the most serious and the least tolerable infringements on First Amendment rights. *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 559 (1976). The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before adequate determination that it is unprotected speech. *Pittsburgh Press v. Commission on Human Relations*, 413 U.S. 376, 390 (1973).

Ulysses Tory petitioned the U.S. Supreme Court to lift an injunction that Attorney Johnnie Cochran obtained that prohibited Tory from picketing Cochran's office because he claimed Cochran owed him money. The Court held that Cochran's death did not moot the case, and Tory was entitled to seek injunctive or other relief as warranted. *Tory v. Cochran,* 544 U.S. 734, 738-739 (2005). "[W]e take it as a given that the injunction here continues to significantly restrain petitioner's speech, presenting an ongoing federal controversy. See *Dombrowski v. Pfister,* 380 U.S., 479, 486-487 (1965); *NAACP v. Button,* 371 U.S. 451, 432-433 (1963)." *Tory,* at 737. So too, here.

A state's procedures are "fatally flawed" if they permit a citizen to initiate judicial proceedings to persuade courts that published expressive materials are First Amendment-protected. "The First Amendment demands that the Government must assume this burden." *Blount v. Rizzi,* supra, at 418. "When First Amendment compliance is the point to be proved, the risk of nonpersuasion – operative in all trials – must rest with the Government, not with the citizen." *U.S. v. Playboy*, 529 U.S. at 817-818.

There Is No Other Adequate Remedy At Law

The procedures by which a state determines whether certain materials unprotected by the First Amendment must be ones that ensure "the necessary sensitivity to freedom of expression." *McKinney v. Alabama,* 424 U.S. 669, 674 (1976) (Quoting *Freedman,* 380 U.S. at 58).

To prevent "an effect of finality to the censor's determination whether a film constitutes protected expression" *Freedman*, at 58, a criminal conviction must be vacated to afford a defendant the opportunity to litigate, in some forum, the obscenity *vel non* of expressive materials introduced as criminal evidence in a criminal trial. *McKinney,* at 676. Wisconsin complies with these requirements:

> [B]ecause **only** a judicial determination in an adversary hearing ensures the necessary sensitivity to freedom of expression, **only** a procedure **requiring** a judicial determination suffices to impose a valid final restraint. *I, A Woman,* supra, at 114.
>
> . . . .
>
> Since the public interest is affected in the process of finding any matter not protected by the first amendment, the plaintiff is obligated to assume its burden of presenting a prima facie case, **default or not**. *Id*, at 115. (Emphasis added).

Requirements For A Stay

The *status quo ante* between parties is "the last peaceable uncontested status that existed before the dispute arose." *Video-Home-One v. Brizzi,* 2005 U.S.Dist. LEXIS 31151, at 6. (Quoting *Kimberly v. Lawrence County*, 119 F.Supp. 2d 856, 874 (S.D. Ind. 2000). A stay operates upon a judicial proceeding either by halting or postponing the action in question, and suspends judicial alteration of the status quo by returning the status quo to the state of affairs before an order was entered. *Nken v. Holder*, 556 U.S. 418, 428-29 (2009).

In exercising its discretion to grant or deny a stay, a court considers (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies. *Id,* at 434.

Because of the substantial overlap between the requirements for a stay and those of an injunction (either temporary or permanent) – the test for an injunction is functionally identical to that of a stay:

> To obtain a preliminary injunction, plaintiff must show (1) a reasonable likelihood of success on the merits; (2) that is has no adequate remedy at law; (3) that it will suffer irreparable harm if an injunction does not issue; (4) that the threatened injury it faces outweighs the injury the defendant will suffer if the injunction is granted; and (5) that an injunction is in the public interest. *Wil-Kar, Inc. v. Village of Germantown*, 153 F.Supp.2d 982, 987 (E.D.Wis. 2001)

Judge Adelman explained the special considerations for a preliminary injunction in a First Amendment context:

> Although in theory these elements are distinct, in the First Amendment context they essentially reduce to the question of whether the plaintiff is likely to succeed on the merits. This is because the loss of First Amendment freedoms is presumed to constitute irreparable harm, and irreparable injury establishes that there is no adequate remedy at law. Further, because compliance with the First Amendment always serves the common good, the public interest also turns on the merits. *Wil-Kar, Id.* (Internal citations omitted).

Prior restraints are not unconstitutional *per se*. "Any system of prior restraint, however, comes to this Court bearing a heavy presumption against its constitutional validity" *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). The presumption against prior restraints is heavier – and the degree of protection is broader – than that against limits on expression imposed by criminal penalties." *Southeastern Promotions*, supra, 420 U.S. at 558-559.

Requiring a demonstration of strict scrutiny – a compelling interest, and a showing of the least restrictive means of achieving that interest – is the most demanding test known in constitutional law. *Deida v. City of Milwaukee,* 176 F.Supp. 2d 859, 869 (E.D.Wis. 2001).

> Because the Act imposes a restriction on the content of protected speech, **it is invalid** unless California can demonstrate that it passes strict scrutiny – that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The state must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to that solution. This is a demanding standard. It is rare that a regulation restricting speech because of its content will ever be permissible. California cannot meet that standard. ...[I]t acknowledges that it cannot show a **direct causal link** between video games and harm to minors. ...[California] bears the risk of uncertainty, **ambiguous proof will not suffice**. *Brown v. Entmt. Merch. Ass'n.*, 564 U.S. 786, 799-800 (2011). (Citations omitted, emphasis added).

Because the state can prevail only if it satisfies strict scrutiny, there is a strong likelihood of success on the merits. The loss of First Amendment freedoms is presumed to constitute irreperable harm, and irreparable injury establishes that there is no adequate remedy at law.

Further, because compliance with the First Amendment always serves the common good, the public interest also turns on the merits. *Wil-Kar,* supra.

Indeed, the Supreme Court affirmed the grant of an injunction precisely because it served to hold the government to its constitutional burden of proof:

> The reasoning of *Playboy Entertainment Group*, and the holdings and force of our precedents require us to affirm the preliminary injunction. To do otherwise would be to do less than the First Amendment commands. "The starch of our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." ... By allowing the preliminary injunction to stand and remanding for trial, **we require the Government to shoulder its full burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.** *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 670-71 (2004) (Emphasis added).

Petitioner is entitled to a stay to litigate the First Amendment protection *vel non* of the presumptively protected expressive materials seized from his home and prematurely admitted at trial. *McKinney v. Alabama,* supra, 424 U.S. at 676. "Since the public interest is affected in the process of finding any matter not protected by the First Amendment, the [state] is obligated to assume its burden of presenting a *prima facie* case, **default or not.**" *I, A Woman,* at 115 (Emphasis added).

Threat of Sanctions

The State sought sanction[7] against future filings seeking First Amendment relief. 2004AP1497, March 8, 2006. It argued that all First Amendment claims have been "fully litigated and found to be, at every turn, without merit." *Id, at* ¶13, citing *Dressler v. McCaughtry,* 237 F.3d 908, 912 (7th Cir. 2001). It asserted that §2254 habeas corpus denial constitutes "law of the case."

Its specious arguments to this court are contrary to the facts of record; are legally false; and serve to mislead this court to permit the state to shirk its settled First Amendment duty.

[7] *State v. Casteel,* 2001 WI App. 188, ¶25

"The assumption that defense of a criminal conviction will generally assure ample vindication of [First Amendment] rights is unfounded." *Dombrowski v. Pfister*, supra, at 486.

Indeed, the Court explained that *Freedman* was decided precisely "because the regulatory scheme did not sufficiently assure exhibitors a prompt judicial resolution of First Amendment claims," noting the constitutional imperative in "immediate resolution of such claims." *Id,* at 489. Speech must be unencumbered until the State comes forward with sufficient proof to justify its inhibition. *Speiser v. Randall*, supra, 357 U.S. at 524-529. The First Amendment presumption of expressive materials "is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding." *Fort Wayne Books v. Indiana*, supra, 489 at 63-68. There has never been an adversary proceeding in this case.

The state fails the rule that its pleadings are "well grounded in fact and warranted by existing law" and "is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." §802.05(1), Stats.

The *I, A Woman* Court specifically noted that "It is obvious that a constitutional problem is presented" if a criminal case were to go to trial – or appeal – prior to *Freedman* compliance. At 115-116. After *I, A Woman,* Wisconsin's enforcement scheme must:

> *** place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require 'prompt judicial review' – a final judicial determination on the merits within a brief period – to prevent the administrative decision of the censor from achieving an effect of finality; and limit preservation of the *status quo* for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. *I, A Woman*, at 114 (Quoting *Blount v. Rizzi,* supra, 400 U.S. at 417).

Further, federal habeas proceedings – always defendant initiated, and available only after exhaustion of direct appeal – can never satisfy *Freedman's* requirement of "prompt" judicial

review, and are by definition "too little and too late." *Freedman,* at 57. This court itself explained that a "'brief' period within which all judicial avenues are exhausted would be an oxymoron." *City News & Novelty, Inc. v. City of Waukesha,* 231 Wis.2d 93, 115 (Wis.App. 1999). After *Littleton v. Z.J. Gifts*, supra, *Freedman* compliance and "prompt judicial review" and a final decision on the merits is compulsory.

The state's "law of the case" argument to this court is equally specious. "A void judgement cannot be validated by consent, ratification, waiver, or estoppel." *Neylan v. Vorwald,* supra, 124 Wis.2d at 97. While a decision on a legal issue *by an appellate court* establishes the law of the case which must be followed in all subsequent proceedings, see *State v. Stuart,* 205 WI 47 ¶1, no "appellate court" ever addressed the First and Fourteenth Amendment claims. On direct appeal this court specifically declined to address the issue. While the U.S. Supreme Court enjoys appellate jurisdiction over state courts by virtue of the Supremacy Clause, the Seventh Circuit itself explained that federal district and circuit courts have no appellate jurisdiciton over state criminal trials whatsoever. *U.S. ex rel Lawrence v. Woods*, supra, 432 F.2d at 1075-76. Federal habeas corpus denial is not an "appellate" decision that establishes law of the case, nor overrules the Wisconsin and United States Supreme Court binding authority of *Winters v. New York, Speiser v. Randall, Freedman v. Maryland, State v. Voshart, State v. I, A Woman, Neylan v. Vorwald* and *U.S. v. Playboy*, supra.

Significantly, threatening sanctions for litigating vindication of First Amendement rights has been repeatedly condemned as unconstitutional. See *NAACP v.Button,* 371 U.S. 415, 429-433 (1963) (Threatening NAACP with legal sanctions for "soliciting" negro clients to vindicate civil rights violates First Amendment); *Dombrowski v. Pfister,* 380 U.S. 479, 482-498 (1965) (Where Southern Conference Legal Fund, who represented negroes for vindication of First

Amendment rights was threatened, immediate injunctive relief required). A prior restraint exists whenever any color-of-law action is threatened against published materials that "do not follow judicial determinations that such publications may lawfuly be banned." *Bantam Books v. Sullivan,* supra, 372 U.S. at 68-70.

Because any threat of sanctions for seeking First Amendment relief is itself an ongoing prior restraint, the issue is not moot and requires relief. *Tory v. Cochran*, 544 U.S. 734, 737-79 (2005) (Since the injunction continues to significantly restrain petitioner's speech, the ongoing federal conroversy warrants relief.)

The state's arguments to this court that all First Amendment claims have been fully litigated; that the Seventh Circuit's habeas denial constitutes "law of the case;" and its threat of sanctions lack merit because they are factually and legally false, and unconstitutionally permit the state to shirk its First Amedment onus. The state, and this court, are bound by the constitutional holdings of the United States and Wisconsin Supreme Courts.

Conclusion and Prayer for Relief

This petition asks this court for a straightforward application of the binding, Supreme Court constitutional holdings of *Winters v. New York, Speiser v. Randall, Freedman v. Maryland, State v. Voshart, State v. I, A Woman, Neylan v. Vorwald, U.S. v. Playboy*, and *Ashcroft v. A.C.L.U.*, supra.

"[A]n invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First-Amendment protection." *State v. I, A Woman*, 53 Wis.2d at 112-113. The First Amendment presumption of the materials at issue are not rebutted until the claimed justification for seizing books or other

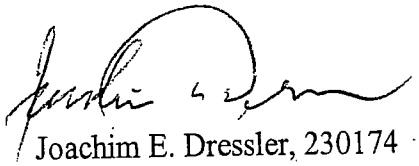
publications is properly established in an adversary proceeding. *Fort Wayne Books v. Indiana*, 489 U.S. at 63-68 (1989). The state has never sought, and there has never been an adversary hearing in this case.

Mandamus is a remedy to compel public officers to perform a duty that they are legally obligated to perform. "Since the public interest is affected in the process of finding any matter not protected by the First Amendment, the [state] is obligated to assume its burden of presenting a *prima facie* case, default or not." *I, A Woman.* at 115.

For the reasons and authorities presented above, petitioner prays that this court grant a stay of proceedings in *State v. Joachim Dressler,* Racine Case Number 1990CF584, and remand to the Racine Circuit Court with an order to convene an adversary hearing, and provide for expedited "prompt judicial review" pursuant to *Freedman v. Maryland*, *State v. I, A Woman, Part II, McKinney v. Alabama,* and *Littleton v. Z.J. Gifts,* supra.

Pursuant to §809.51(4), Wis. Stats, petitioner certifies that this petition is produced in proportional serif font and contains 6893 words.

Respectfully submitted at Waupun, Wisconsin, June 4, 2018.



Joachim E. Dressler, 230174
Petitioner *pro se*
Waupun Correctional Institution
Waupun, Wisconsin 53963-0351

Burleigh Elementary School and observed that all three bags were identical in physical appearance when size, shape, thickness, consistency, tear marks, folds, seams, color were compared;

34) Your affiant states that Agent Luell reported that on 7-27-90, he personally spoke with Craig Cummings, who stated that he is a salesman for the Frontier Bag Company of Granview, Missouri, and that he was the salesperson that sold the above mentioned yellow plastic bags to the Burleigh Elementary School of Brookfield, Wisconsin; he further stated to the Special Agent that when he checked the company records, he observed that the only sale of yellow plastic bags to Wisconsin was his personal sale of bags to the Burleigh Elementary School on or about 10-19-89;

35) Your affiant states that he personally spoke with Albert Luetzow, owner of Luetzow Industries, South Milwaukee, Wisconsin, on 6-30-90 at the Milwaukee County Medical Examiner's Office, Milwaukee, Wisconsin, who stated that he is a major manufacturer of plastic bags and is knowledgeable with the industry and is familiar with the products, manufacturing processes, and distribution of plastic bags; Albert Luetzow examined the yellow plastic bag that the James Madden torso was found in and stated that there is nobody in the midwest area that manufactures or distributes this style of plastic bag and that the bag is not common to the midwest area of the country;

36) Your affiant states that Special Agent Luell reports that he personally spoke with Joachim Dressler on 7-10-90 at the Dressler residence at which time Joachim Dressler stated that he was home alone on the night of 6-27-90 and that his wife was in the hospital and his children were out of town; Joachim Dressler further stated that he did have yellow plastic bags at the house but had not seen them for several months; he further stated to the Agent that no one had been to his residence of the night of the disappearance of James Madden;

37) Your affiant states that Special Agent Luell reports that he personally spoke with Kathleen Dressler on 7-26-90 at the residence of Cheryl Waffenschmit whereupon she stated that her husband, Joechim Dressler, has numerous video tapes dipicting what she believed to be actual murder, torture and mutilation; that he also has a complete set of three video tapes entitled "the Faces of

Death" that she believes to depict actual murders of human beings;

38) Your affiant states that in his experience and training and common knowledge, it would be reasonable for a perpetrator of the above described offence to use a motor vehicle in order to transport the body parts to the locations where those parts were found due to the distances and the fact that the body parts were located near or adjacent to highways; and that evidence of that transport of body parts could reasonable be recovered from said vehicle; that it is common that incriminating evidence such as clothing and personal property of a victim is hidden, buried or otherwise concealed by a perpretrator in or around buildings, outbuildings, garages, or areas under his control in an attempt to conceal said evidence from discovery by others;

39) Your affiant further states that the clothing believed to be worn by James Madden and the personal items believed to have been carried by James Madden have not been located;

40) Your affiant relies upon the statements of Blair Cassell, Allen Bishop, Mary Madden, James L. Madden, Cheryl Waffenschmit, Mary Hauke, Kathleen Dressler, Craig Cummings in asmuch as they are adult citizen eyewitnesses and reported that information that they had personal knowledge of; Your affiant relies upon the statements of Special Agent Richard Luell, Sgt. Vyvyan, Dr. L.T. Johnson, Dr. Jeffrey Jentzen, Albert Luetzow, and Michael Camp in asmuch as they are part of an official law enforcement investigation or are statements based upon information of which they had personal or professional knowledge.

WHEREFORE, YOUR AFFIANT prays that a search warrant be issued directing law enforcement officers to enter upon and search the lands, residence, buildings and vehicles found on the property, or belonging to either Kathleen or Joachim Dressler, said property located at 11739 West

inscribed, blue polo shirt;

3. Personal possessions of James Madden including but not limited to a red plastic-type folder/clipboard, brochures with "Citizen for a Better Evironment" imprinted on them, various personal checks made payable to "Citizens for a Better Environment", Plastic ID card in the name of James Madden, Wallet or other personal identification or items with the name of James Madden or "Citizens for a Better Environment" written or printed on them;

4. Yellow plastic bags of approximately 33 gal. size

5. Knives, scalpels, cutting tools, saws or any other devices capable of cutting or sawing human tissue or bone;

6. Firearms, ammunition;

7. Written materials, photographs, video tapes, or other materials including but not limited to sado-masochism pornography, "snuff films" depicting torture or death scenes;

8. Ropes, binding materials, or any other similar type devices capable of binding hands or feet;

which things were used in the commission of, or may constitute evidence of a crime, to-wit: FIRST DEGREE INTENTIONAL HOMICIDE, committed in violation of section 940.01(1) of the Wisconsin Statutes and pray that a search warrant be issued to search said premises, curtilage, and surrounding lands and vehicles for said property or evidence.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search the said premises, curtilage, and surrounding lands and vehicles, using all reasonable and necessary means, for said things, and if the same or any portion thereof are found, to bring the same, and return this warrant within 48 hours to the Clerk of Courts, to be dealt with according to law.

Dated July 28, 1990.

Stephen A. Simanek
Judge of Circuit Court
Branch 2

When the District Attorney talks about identification, the basis for that identification again is we're looking for a person who has this propensity, and she cites something from some publication and a little bit by the pathologist, who I don't know whether he's an expert in homosexual killings or not. I don't know how many of those occur in this jurisdiction, but I don't think counsel's argument and the fact that she has little evidence allows any of this in.

THE COURT: Thank you. We'll take about a ten-minute recess here. I am going to read over the facts and the law again in the Evers case, and I also want to take a look at the items that Mrs. Weber wants me to take a look at. I will take those into chambers with me and be back in about ten minutes.

MR. MATHIE: Judge, I'd also ask you to consider State v. Friedrich.

THE COURT: All right.

MR. MATHIE: And the Spraggin case. I will give you the cite to that.

THE COURT: I have those cases in mind, and also I have them.

MR. MATHIE: Okay. Thank you.

(Recess had)

THE COURT: All right. The record will show

that the appearances continue as they were, that we have been in recess for about fifteen or twenty minutes, that in chambers I had a chance to review the materials presented by the State and in the briefcase, on the placards and the six paperback books that were presented, and also I have read some of the cases, primarily the Evers case that was referred to by the defense. The issue is whether or not the State should be allowed to offer information into the record that consists of video tapes, and as referred to in the defendant's motion, collected published materials that some of which were mentioned orally on the record and others which I was able to review. The issue is whether or not the evidence is relevant, number one; whether or not the State's argument that this is Whitty type evidence, evidence of other acts or wrongs, applies here; and whether or not that analysis leads to the admission of this type of evidence.

It's interesting to note that among the offered testimony of the State would be the testimony of an expert who in his opinion, as I understand the offer of proof in a statement, would rely on having access to these materials, is that not correct?

MS. WEBER: He hasn't had access and said he didn't need access. It's the types of materials that go to the conclusions.

THE COURT: So he's aware of the types of

that's the test, whether it's prejudicial or even harmful to the defendant, but whether or not it's probative value is more than the prejudicial effect and that the probative value should come into the record.

I also recognize the statement of the State, and I am inclined to agree with it based upon the facts which have been orally stated as offers of proof on the record. The State's case is in fact by agreement by the defense a weak case. It's a circumstantial case, and that, therefore, this type of evidence is important for the presentation of the State's case, and whether the jury accepts it is not up to me, it's up to them, but it's important to the State's case in order for them to meet their burden of proof in their mind, and therefore, I think that's a factor to be considered. I think without the evidence it's clear that the State's case would in fact be significantly weakened, and that is also, as I have stated before, evidence which is relevant to the issues of intent, plan, motive, method of operation and so on. Without reaching the elements that the parties have discussed in their arguments with respect to absence of mistake and so on, it also goes, I think, to identity based upon the state of mind of the defendant.

At any rate, dealing with the issue whether or not the prejudicial effect far outweighs the probative value I am satisfied that the probative value is sufficient as to

act is--yes, in my mind one of the ways that this comes into the statute is that it's an act on his part to in fact collect materials, to have them in his possession and that these materials collectively give evidence of a method of operation, a thought, a plan on his part and so on.

MR. MATHIE: Is that the only act that the Court is relying upon as a prior act?

THE COURT: Well, there's more than that in the record obviously. At this point there's admissions apparently to police officers of his homosexuality. That's come into the record in this motion hearing. So that's part of the record in my state of mind when reviewing the record as a whole.

MR. MATHIE: With respect to the materials that are at issue on the motion, is the only prior act that the Court's relying upon the possession of those materials?

THE COURT: Well, certainly as the statute defines the terms, there's no crime here. We have all agreed to that. The State hasn't suggested there's a crime in the possession of these materials. Other wrongs, I don't know. I guess I don't want to get into litigation whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession, although again that's a matter of state and of national import, so I am not making any judgment as to

whether or not those are crimes to possess the materials. I don't think that I am in a position to do that. I am not being asked to do that.

MR. MATHIE: I am not wondering whether they're crimes, wrongs or acts. I am wondering is the only act or crime or wrong, whatever you define it, is the possession of those materials, is that what the Court's ruling is?

THE COURT: Yes.

MS. WEBER: Possession being all encompassing--

THE COURT: Yeah.

MS. WEBER: --in terms of I collected it, I cut it out, I put it all together in one place, I viewed it. Obviously that's an attempt, I am not sure why, to put it into one word. I think that act of possession connotes a larger forum.

MR. MATHIE: Has the Court made any finding as to the time of this collection in order to come to its ruling?

THE COURT: I can't obviously from those materials in terms of the amount of time over which it was compiled.

MR. MATHIE: Or when it was compiled.

THE COURT: There's nothing in the record

obviously to allow me to do that.

MR. MATHIE: Or when it was last compiled.

THE COURT: I don't know. It's obvious though it was in his possession based upon the facts that there was a search warrant at the home and during that search warrant execution these items were recovered. I can say I looked at some of those materials, and it's clear there are items clipped from news magazines. It's clear-- I didn't look for dates. There may be dates on some of those things in the briefcase. I didn't look for dates. I am sure the books there have dates of publication in them. There are magazines. I don't know whether the magazines which show male homosexuality had dates. I know there's a number of photographs with it looks like summer activities, a lot of young men, as Mrs. Weber referred to, in swimsuits. I'd say as I look at those photographs they appear somewhat dated, but it doesn't tell me when or what circumstances they came into the possession of the defendant.

MR. MATHIE: Okay. And the Court has no idea what the circumstances are that these things came into the defendant's possession.

THE COURT: Quite obviously there's nothing in the record that tells me that.

MR. MATHIE: Okay. And is the Court ruling that all of this can come in in the State's case in chief?

whether or not this was a case of homosexual overkill. If only that information came into the record regarding the conduct of the defendant with respect to possessing materials and the characterization of this crime by an expert, it's clear, I think, the State could argue from inference that there was a homosexuality on the part of the defendant. He possessed those materials. They clearly depict homosexual activity. And it's also clear, I think, that an expert would testify that evidence in his mind and his possession would, in fact, support his opinion that this would be an act of homosexual overkill. I think that from that and that alone it's safe to inquire of the jurors with respect to the whole topic of homosexuality even if the Court does not allow the State to produce that other evidence which is the subject of the written motion most recently filed.

So that again the Court will not modify its rulings on the materials in the briefcase and the testimony of Dr. Jentzen. Those decisions and rulings by the Court will stand. We'll take up the other Whitty evidence that the State wishes to offer prior to opening statements and we'll proceed at this point with the voir dire process and the jury selection. Your motions are noted for the record and are denied.

With respect to the jury selection process, let me just run by that process briefly. When we go into the courtroom we will first of all have all the jurors stand to be sworn. We will then call the roll. I'll call it myself to make sure all of the jurors are in the correct seats so we all have them right in our seating charts. Obviously that's important. Then I'll ask that the case be introduced by having Mrs. Weber first introduce herself, the members of her office, her witnesses and to read the Information indicating to the jurors what the charge

liked--in these pictures that he collected you will see that he liked bare chests, bathing suits and what I am going to call, for lack of a more sensitive term, pictures of men with bulges in their pants. This was all part of one collection. Obviously his friends didn't know about and weren't familiar with these things. It provides a motive for an otherwise inexplainable and unexplainable event. Who would do this and why? A man who's fascinated by this sort of thing, but by all outward appearances is Mr. Neighbor, husband and father.

Dr. Jentzen provides other evidence that you will hear. He will testify that in the area of pathology, the study of death, the forensics of it and death and the cause of death, and with that forensic pathology that's bringing the legal part of the investigation of death into cause of death, he has seen, he knows of, and there is literature to support a concept called homosexual overkill. The overkill part of it is the type of injuries you see to the body of James Madden. It's more than is necessary to cause death and suggests some other motivation, and this is consistent with deaths caused by homosexuals in their panic or rage or whatever motivates this type of death.

Jeff Jentzen will testify that based on the stomach contents, Jim Madden died shortly after Marilyn Meyer saw him because if he last ate at 4:00 or 4:30, that

Wisconsin Supreme Court
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688

Dear Clerk of Court:

July 23, 2018

Enclosed for filing with the Wisconsin Supreme Court are three copies of a Petition for a Writ of Mandamus and a Stay, with Exhibits, pursuant to §809.71 Wis. Stats.

I have also enclosed a Petition for Waiver of Costs/Fees – Affidavit of Indigency.

Please note that a petition for a Writ of Mandamus is not a form of prisoner litigation that is subject to the Prison Litigation Reform Act (PLRA). *Martin v. United States,* 965 F.3d 853, 854 (7th Cir. 1996).

By my signature, I certify that a copy of this Petition has been placed in the United States Mail addressed to:

Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, Wisconsin 53403

In the event there are any filing deficiencies, please notify me so that I may promptly correct them.

Respectfully submitted,

Joachim E. Dressler, 230174
Petitioner *pro se*
Waupun Correctional Institution
P.O. Box 351
Waupun, Wisconsin 53963-0351

cc: Racine County Clerk of Court

THE SUPREME COURT OF WISCONSIN

State of Wisconsin ex rel.
JOACHIM DRESSLER,
Petitioner,

v.

Case No: _____
Ct. App. No: 2018AP001030W
Racine Case: 1990CF584

RACINE COUNTY CIRCUIT COURT,
RACINE COUNTY DISTRICT ATTORNEY, and
WISCONSIN COURT OF APPEALS, DIST II,
Respondents.

PETITION For a WRIT OF MANDAMUS and STAY
Ch. 783 and §809.71, Wis. Stats.

Joachim Dressler petitions The Wisconsin Supreme Court for a Supervisory Writ Of Mandamus to compel the Racine District Attorney and the Racine Circuit Court for a stay, and to convene an adversary hearing and immediate appellate review pursuant to *Freedman v. Maryland* [1], *State v. I, A Woman* [2], *McKinney v. Alabama* [3], and *Littleton v. Z. J. Gifts* [4].

[1] Infra, *Freedman v. Maryland,* 380 U.S. 51 (1965).
[2] Infra, *State v. I, A Woman-Part II,* 53 Wis.2d 102 (Wis. 1971).
[3] Infra, *McKinney v. Alabama,* 424 U.S. 669 (1976).
[4] Infra, *City of Littleton, Colorado. v. Z.J. Gifts D-4,* 541 U.S. 774 (2004).

A Supervisory Writ of Mandamus Is Required To Compel Compliance With This Court's Binding Mandates

> [B]ecause **only** a judicial determination in an adversary hearing ensures the necessary sensitivity to freedom of expression, **only** a procedure **requiring** a judicial determination suffices to impose a **valid** final restraint. *Freedman v. Maryland,* 380 U.S. 51, 58 (1965) (Emphasis added).

Fully twenty years before the facts of this case this Court applied *Freedman's* First Amendment "strict procedural safeguards" and declared that Wisconsin's enforcement scheme must:

> *** place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require 'prompt judicial review' – a final judicial determination on the merits within a brief period – to prevent the administrative decision of the censor from achieving an effect of finality; and limit preservation of the *status quo* for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. *State v. I, A Woman-Part II,* 53 Wis.2d 102, 114 (Wis. 1971) (Quoting *Blount v. Rizzi,* 400 U.S. 410, 417 (1971)).

This Court does not issue advisory constitutional opinions. It specifically warned all Wisconsin courts not to enter any interlocutory orders that admit First Amendment-protected expressive materials into criminal evidence – where they could have evidentiary weight – before the state has proven them to be unprotected in an adversary proceeding. *I, A Woman.* at 112-120.

As detailed below, when a sole Racine Circuit Court declares: "**I guess I don't want to get into litigation whether or not some of that material constitutes pornographic materials that might be prohibited in terms of its possession, although again that's a matter of state and national import**" – and the Wisconsin Court of Appeals at all times repeatedly declines *any* First Amendment review, then this Court should grant a Supervisory Writ of Mandamus to compel compliance with this Court's unreversed binding constitutional mandates. If lower Wisconsin courts may simply disregard Supreme Court decisions interpreting the United States and Wisconsin Constitution, then a "Supreme" Court's role is rendered superfluous.

Office of the Clerk
Wisconsin Supreme Court
PO Box 1688
Madison, Wisconsin 53701-1688

St. ex rel Joachim Dressler v. Racine Circuit Court et al.
Appeal No. 2018AP001030 W

July 27, 2818

Dear Clerk

Please reference your Form AP-8040 to me, dated July 24, 2018, that acknowledged receipt of a "Statement in Support of the Petition for Review," citing §§ 808.10 and 809.62, Stats.

Please note that the petition I filed specifically states that it is a "Petition for a WRIT OF MANDAMUS and STAY". and that it was filed pursuant to §809.71, Stats.

I specifically did not seek certiorari review pursuant to §809.62, Stats., and therefore I did not meet or address the criteria and form §809.62 requires. Rather, my petition for a Supervisory Writ pursuant to §809.71 that I filed meets with the criteria of §809.71, and as required, I first sought a supervisory writ in the Court of Appeals and attached the court's ruling.

I request that you file my Petition for a Supervisory Writ of Mandamus and Stay under the statute that I submitted it under, and conformed it to meet - §809.71, Wis. Stats. I believe that I have complied in all respects to that statute and do not wish risking dismissal for failing to comply with §809.62, a statute I specifically did not file under.

Please accept my thank you, in advance, for your prompt attention to this matter and I look forward to hearing from you.

Joachim Dressler 230174
Petitioner pro se
Waupun Correctional Institution
PO Box 351
Waupun, Wisconsin 53963-0351

App. G