

.001(8)(Supp. 1990). In addition, Florida's obscenity statutes are intended to have the broadest, constitutional scope. See FLA. STAT. ANN. §847.001(7)(Supp. 1990. States may outlaw certain portrayals of sexual conduct and nudity if they constitute "hardcore pornography." See Jenkins v. Georgia, 417 U.S. 153(1974). In Jenkins, the Supreme Court reversed a conviction for distribution of the film "Carnal Knowledge" which contained scenes of a woman with a bare midriff and several lovemaking sessions. Id. at 161. This depiction was held by the Court to not be within the hardcore category. As noted by the Court,

While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards. Id. at 161.

nudity alone not obscene

In Miller, the Supreme Court gave two examples of the type of conduct subject to state regulation: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation,

excretory functions, and lewd exhibition of the genitals."

Id., 413 U.S. at 25. The conduct described in the Nasty recording is certainly within the scope of the Florida statutes. The state law, of course, is not dispositive on the question of whether this particular community would be patently offended, but it is entitled to significant weight. Smith, 431 U.S. at 307-08.

While the above facts are sufficient to support a finding that this material is patently offensive, there are additional considerations that support such a finding. First, the Nasty lyrics contain what are commonly known as "dirty words" and depictions of female abuse and violence. It is likely that these offensive descriptions would not of themselves be sufficient to find the recording obscene. See, e.g., American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323(7th Cir. 1985)(sexual subordination of women); New Jersey v. Rosenfeld, 62 N.J. 594; 303 A.2d 889(Sup. Ct. 1973)(after remand for reconsideration by U.S. Supreme Court in light of Cohen v. California, state court acknowledged that the use of public profanity, if not rising to the level of fighting words, was constitutionally protected). When these terms are used with explicit sexual descriptions, however, they may be considered on the issue of patent offensiveness. Secondly, the material here is music which can certainly be more intrusive to the unwilling listener than other forms of communication. Unlike a video tape, a book, or a periodical, music must be played to be

experienced. A person can sit in public and look at an obscene magazine without unduly intruding upon another's privacy; but, even according to the plaintiffs' testimony, music is made to be played and listened to. A person laying on a public beach, sitting in a public park, walking down the street, or sitting in his automobile waiting for the light to change is, in a sense, a captive audience. While the law does require citizens to avert their ears when speech is merely offensive, they do not have an obligation to buy and use ear plugs in public if the state legislature has chosen to protect them from obscenity.

Finally, in determining whether the Nasty recording is patently offensive, it is again proper to consider the plaintiffs' commercial exploitation of sex to promote sales. As noted by the Supreme Court in Ginzburg v. United States, 383 U.S. 463, 470 (1966), representations of a publication as erotically arousing "would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material." Such is the case here, as already discussed. Again, while this factor has not been given great weight, it is entitled to consideration.

THE THIRD MILLER TEST: SOCIAL VALUE

The final factor under Miller is whether the Nasty recording, taken as a whole, lacks serious literary, artistic, political, or scientific value. This factor is not

measured by community standards. The proper inquiry is whether a reasonable person would find serious social value in the material at issue. See Pope v. Illinois, ___ U.S. ___, 107 S.Ct. 1918, 1921 (1987). The plaintiffs correctly note that the value of a work can pass muster under Miller if it has serious merit, measured objectively, even if a majority of the community would not agree.

As a preliminary matter, it is again important to note what this case is not about. Neither the "Rap" or "Hip-Hop" musical genres are on trial. The narrow issue before this court is whether the recording entitled As Nasty As They Wanna Be is legally obscene.

This is also not a case about whether the group 2 Live Crew or any of its other music is obscene. The third element of the Miller test focuses upon the social value of the particular work, not its creators. The fact that individuals of whom we approve hold objectionable ideas or that people of whom we do not approve hold worthy ideas does not affect judicial review of the value of the ideas themselves.

The Phillistines are not always wrong, nor are the guardians of the First Amendment always right.

This court must examine the Nasty recording for its content; the inquiry is objective, not ad hominem.

Finally, this court's role is not to serve as a censor or an art and music critic. If the Nasty recording has serious literary, artistic, political, or scientific value, it is irrelevant that the work is not stylish, tasteful, or even popular.

*stylish, tasteful or
Pop not relevant
value*

The plaintiffs themselves testified that neither their music nor their lyrics were created to convey a political message.

The only witness testifying at trial that there was political content in the Nasty recording was Carlton Long, who was qualified as an expert on the culture of black Americans. This witness first stated that the recording was political because the 2 Live Crew, as a group of black Americans, used this medium to express themselves. While it is doubtless true that Nasty is a product of the group's background, including their heritage as black Americans, this fact does not convert whatever they say, or sing, into political speech. Professor Long also testified that the following passages from the recording contained political content: a four sentence phrase in the song "Dirty Nursery Rhymes" about Abraham Lincoln, the word "man" in the Georgie Porgie portion of the same song, and the use of the device of "boasting" to stress one's manhood. Even giving these isolated lyrics the meaning attributed by the expert, they are not sufficient in number or significance to give the Nasty recording, as a whole, any serious political value.

In terms of science, Professor Long also suggested that there is cultural content in 2 Live Crew's recording which rises to the level of serious sociological value. According to this witness, white Americans "hear" the Nasty recording in a different way than black Americans because of their different frames of references. Long identifies three

cultural devices evident in the work here: "call and response", "doing the dozens", and "boasting". The court finds none of these arguments persuasive.

The only examples of "call and response" in the Nasty recording are portions where males and females yell, in repetitive verse, "Tastes Great--Less Filling" and, in another song, assail campus Greek-letter group. The phrases alone have no significant artistic merit nor are they examples of black American culture. In the case of "Tastes Great--Less Filling", this is merely a phrase lifted from a beer commercial.

The device of "doing the dozens" is a word game composed of a series of insults escalating in their satirical content. The "boasting" device is a way for persons to overstate their virtues such as sexual prowess.

While this court does not doubt that both "boasting" and "doing the dozens" are found in the culture of black Americans, these devices are also found in other cultures. "Doing the dozens" is commonly seen in adolescents, especially boys, of all races. "Boasting" seems to be part of the universal human condition.

Professor Long also cited to several different examples of literary devices such as rhyme and allusion which appear in Nasty, and points to the song title "Dick Almighty" as an example of the literary device of personification. This, of course, is nonsense regardless of the expert's credentials. "A quotation from Voltaire in the fly leaf of a book", noted

the Supreme Court in Miller, "will not constitutionally redeem an otherwise obscene publication." 413 U.S. at 25 n.7 (quoting Kois v. Wisconsin, 408 U.S. 229, 231 (1972)).

Prior to Miller, the government had to demonstrate that a work was utterly without redeeming social value to be judged obscene. See Memoirs, 383 U.S. at 419. The present test is less stringent, only requiring proof of an absence of serious social worth. This leads to the plaintiffs' strongest argument: that the Nasty recording has serious artistic value. This category of social worth is broad enough to include the value contributed by the political, literary, and cultural aspects of the particular work.

The plaintiffs stress that the Nasty recording has value as comedy and satire. Certainly, people can and do laugh at obscenity. The plaintiffs point to the audience reaction at trial when the subject recording was played in open court. The audience giggled initially, but the court observed that after the initial titillation, it fell silent.

In a society where obscenity is forbidden, it is human nature to want taste forbidden fruit. It is quite another thing to say that this aspect of humanity forms the basis for finding that Nasty has serious artistic value. Furthermore, laughter can express much more than enjoyment and entertainment. It is also a means of hiding embarrassment, concealing shame, and releasing tension. The fact that laughter was only heard at the time that the first song of the tape was played is probative on what the

audience's outbursts really meant. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art.

The Nasty recording is not comedy, but is first and foremost, music. Initially, it would appear very difficult to find a musical work obscene. As noted by the American Civil Liberties Union, the meaning of music is subjective and subject only to the limits of the listener's imagination. See ACLU Brief at 3.

Music nevertheless is not exempt from a state's obscenity statutes. Musical works are obscene if they meet the Miller test. Certainly it would be possible to compose an obscene oratorio or opera and it has probably been done.

The plaintiffs claim that this case is novel since it seeks to determine whether music can be obscene. The particular work here, although belonging to the general category of music, however, is to be distinguished from a purely instrumental work, or other more common recordings with a fairly equal emphasis on music and lyrics. The focus of the Nasty recording is predominately on the lyrics. Expert testimony at trial indicates that a central characteristic of "rap" music is its emphasis on the verbal message. Rhythm is stressed over melody, not for its own sake, but to accentuate the words of the song. The pounding beat and the presence of near continuous lyrics support this.

*meaning of music
is subject only to
the limits of
listener's
imagination*

conclusion. 2 Live Crew's music is explicitly clear as to its message. Although music and lyrics must be considered jointly, it does not significantly alter the message of the Nasty recording to reduce it to a written transcription. The Supreme Court's decision in Kaplan v. California, 413 U.S. 115(1973), is applicable here. The Court held that an expression by words alone, albeit in a written form, can be legally obscene even if there are no accompanying pictorial depictions. Id. at 118-119. The case at bar is an extension of the law to the extent that words, as lyrics in music, can be obscene.

The key to judging the Nasty recording is to consider it as a whole. 2 Live Crew has "borrowed" components called "riffs" from other artists. Taking the work in its entirety, the several riffs do not lift Nasty to the level of a serious artistic work. Once the riffs are removed, all that remains is the rhythm and the explicit sexual lyrics which are utterly without any redeeming social value.

Obscenity is not a required element for socially valuable "rap" or "hip-hop" music. 2 Live Crew itself proved this point by the creation of its Clean recording.

The court is reminded of a story by Charles Baudelaire, a poet who also had problems with the civil authorities of his day. In My Heart Laid Bare (Vanguard Press 1951), at pages 203-04, he writes:

All the imbeciles of the Bourgeoisie who intentionally use the words, "immoral", "immorality", "morality in art" and other such

stupid expressions remind me of Louise Villdieu, a five-franc whore who once went with me to the Louvre. She has never been there before, and began to blush and cover her face with her hands, repeatedly plucking at my sleeve and asking me, as we stood before deathless statutes and pictures, how such indecencies could be flaunted in public.

One of the plaintiffs' expert witnesses testified at trial that material is art if it causes a reaction in the audience perceiving it. If that reaction is an appeal to the prurient interest in a patently offensive way, and if the material lacks serious literary, artistic, political or scientific, the law does not call that art--it calls it obscenity and when so proven beyond a reasonable doubt is a crime in Florida.

OBSCENITY? YES!

The recording As Nasty As They Wanna Be, taken as a whole, is legally obscene.

The court so finds by a preponderance of the evidence although the standard of proof presents no real issue.

The court also finds As Nasty As They Wanna Be to be legally obscene under the Miller test by clear and convincing evidence, which standard the plaintiffs maintain is the correct burden of proof.

PRIOR RESTRAINT AND PROCEDURAL DUE PROCESS

A prior restraint can be generally defined as any

condition imposed by the government on the publication of speech. See, e.g., Times Film Corp. v. City of Chicago, 365 U.S. 43, 55 n.2(1961)(Warren, C.J., dissenting). Such a limitation can come in varying forms including permit requirements, licensing taxes, registration, prepublication submission of materials, seizures, and judicial injunctions. The distinguishing characteristic of a prior restraint is that the condition vests power in a nonjudicial official to make the final decision as to whether speech will be permitted at all or in what form. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556-57(1975); Freedman v. Maryland, 380 U.S. 51, 58(1965).

Prior restraints are repugnant to the right of free speech. The First Amendment prohibits this type of regulation to minimize the risk of governmental censorship. Many forms of speech are of value because of the urgency and immediacy of the idea expressed. Even if a censor ultimately allows publication, significant delay in the decisionmaking process can destroy the fleeting value of the speech. See, e.g., Southeastern Promotions, 420 U.S. at 562(use of a theater). If speech is delayed or denied, the rights of both the speaker and his audience are impaired and society is the ultimate "loser." See Dombrowski v. Pfister, 380 U.S. 479, 486(1965); also see Marcus v. Search Warrants of Property, 367 U.S. 717, 736(1961); Quantity of Copies of Books v. Kansas, 378 U.S. 206, 214(1964). Furthermore, if allowed, prior restraints necessarily legitimize the

existence of a censor. The danger is that officials, even if originally well-intentioned, may be driven to suppress an ever growing amount of speech.

For all of these reasons, the First Amendment casts a jaundiced eye on any form of prior restraint. But, as with the right of free speech itself, this prohibition is not absolute. A limitation on speech prior to its publication may withstand constitutional scrutiny in "exceptional cases." Near v. Minnesota, 283 U.S. 697, 715-16(1931); also see Southeastern Promotions, 420 U.S. at 559. Included within this category are all types of speech unprotected by the Constitution such as obscenity. Near, 283 U.S. at 716.

The fact that the government may prevent obscene materials from ever reaching their intended audience assumes that the issue of obscenity has already been decided. It is the courts and not nonjudicial officials who must decide whether a specific work is obscene. See United States v. Thirty-Seven Photographs, 402 U.S. 363, 370-71(1971).

Interpreting obscenity laws requires "appraisal of facts, the exercise of judgment, and the formation of an opinion"; in other words, the exercise of judicial power. See Southeastern Promotions, 420 U.S. at 554-55(citation omitted); Staub v. Baxley, 355 U.S. 313, 323(1958)(same); also see Thirtv-Seven Photographs, 402 U.S. at 370-71("determinations of obscenity should be left to courts and juries."). Because the line between free speech and obscenity is so subtle, the law imposes a presumption that

all utterances are constitutionally protected until there is a judicial decision to the contrary. See, e.g., Fort Wayne Books, Inc. v. Indiana, ____ U.S. ____, 109 S.Ct.

916,927(1989); Heller v. New York, 413 U.S. 483,491(1973).

Because of this presumption, the state must follow constitutionally mandated procedures in seizing obscene works. The state may criminalize obscenity, but its regulation must comport with the minimum procedural safeguards required by due process. To trigger the Fourteenth Amendment's application, the state regulation must constitute a deprivation of a protected interest. Florida law provides that no property interest exists in obscene materials. See FLA. STAT. ANN. §847.011(7)(Supp. 1990). In essence, this state has made obscenity a form of contraband, the seizure of which would not normally implicate the Fourteenth Amendment. However, because free speech has an independent source of protection under the First Amendment as a constitutional "liberty", arguably obscene articles are not treated by the law like other contraband such as illegal drugs. See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319,326 n.5(1979); Roaden v. Kentucky, 413 U.S. 496,501-03(1973); Quantity of Books, 378 U.S. at 211-12; Marcus v. Search Warrants of Property, 367 U.S. 717,730-31(1961); Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353,1359(5th Cir. 1980)("There must be some judicial determination of obscenity before a seizure or "constructive seizure" may occur.")(citation omitted).

Although it has been assumed to this point, music is clearly a form of expression within the scope of the free speech guaranty and thereby entitled to the presumption of constitutionality as a form of "liberty" protected under the Fourteenth Amendment. Cf. Southeastern Promotions, 420 U.S. at 557-58(theater is form of speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02(1952)(motion picture film is form of speech).

NASTY SUPPRESSION

The remaining issues are whether the defendant's actions in this case constituted a Fourteenth Amendment deprivation and prior restraint and, if so, whether the accompanying procedures were adequate to comport with due process and the First Amendment.

Deputy Wichner's initial purchase of Nasty at Sound Warehouse was neither a prior restraint nor a constitutional deprivation. See Marvland v. Macon, 472 U.S. 463(1985). Moreover, his impulse to seek judicial guidance was equally proper. Prior to any seizure of arguably obscene materials, there must be a minimum of an ex parte hearing before a judicial officer to determine if probable cause exists. See Marcus, 367 U.S. 717(1961); Roaden, 413 U.S. at 504 n.5.

Judge Grossman's review of the probable cause application was also the type of "searching inquiry" demanded by the Constitution prior to a seizure. See Marcus, 367 U.S. at 732. He reviewed the Nasty recording "in its entirety" and had the transcript of six of the songs to

review. His decision took several days and he requested additional information from the deputy about the location and accessibility of the purchased tape. This is not a case where the probable cause finding was based solely upon a policeman's subjective conclusion that Nasty was obscene. See Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636(1968).

It is at this point that the facts of this case become unusual or, in the prior words of this court, "bizarre." The state court judge issued an order finding probable cause that Nasty was obscene. Why this order was entered is unclear. There is no statutory or common law basis for such a procedure. There was no case or controversy before that court as the only party was Deputy Wichner. Nor did Wichner seek an injunctive remedy, or a warrant to search for or to seize suspected obscene materials. What he apparently sought was a legal opinion, and in this he was successful. This is unusual since the giving of legal advice is normally the function of lawyers--not judges.

Nonetheless, the order of probable cause issued. The Broward County Sheriff's office then copied and distributed Judge Grossman's order to the retail music stores in the county which were selling Nasty. The result was predictable. The store managers, as law abiding citizens pulled the recording from their shelves. Individuals confronted with the threat of arrest by law enforcement officers and presented with a court's order can be expected to do as they are told. Courts declare the law through their orders and all citizens are conscious of our duty to obey the law.

Despite his arguments to the contrary, the Sheriff's actions in this case constituted a seizure of presumptively protected speech within the scope of the First and Fourteenth Amendments.

The First Amendment rights of 2 Live Crew and the music store owners to publish the recording and the public's rights as an audience were all infringed. Even though the defendant is correct that there was no physical transfer of possession of the Nasty inventories, the notion of a seizure for prior restraint purposes encompasses the conduct here. Whether the seizure is called "constructive" or "actual", there was a direct relationship between the sheriffs' visits and the surrounding publicity on the one hand, and the store operators' decision to remove Nasty from their shelves on the other.

The "common thread" of the law is that when an arguably protected work clothed in the presumption of constitutional free speech is removed from public distribution, the state has imposed a prior restraint. See Roaden, 413 U.S. at 504-05(1973); Cf. Mishkin v. New York, 383 U.S. 502, 513(1966)(Court refused to reach issue of seizure's legality because record inadequate on the quantity of books seized and whether they were "on the threshold of dissemination.").

The final decision of whether As Nasty As They Wanna Be would be published was left in the nonjudicial hands of the Broward County Sheriff's office. See Southeastern

Promotions, 420 U.S. at 556-57 ("denying use of the municipal facility...constituted the prior restraint. That restraint was final. It was no mere temporary bar while necessary judicial proceedings were under way."). Although the music store operators were the immediate parties who stopped distributing the recording, they so acted only after the police visits and the delivery of the court's probable cause order. Had the deputies only given advice to aid compliance with the law (without also threatening arrest while presenting a judicial order of probable cause) and had the store operators decided to accept the advice and remove the recording from their inventory, this would be a different case. As noted in Fort Wayne Books, Inc. v. Sullivan, 109 S.Ct. 916 (1963), "The mere assertion of some possible self-censorship...is not enough to render an anti-obscenity law unconstitutional." Id. at 926. Indeed, law enforcement officers also have a right of free speech, which citizens are at liberty to disagree with if they believe the police have misstated the law. Justice John Harlan stated in Bantam Books, Inc. v. Sullivan, that "' Bearing the discomfiture and cost' even of 'a prosecution for crime [though] by an innocent person is one of the painful obligations of citizenship." 372 U.S. at 82(dissenting opinion)(citation omitted).

The argument that no other musical works were banned and that the sheriffs' visits did not otherwise disrupt business in the stores is of no consequence. The material

issue in this case is that there was a county wide seizure of As Nasty As They Wanna Be. Every single copy of this recording was removed from the shelves of approximately forty stores. Because of the vulnerability of First Amendment rights, the seizure of even a single copy of one work is constitutionally significant. See Heller v. New York, 413 U.S. 483(1973)(if seizure of a single work prior to trial will deprive the public of the sole copy, the police must make and return a copy for pretrial publication or return the original).

The facts here are also materially similar to the situations presented by the cases of Bantam Books, Inc. v. Sullivan, 372 U.S. 58(1963), Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1354(5th Cir. 1980), and Council for Periodical Distributors Association v. Evans, 642 F.Supp. 552(M.D.Ala. 1986), aff'd, 827 F.2d 1483(11th Cir. 1987). In each case the courts found that the conduct of the governmental officials constituted an unconstitutional prior restraint.

In Bantam Books, an administrative commission created under state law was given authority to review books and magazines. The commission circulated blacklists of publications believed by them to be objectionable for sale to minors. The lists were sent on official stationery with a reminder that the commission had a legal duty to recommend prosecutions for obscenity law violations to the state Attorney General. Upon receiving the notices, publishers

stopped selling the listed items. Police officers conducted follow-up visits to oversee compliance. 372 U.S. at 61-63. The Supreme Court finding this process to be a prior restraint, said:

People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around...The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications...It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity. Id. at 68-69(emphasis added) (footnote omitted).

The same result was reached in this Circuit. In the Penthouse case, Georgia's Solicitor General used a scheme of media announcements, visits to retailers, and warrantless arrests to ban the sale of sexual publications without instituting judicial proceedings for a final determination of the issue of obscenity. 610 F.2d at 1355-58. In Evans, a county district attorney pursued a two-tiered approach. To persuade a distributor to stop selling objectionable works, the attorney warned that further sales would result in the

institution of criminal and nuisance proceedings. The distributor withdrew his prior opposition to the district attorney's demands and signed a consent decree banning all future sales of the listed items. On the retail level, the district attorney informed all store owners that they should attend a meeting at the county courthouse. He "strongly suggested" that all sales of specified publications should stop or he would begin arrests. 642 F.Supp. at 554-57.

The defendant attempts to distinguish Bantam Books, Penthouse, and Evans by arguing that in those three cases there was a lack of judicial involvement unlike the probable cause order here. Further, Navarro argues that those visits were made for the stated purpose of intimidating distributors to stop selling objectionable works whereas the efforts of his deputies were all in good faith. The first alleged distinction is unpersuasive because, as already discussed, the order of probable cause was of no legal effect. Further, by publicizing the order, the sheriffs' office gave an apparent, albeit misleading, judicial endorsement to their threats of arrest. Further, as also noted previously, the good faith of the deputies is not controlling if the effect of their actions was to impose a prior restraint on presumptively protected speech.

THE LACK OF SENSITIVE TOOLS

Because obscenity is an appropriate subject for state regulation, there is no absolute right to be free from all prior restraints. Near, 283 U.S at 716. To determine whether

the Nasty ban was an impermissible prior restraint or merely a valid regulation of unprotected obscenity depends on the facts of the case. See Kingslev Books, Inc. v. Brown, 354 U.S. 436, 441-42 (1957).

The standard is whether the procedures required by the state are sufficient to guarantee a speedy and correct determination of a work's obscenity; and whether the safeguards are sufficient to reasonably minimize the risk that nonobscene speech will be suppressed. The Supreme Court observed the need for procedural safeguards in Marcus v. Search Warrants of Property, 367 U.S. 717 (1961): "'[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn....The separation of legitimate from illegitimate speech calls for ...sensitive tools.'" Id. at 731 (citation omitted). As further noted by the Court in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963):

[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous

procedural safeguards...is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. Id. at 66.

The only procedural protections accompanying the ban of As Nasty As They Wanna Be were an ex parte application to a state judge for an order of probable cause and the fact of the order itself finding that there was probable cause to believe Nasty was obscene.

These two procedures were clearly insufficient to meet the minimum requirements of due process. The result was that Nasty was subjected to an unconstitutional prior restraint and the plaintiffs' rights to publish presumptively protected speech were left twisting in the chilling wind of censorship.

The Supreme Court's decision in Freedman v. Maryland, 380 U.S. 51(1965), reaffirmed the minimum procedural safeguards necessary for a prior restraint to pass due process scrutiny. Also see Southeastern Promotions, 420 U.S. at 559-60; Universal Amusement Co., Inc. v. Vance, 445 U.S. 308, 317(1980)(Freedman applies to judicial orders which impose prior restraint). There are three basic requirements:

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 brief period and only for the purpose of preserving the status

quo. Third, a prompt final judicial determination must be assured. Southeastern Promotions, 420 U.S. at 560(emphasis in original).

By pretrial motion, the defendant accepted the burden of proving that Nasty was unprotected speech because it is obscene. As to all the other Freedman safeguards, however, the defendant's conduct fell woefully short of legal and constitutional requirements.

First, the Sheriff did not institute judicial proceedings after threatening the music store operators and distributing Judge Grossman's order. The visits occurred on or about March 9, 1990. It was not until March 27, 1990, eighteen days later that the defendant finally filed an action in state court.

The defendant noted at the preliminary injunction hearing(April 19, 1990) and at trial(May 14 and 15, 1990) that he was preparing guidelines for the future application of this enforcement technique which would assure that judicial proceedings are promptly initiated. Even after trial, however, there is still no evidence that such rules have been developed and implemented. This is simply intolerable; nor would such future guidelines have any relevance to the Sheriff's conduct in this case.

The defendant's action in this case suffers from the same constitutional infirmity as seen in Blount v. Rizzi, 400 U.S. 410(1971): total discretion in a nonjudicial officer to initiate judicial proceedings after a final

decision suppressing arguably obscene materials. In Blount, the Postmaster General could intercept suspected obscene mail and hold it for an indefinite time period without any mandatory requirement that he invoke judicial review. Here, the first application for judicial review occurred when the plaintiffs--not the Sheriff--filed this lawsuit.

It is well-established that prior restraints vesting unbridled discretion in nonjudicial officials, thereby making their suppression decision final, in effect, are constitutionally unacceptable. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151, 1534 (1969); Staub v. City of Baxley, 355 U.S. 313 (1958); Kunz v. New York, 340 U.S. 290 (1951).

Why the defendant chose to pursue this type of prior restraint is not clear. Had the Sheriff's office initiated a criminal prosecution, the Freedman problems might not have arisen because of the rigorous procedures inherent in criminal of proceeding. See Times Film Corp. v. City of Chicago, 365 U.S. 43, 82-84 (1961) (Douglas, J., dissenting). Further, Florida's Legislature has provided a civil remedy in the form of an injunction. See FLA. STAT. ANN. §847.011(8) (Supp. 1990). Because this statute tracks the procedures found constitutionally sufficient in Kingsley Books, Inc. v. Brown, 354 U.S. 437 (1957), there would have been no constitutional objection. It is not the duty of this court to dictate to state officials which means are most appropriate to regulate obscenity. See Freedman, 380 U.S. at

60; Kingslev, 354 U.S. at 441. But, this court must intervene when that choice impermissibly infringes upon the First Amendment.

Second, the prior restraint imposed on Nasty was not limited "for only a specified brief period" or restricted to "the purpose of preserving the status quo." Rather, the ban initiated by the visits and the presentation of the probable cause order when combined with the threat of future prosecution was designed to indefinitely suppress the recording. Indeed, Deputy Wichner testified that the Sheriff's office had no plans for future action because there were no further citizen complaints or evidence of sales in the county.

This case is distinguishable from Heller v. New York, 413 U.S. 483(1973). There, the issue was whether a judge who views a film and finds it obscene can then issue a constitutionally valid warrant for the film's seizure as evidence for trial. The Court held that the seizure of one copy for the bona fide purpose of preserving it as evidence was constitutionally permissible. However, the Court also noted that its holding was limited to cases where there was more than one copy of the film. If there was only a single copy, the government must preserve the status quo by allowing a copy to be made or the original must be returned to allow pretrial publication. Id., 413 U.S. at 492-93. The status quo for presumptively protected speech is that it remains available to the public. Where the government seizes

problem with prior restraint

more than a single copy for evidentiary purposes, however, the constitutional risks are much greater. As noted in Heller, "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it for evidence in a criminal proceeding." Id. at 492(emphasis added). The same judicial condemnation of facts materially similar to this case was made in Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1354(5th Cir. 1980):

[T]he procedure adopted and enforced by McAuliffe was much more dramatic and devastating than the mere seizure of one film to be used as evidence. Instead, it resulted in the "constructive seizure" of every magazine in Fulton County, Georgia, that McAuliffe deemed to be obscene. Id. at 1362.

Indeed, the facts of this case demonstrate just how dramatically informal censorship can impair the First Amendment. With relative ease, every copy of Nastv in Broward County was suppressed within days of the deputies' action. The music store operators understandably chose to obey the law as stated in the probable cause order thereby avoiding possible arrest. They also had a strong economic incentive to remove this single recording from their shelves rather than risk the expense of possible litigation. See Freedman, 380 U.S. at 59-60; Manual Enterprises, Inc. v. Day, 370 U.S. 478,493(1962).

The defendant claims that the initiation of formal proceedings would have been overaggressive. But, as the Supreme Court has taught, the harm from informal censorship raises grave concerns:

The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law. Bantam Books, 372 U.S. at 69-70.

The final Freedman violation is the defendant's lack of assurance of a prompt final judicial determination. The defendant relies upon the existence of the in rem action filed in the state circuit court on March 27, 1990. There is no evidence that any decision has been reached in that

case or that a trial date has even been set as of the date of this order. Further, the defendant's decision to initiate judicial proceedings and the timing thereof are completely discretionary with no reasonable guarantee that a prompt decision will be made.

The defendant relies upon the filing date of the state suit to satisfy the dictates of Freedman v. Maryland. Because this action was commenced eighteen days after the Nast seizures, reasons Navarro, this civil suit provided the necessary procedural safeguards. Because this position is not legally valid, this court need not reach the issue of whether this eighteen day period would comply with procedural due process.

The Freedman decision requires that there be a prompt and final judicial decision. This includes not only the time from seizure to filing, but also considers the delay between commencement of the lawsuit and a full adversary hearing; and the time after the trial until the court enters a final order on the issue of obscenity. Unreasonable delay or the lack of assurance at any step is fatal to the constitutional adequacy of the state regulation. See, e.g., Teitel Films Corp. v. Cusack, 390 U.S. 139(1968)(procedure deficient where no time limit in which judge must issue final order after trial). In this case, there were no assurances at any stage in the proceedings.

Moreover, due process requires more than an assurance of a prompt judicial decision. When the government intends

to seize large quantities of presumptively protected materials, the First and Fourteenth Amendments require an adversary hearing before any seizures are made. See Fort Wayne Books, 109 S.Ct. at 929; Quantity of Books, 378 U.S. at 210-11; Marcus, 367 U.S. at 735-36; Evans, 642 F.Supp. 552(M.D.Ala. 1986), aff'd, 827 F.2d 1483(11th Cir. 1987).

The Supreme Court has clearly held that in the case of massive seizures such as here, mere ex parte determinations of probable cause are simply impermissible under the U.S. Constitution. See Fort Wayne Books, 109 S.Ct. at 929; Blount, 400 U.S. at 420.

Therefore, this court finds the defendant's prior restraint in this case violated the plaintiffs' rights under the First and Fourteenth Amendments. Permanent injunctive relief is necessary to prevent future infringements. This court is well aware of the serious implications of interfering with integral state functions such as law enforcement. However, when the Constitutional liberties which we all hold sacred are threatened, this court has both the power and the duty to intervene. See Ex Parte Young, 209 U.S. 123(1908); Edelman v. Jordan, 415 U.S. 651(1974); Steffel v. Thompson, 415 U.S. 452(1974); Wooley v. Maynard, 430 U.S. 705(1977).

And so our legal odyssey ends.

What began as a dispute between two ancient enemies concludes with the hope that they are reconciled by a mutual friend--The Constitution of the United States.

Having considered the above matters and the record in this cause, it is hereby

ORDERED AND ADJUDGED as follows:

(1) The recording As Nastv As They Wanna Be created by the group 2 Live Crew is hereby DECLARED obscene.

(2) The action of the Broward County Sheriff's office in threatening retail music stores with arrest for selling the Nastv recording and presenting them with a copy of a probable cause order is hereby DECLARED unconstitutional as an improper prior restraint of free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

(3) The defendant, Sheriff Nicholas Navarro, and his deputies, agents, servants, employees, attorneys, and persons in active concert or participation with any of them who receive actual notice of this order are all hereby PERMANENTLY ENJOINED from threatening employees, managers, or owners of retail stores selling musical recordings with arrest for selling allegedly obscene materials. The same persons are also hereby PERMANENTLY ENJOINED from presenting or speaking about any probable cause order of obscenity to employees, managers, or owners of retail stores selling musical recordings. Nothing in this order shall be understood as prohibiting Sheriff Navarro or any of his deputies, agents, or employees from: (a) giving legal advice to any person who is suspected of violating a valid law prohibiting obscenity where such consultation is

genuinely undertaken with the purpose of aiding the suspect to comply with the law and avoid prosecution under the obscenity laws, or (b) vigorously enforcing the obscenity laws of the state of Florida as mandated and required by section 847.011(9), Florida Statutes.

(4) The sole affirmative defense in the answer and the class action claims in the amended complaint are hereby DISMISSED. The plaintiffs amended their pleading to include class action allegations, but they never made a motion for certification of the class. Furthermore, the request to certify a class would be moot as this order awards the same relief which the class could conceivably seek. Judgment is not entered against the defendant on the affirmative defense because the class portion of the case is moot. However, the court does find that the plaintiffs have standing and are "interested part[ies]" within the meaning of the Declaratory Judgment Act, 28 U.S.C. §2201(a).

(5) Any party seeking costs or an award under section 1988, Title 42 of the U.S. Code, shall apply to the court within the time allowed by the Federal Rules of Civil Procedure, the local rules of this court, and other applicable law. The parties' applications, if any, shall include all appropriate factual and legal argument to support the request for an award.

(6) Judgment shall be ENTERED on the two counts of the amended complaint by separate order.

(7) The court shall RETAIN JURISDICTION to enforce the permanent injunction entered in this case.