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STATEMENT OF CASE AND FACTS¹

Defendant John Webster believes that in 1990 a unit of the San Jose Police Department including Officer Brenda Wells, now Lieutenant Brenda Herbert, was involved in organized criminal activity during a sting operation in conjunction with the US Postal Inspection Service (hereinafter “USPIS”). During that sting Officer Wells, in an undercover capacity talked extensively with defendant Webster in a series of taped phone conversations. As a result of that sting defendant Webster received a felony conviction for crimes allegedly committed during those conversations.

Defendant Webster further believes that in that sting the police and the USPIS used illegal active split entrapment and then hid and falsified evidence, including extensive editing of the tape recordings of those phone calls, all to cover up their illegal activity. Judge Thomas Cain had aided in hiding the details of that sting by sealing the Justification for the Search Warrant to Defendant’s residence.²

According to the plaintiff, Mr. Webster first committed any act in furtherance of his beliefs in September 1994 when he had a conversation with San Jose Police Lieutenant Glenn McCourtie where he claimed that he had been wrongly arrested and prosecuted and that Brenda Herbert was primarily responsible. Lt. McCourtie was concerned for Ms. Herbert, and he immediately

¹ The “facts” are based upon the evidence tendered by the City of San Jose in its Petition for Injunction and supporting declarations. Defendant respectfully requests that this court take judicial notice of those pleadings on file in this matter pursuant to Evidence Code section 452, subdivision (d).

told her of the conversation.³ (McCourtie Declaration) A year later, Mr. Webster went to the San Jose Police Department and dropped off a flyer offering a “reward” to San Jose Police Officers “[f]or information or actions leading to the arrest and conviction of the Officers who participated in fabricating evidence as part of an illegal entrapment scam run five years ago in San Jose. (Exhibit B to Declaration of Lieutenant Ken Ferguson) Five months later, in January 1996, Mr. Webster left a petition for San Jose police officers to sign asking for a grand jury investigation into police misconduct. (Paragraph 5 to Declaration of Ferguson)

Mr. Webster additionally has a web-site that contains the following material. A review of the web-site material shows that Mr. Webster complains of police and governmental corruption, and explains why. He requests the address of Lieutenant Herbert as follows:

A MAILER TO THE FAMILY - When they ignore messages to the Public.

It is becoming obvious that the City of San Jose, the police Department, and Lt. Brenda Herbert herself couldn't care less what the public believes so I will be attempting to inform people in the Herbert and Wells family directly of Brenda's evil deeds. Hopefully there will be someone who receives it that will be able to apply family pressure on Lt. Herbert to “Do the right thing.”

If anyone reading this happens to know the address of someone living in Northern California with either of those last names please send me the address by email at: Jwebster@ix.netcom.com. I will only use these addresses for sending the mailer.

(Exhibit A to Declaration of Ferguson [emphasis added])

² This is taken from transcript July 25, 2003, pg. 21 line 21 plus what it means to seal a document.

³ It is important to note that nothing has happened to Lt. Herbert in the 8 1/2 years since that conversation.

Three years later, in July 1999, Mr. Webster sent to Lieutenant Herbert at the San Jose Police Department a postcard, which challenged her to a “duel to the truth!” It went on to explain:

“With polygraph tests being the weapon of choice.”
(Exhibit C to Ferguson Declaration)

Over a year later, a campaign flyer for Mr. Webster, running as the Libertarian candidate for State Senate, came to the police department where Mr. Webster again accused Lieutenant Herbert of official misconduct.

(Exhibit D to Ferguson Declaration)

Two years later, in June 2001, Lieutenant Herbert received a Libertarian newsletter once again accusing her of falsifying evidence. (Exhibit E to Ferguson Declaration) Six months later, Mr. Webster subpoenaed Lieutenant Herbert to testify in United States Tax Court, again to prove that she had falsified evidence.

In August 2002, Mr. Webster began using a mobile billboard, again accusing Lieutenant Herbert of falsifying evidence. This truck was driven around the San Jose Police Department, the Hall of Justice, and the San Jose City Hall. Occasionally it was parked near the Police Administration building.

In February 2003, Mr. Webster with a female companion went to the address listed in Santa Clara County Records as being owned by a Samuel and Brenda Herbert. He rang the doorbell and knocked on the door. The door was not answered. At a later date he again went to that address and tried a second time to contact the residences. Again the door was not answered.

This second time he and his companion, pretending to be a couple interested in buying property, then went to the neighbors to try and find out

exactly who lived at the first house. A teenage neighbor volunteered the information that the Herberts actually lived there and that the Brenda Herbert who lived there was employed at the San Jose Police Department. No other attempt to speak with the residents or neighbors was ever made. (See Declaration of Samuel Herbert⁴)

In the last act complained of, Mr. Webster wrote Lieutenant Herbert a letter and delivered it to her place of work. (See Exhibit A to Declaration of Samuel Herbert) The letter begins that it was written at the suggestion of Assistant San Jose Police Chief Thomas Wheatley⁵. The letter proclaims Mr. Webster's innocence and accuses her of falsifying evidence. It explains why he acted the way he did. He states that he believes that Lieutenant Herbert only "reluctantly" participated in the fabrication. He states that "I can't prove that without getting you on the witness stand first."

He also states: "I see you as somewhat of a victim yourself; a victim of a system that punishes good cops and rewards the police officers that are willing to sell their soul to get the criminal". He suggests that they write a book together about the experience. He states that even if he gets a monetary settlement due to the falsification of the evidence that it "will not buy my silence." There is no mention of any violence of any kind. Enclosed with the letter was a flyer, which mirrored the web-site. Included was the following:

⁴ Several points of clarification are in addition to Samuel Herbert's declaration. This demonstrates how by Plaintiff/Respondent giving less information that they can better sell paranoia to the courts. Obvious questions left unanswered by their version is: How did Defendant come to know where Lt. Herbert lived and when did he discover this information?

Bad Cops turn good citizens into Terrorists.

When Law Enforcement Agencies like the USFIS and Police like Lt. Brenda Herbert hide or alter evidence to supposedly get the "bad guys" they will unavoidably also destroy the lives of a few good citizens. Add to that our local court's willingness to cover-up police wrong doing as long as it was done "with good intentions." The once "good citizen" is left with no way to get a peaceful redress of grievances. When this occurs repeatedly that "Government Gone Bad" loses its legitimacy and gives moral justification for its overthrow by force. This is what was happening to cause the Oklahoma bombing where hundreds of innocent people were killed as "collateral damage" in an effort to send a message to the FBI and BATF for violating people's rights.

Is a Bad Cop like Lt. Brenda Herbert putting your freedom in danger? Absolutely!

If you have any contact with Lt. Herbert or the San Jose police Department please urge them to come clean and to admit to the hiding and alteration of evidence that has occurred in the past.

Nowhere in the pamphlet was Lieutenant Herbert directly or even indirectly threatened with any sort of violence. What Defendant did threaten is that eventually Lt. Herbert will be put on the witness stand and the truth will come out.

⁵ This letter was written at the request of a high San Jose Police official and yet the City cites this as an example of ongoing harassment. This doesn't make sense.

ARGUMENT

This Court of Appeal has authority and jurisdiction to rule on this case.

Code Civ. Proc. §909.

In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

Another pertinent code is Code Civ. Proc. §657

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.
7. Error in law, occurring at the trial and excepted to by the party making the application.

I. Judge Thomas Cain should have recused himself from this case.

Back in 1990 he signed the Search Warrant papers for the residence of the defendant as well as signing the Order to seal the Justification papers for that warrant. This occurred shortly after the defendant was arrested on March 9th of that year.

The conduct of defendant Webster that is alleged to be harassing in the current case is all related to his making accusations of organized criminal activity including police misconduct that defendant Webster believes occurred back in that 1990 sting.

Defendant believes that there was insufficient and erroneous information given to justify that Search Warrant, and the sealing of that Justification document was done to hide this fact and not to “protect the identity of a confidential informant or to protect an ongoing investigation” as is allowed by law. In other words, back in 1990 Judge Cain was actively involved in covering up illegal activity by the police. Even if he was originally unaware that the current defendant was one of the defendants back then that he signed search warrants for, as shown in the transcript (July 25, 2003 page 21, starting at line 20) defendant’s attorney, Mr. Anthony Boskovich reminded Judge Cain of that fact. Judge Cain would have been instantly reminded that his own past activity would come up for scrutiny if he allowed the current defendant the ability to continue with his accusations or to get a deposition from Lt. Herbert.

II. Judge Thomas Cain had not allowed the defendant to prove that his actions served a legitimate purpose.

Judge Cain had done this by disallowing any deposition of Lt. Herbert concerning her part of the sting that led to defendant's arrest back in 1990.

Plaintiff's explanation for defendant's actions over the years was that he was trying to make Lt. Herbert's life miserable as payback for her having been the police officer that caught him committing his crimes back in 1990. Defendant's explanation was that back in 1990 he had been caught in an illegal sting that used hiding of evidence and the extensive falsification of the tape-recorded evidence from phone calls all to make innocent victims look like criminals. He further believed that this evidence tampering was premeditated and was intentionally used to force the innocent victims of that sting into believing that their case was hopeless, and that their only real option was to accept the best plea bargain available.

In Defendant's view then he has been doing everything he could think of these last ten years to inform the public, the San Jose City Government, and good San Jose police officers that there were Bad Cops in their midst who had altered evidence to get convictions. He was hoping that his actions would eventually result in an investigation into these allegations.

The obvious best factor to determine which of these two possible scenarios was actually being played out, that of the Plaintiff or that of the Defendant, then is whether or not evidence was actually tampered with by police back in that 1990 sting.

Even after all these years there are clearly two people that would know for a fact if this had indeed happened: the Defendant and Lt. Herbert. Since defendant's testimony has been discounted he believes that a deposition of Lt. Herbert would prove once and for all that his accusations are indeed true and that these past years he was pursuing a legitimate purpose.

Code Civ. Proc. §527.8:

(a) Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee prohibiting further unlawful violence or threats of violence by that individual.

(b) For the purposes of this section:

(1) "Unlawful violence" is any assault or battery, or stalking as prohibited in Section 646.9 of the Penal Code, but shall not include lawful acts of self-defense or defense of others.

(2) "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.{emphasis added}

It is clear that Lt. Herbert has suffered no "unlawful violence", as per CCP §527.8 (b)(1), from defendant. This is particularly true with the City discounting any "stalking"⁶ (transcript June 13, 2003 page 15 through page 17), then the remaining issue is limited to whether there exist a "Credible threat of violence" as defined in CCP §527.8 (b)(2). An important part of this definition is the requirement that the statement or conduct "serves no legitimate purpose". That portion of the statute and the intent of the Legislature is clear: if there is a

⁶ It is clear that there was no stalking anyway. The occasional parking of the truck with 8' X 10' signs across from the Police Administration building clearly was to give Mr.

legitimate purpose in the statements or conduct then it is immaterial whether or not a reasonable person is placed in fear for his or her safety.

Exposing police corruption and misconduct certainly serves a legitimate purpose.

“It is our opinion that the plaintiff is within the ‘public official’ classification. Although *as a patrolman he is ‘the lowest in rank of police officials’* and would have slight voice in setting departmental policies, *his duties are peculiarly ‘governmental’ in character and highly charged with the public interest.* It is indisputable that *law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers,* even at, and perhaps *especially at,* an ‘*on the street’ level* than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. *The abuse of a patrolman’s office can have great potentiality of social harm;* hence, public discussion and public criticism directed towards the performance of the office cannot constitutionally be inhibited by threat of prosecution under State libel laws.” (Emphasis added.)

(*Gomes v. Fried* (1982) 136 Vsl.Spp.3d 924, 933 [186 CalRptr. 605, 610], quoting *Coursey v. Greater Niles Township Publishing Corporation* (1968) 40 Ill.2d 257 [239 N.E.2d 837, 841])

Yet Judge Cain refused to allow Defense the ability to prove that there was a legitimate purpose in Defendant’s actions, that his accusations were indeed truthful and not some way to just make Lt. Herbert’s life miserable, as Plaintiff/Respondent would have us believe.

Webster’s message to all of the police officers and personnel there and was not targeting Lt. Herbert specifically.

III. Judge Cain's snap decision that there was an actual "threat of violence" is invalid.

In the section of defendant's flyer titled "Bad Cops turn good citizens into Terrorists" the defendant draws a parallel with the FBI and BATF as Bad Cops⁷ who attacked the Branch Dividians at Waco Texas. Then because of the unanswered accusations made against those Federal agencies of allegedly using unjustified lethal force against innocent people, followed by a cover-up, a third person, an otherwise good citizen named Timothy McVeigh became a domestic terrorist and blew up the Federal Building killing innocent people.

Upon analyzing the transcript (July 25th, page 55, line 15 to line 20) it is clear that a major part of Judge Cain's decision is based on a difference of opinion with the defendant, about the role those law enforcement agencies had in causing the Oklahoma City bombing.

What defendant was saying in his flyer was that we can not afford to let accusations of police corruption and cover-up go unanswered. We must have a public investigation to determine if there is any truth in them, and then prosecute those that are guilty. Otherwise there will eventually be some third party that believes the accusations but "knows" the system won't prosecute bad cops, so he takes the law into his own hands. It might even be another police officer. The defendant here is only being the messenger of what happens when the system no longer works for Justice.

⁷ It is public knowledge that Mc Veigh's motivation in the Oklahoma City bombing was from his perception of Law Enforcement misconduct at Waco. (See, e.g., *McVeigh Letter Shows Anger Over Waco Fire*, San Jose Mercury News (9 April 1997), p. 6A)

Ignoring the question for a moment as to whether or not Defendant's actions and statements served a legitimate purpose, CCP §527.8 (b)(2) still requires a "reasonable person being in fear for his or her safety". This clearly is not the case. On Defendant's web-site and all of his flyers, and even including the section mentioning the Oklahoma City bombing, he implies that if the Government and Courts were to actually seek Justice and to actually investigate into allegations of Police corruption that such incidents of violence would never occur. Clearly a "Reasonable Person" would have faith that our Government and Courts would seek Justice and would investigate into allegations of Police corruption. Perhaps Judge Cain has inside information that in his Court this is not what happens.

Finally, when Judge Cain queries "So the same type of frustration Mr. McVeigh felt towards his Government?" (July 25th transcript, page 55, line 26) And defendant answers "That's the type I'm talking about." Besides the obvious ambiguity as to who the Judge was referring to as having the same frustration as McVeigh, versus who the defendant was talking about, there just is no basis to believe that the defendant would react to that frustration in the same way as McVeigh, ever. There just is no basis for interpreting statements made by Defense in either his web-site, his flyers, or in court as being "Threats of Violence".

SUMMARY:

By denying the Defendant the right to prove that his actions were indeed serving a legitimate purpose, Judge Cain reduced this case to one of a subjective nature. He then used his Court Discretion to accept the City's obtuse spin on those actions: accepting that a "Reasonable person" would feel threatened by those statements and actions.

Judge Cain was wrong on both counts. First CCP §527.8 (b)(2) is clear that if a legitimate purpose is being served that it is immaterial as to whether or not the statements and actions are "threatening". Second, Defendant's alleged veiled threats were only that "an on going violation of people's rights by the Government would predictably result in violence against that Government". The continuing message of Defendant has been that investigation and full disclosure of illegal police tactics would go a long way in preventing such violence.

One could wonder why Judge Cain could be so sloppy in his interpretation of the civil code and of the actions and statements of Defense. But the possibility exists that Judge Cain himself was involved in this alleged organized criminal activity of the San Jose Police that Defense was trying to bring to the public's attention. This would have put Judge Cain into a conflict of interest situation where he should have recused himself. Yet instead he chose to remain in control of how "Justice" was administered possibly to insure that the results were favorable for himself.

CONCLUSION

PREVENTION OF FAIR TRIAL:

A new hearing should be granted on the ground that court order or abuse of discretion prevented a fair hearing.

ERROR IN LAW – EXCLUDED EVIDENCE:

A new hearing should be granted on the ground of error in law, occurring at hearing and excepted to by the party making the application, because the court erroneously excluded evidence at that hearing, thus materially affecting defendant's substantial rights.

Judge Cain granted the motion by the Plaintiff for a Protective Order to stop counsel for defense from taking the deposition of Lt. Herbert. That deposition would have been used as evidence to show that Defendant's actions were serving a legitimate purpose and therefore not part of a "Credible threat of violence".

ERROR IN LAW – VERDICT UNSUPPORTED BY EVIDENCE

A new hearing should be granted because the verdict is against law in that it is unsupported by any substantial evidence and the entire evidence would justify a directed verdict in favor of defendant.

It is clear that counsel for Plaintiff/Respondent has been thinking backwards. They apparently started from the premise that Defendant must be stopped from continuing to blatantly broadcast his accusations of San Jose Police misconduct to police officers, police officials, and to San Jose City Government officials. They then derived how to best misrepresent the facts to justify a Restraining Order.

Defendant has been persistent about working for Justice and Truth these many years. Plaintiff has him as being obsessed. Defendant parks a big billboard truck with 8'X10' signs so that all the police officers and officials there can't help

but see it. Plaintiff has him lying in wait for Lt. Herbert. Defense writes a letter to Lt. Herbert at the request of an assistant chief of police, Plaintiff claims that it's part of a continuing harassment. All of the claims of harassment submitted by Plaintiff disappear upon close examination.

It is therefore respectfully submitted that this court should order this matter to be re-heard in Superior Court before a different judge, and to allow defense to take the deposition of Lt. Herbert concerning her part in that 1990 sting.

Dated: June 15, 2004

Respectfully submitted

--- signature of John Webster

John H. Webster
appellant pro-per