COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE,) CASE NO: H026491
PLAINTIFF-RESPONDENT,)
TEMINITI - NEST ONDENT,) SANTA CLARA CASE NO
VERSUS) 103-CB815401
JOHN WEBSTER,)
DEFENDANT-APPELLANT.)
)

APPELLANT'S REPLY BRIEF

ON APPEAL FROM ORDER AFTER HEARING ON PETITION OF EMPLOYER FOR INJUNCTION PROHIBITING VIOLENCE OR THREATS OF VIOLENCE AGAINST EMPLOYEE (CLETS) THE HONORABLE THOMAS CAIN PRESIDING

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appellant pro-per

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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

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).

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

had been wrongly arrested and prosecuted and that Brenda Herbert was primarily responsible. Lt. McCourtie was concerned for Ms. Herbert, and he immediately told her of the conversation.³ (McCourtie Declaration [CT:16-17]) 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 (i.e. 1990) in San Jose. (Exhibit B to Declaration of Lieutenant Ken Ferguson [CT:37]) 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 [CT:19])

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."

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

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:

<u>Jwebster@ix.netcom.com</u>. <u>I will only use these addresses for sending the mailer.</u>

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

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 [CT:39])

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 [CT:41-42])

Two years later, in June 2001, Lieutenant Herbert received a

Libertarian newsletter with an article written by Mr. Webster, once again
accusing her of falsifying evidence (Exhibit E to Ferguson Declaration
[CT:44]). That newsletter was sent to Lt. Herbert by its editor, not Mr.

Webster, so as to allow her to respond to that article. Six months later, Mr.

Webster subpoenaed Lieutenant Herbert to testify in United States Tax

Court [CT:51], 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 [CT:47]. 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 mid 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, Saturday February 22nd, 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 Herbert [CT:7-8])

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 [CT:10-12]) The letter begins that it was written at the

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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 actually discover this information?

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 of evidence. 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 [CT:13-14], which mirrored the web-site. Included was the following:

Bad Cops turn good citizens into Terrorists.

When Law Enforcement Agencies like the USPIS 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

⁵ This letter was written at the suggestion of a high San Jose Police official and yet the City cites this as an example of ongoing harassment. Talk about creating a case from nothing.

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 [letter to Lt. Herbert, CT:11, end of 2nd paragraph].

ARGUMENT

This Court of Appeal has authority and jurisdiction to rule on this case and may accept new evidence.

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. Respondent's brief contains significant factual errors.

A. Under the heading "IV FACTUAL BACKGROUND", page 4, bottom of page, Respondent states:

The facts of the threats and harassment do not appear to be disputed in any significant way by Mr. Webster {footnote: Indeed, Mr. Webster confirms his activities in his February 22, 2003 letter. [CT:10-12]}. Instead, he argues that the threats and course of conduct were justified and served a legitimate purpose, thereby precluding the injunctive relief sought by the City.

While much of the *actions* of Defendant are not in dispute, other than that many of the related facts that Respondent must have known about were left out to carefully spin their case of paranoia for the courts, calling Defendant's actions "harassment" has always been strongly disputed.

And there simply is nothing that Defendant has stated in any media that constitutes any kind of threat to Lt. Herbert⁶, her coworkers or neighbors. Calling his actions "threats and harassment" in a section for Factual Background is going pretty low even for a City Attorney.

Also in Appellant's Opening Brief the question as to whether there was a "Credible threat of violence" was split into two questions: Was there no legitimate purpose being served by the conduct? Would a "reasonable" person be placed in fear for his or her safety? *Appellant has argued that both conditions fail* but Respondent's misinterpretation

comes from the following section that starts at the bottom of page 9 of that Opening Brief:

That portion of the statute [of CCP §527.8(b)(2)] and the intent of the Legislature is clear: if there is a 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.

Respondent then mixes in the "threats" word with "course of conduct" as if it is a given. Again there were no threats.

B. Under "V. ARGUMENT A.", page 9, Respondent states:

In fact, Mr. Webster does not dispute that he intentionally set about to harass Lt. Herbert.

Defendant's intentions from the beginning have been to confront her with his accusations, and to encourage her to confess. There was no intent to harass, in fact as shown in his February 22nd, 2003 letter to Lt. Herbert (CT:11, 3rd paragraph) he goes out of his way to make it as painless as he can for her to confess.

C. Under "ARGUMENT A (1)", bottom of page 14 continuing to page 15, Respondent states:

This ongoing campaign of Appellant was justified by him as an effort to get Lt. Herbert to testify under oath that she, in fact, altered tapes in connection with the 1990 criminal prosecution against him. This rationale ignores the fact that Brenda Herbert testified under oat at Appellant's preliminary hearing on June 18, 1990 and at that time *she could have been cross-examined about the tapes* [CT:26-27], and that she stated under oath in a declaration dated January 3, 1992, that she did not alter the

⁶ The only threat that Mr. Webster has stated is that eventually Lt. Herbert will be put under oath and questioned about her role in that 1990 sting, and that the truth will come out.

recordings of her telephone conversations with the Appellant that were used in the prosecution of him. [CT:26] (emphasis added)

This simply is inaccurate; prosecution at the Preliminary Hearing never introduced the actual content of the tapes or their transcripts so they could not be brought up by defense. In that hearing Defense is not allowed to introduce new evidence. In the actual trial though the tapes, if they had not been altered, would have been used to show blatant entrapment and that Officer Wells (who later married becoming Officer Herbert) was driving the conversations. She was demanding details of Defendant's past sexual history with children and demanding promises of future sexual encounters with children for her. Defense had responded by giving exaggerated past encounters he had had (that were way past the statute of limitations) and he promised only impossible future encounters. After the editing of the tapes she is only a passive listener and Defense is initiating "offers" instead of just giving responses. Making impossible "offers" is still against the law. Note that at that time only Defense's Public Defender had actually listened to the tapes and he had not even prepared transcripts for Defense to read (CT:33, under "Tape transcripts:"). From Defense talking with the PD though, it was known that the conversation was missing from the tapes where "Barbara" (Officer Wells undercover identity) solicits sex with the 10 year old boy

from Mr. Webster, and where he adamantly refuses (CT:10, letter to Lt. Herbert, 5th paragraph).

As far as the January 3, 1992 sworn statement of Officer Herbert, keep in mind that this was a sworn statement given to prevent the tapes from being analyzed by a forensic tape expert. There was nothing more to lose for making the big lie to prevent the tapes from being analyzed. If the lie was accepted she would not be found out; if the tapes were analyzed she would go to jail anyway. Plus, the Judge involved (Daniel Creed) apparently was known for not releasing tapes for analysis unless he was legally forced into doing it.

D. In Respondent's brief (page 24 bottom of page continuing to page 25) is the following:

As evidenced by Mr. Webster's own words, the deposition was to be no more that another vehicle of harassment. It has apparently been his desire for years to put Lt. Herbert "on the stand" to confront her with his accusations that she altered evidence against him. Mr. Webster has persistently sought to provoke Lt. Herbert so that she might sue him for defamation to allow him to re-litigate issues that were rendered moot by his plea.

Here Respondent again confuses "making accusations of criminal conduct to a criminal" with "harassment". If this were so, the Justice department would be guilty of harassment on a continual basis.

Next, a deposition of Lt. Herbert would not consist of making accusations to her but would consist of specific questions to her about her role in that 1990 sting and her interaction with the US Postal Inspection Service. Mr. Webster is confident that her answers will show that that sting was illegal and utilized the hiding of evidence and the premeditated alteration of tape-recorded evidence. Mr. Webster believes this was an example of Organized Criminal Activity being carried out under the guise of law enforcement.

Finally, the victims of that sting, of which Mr. Webster claims to be one, allegedly had their Civil Rights violated big time. That's a serious Federal offense committed by the Law Enforcement agents in that sting and there is no statute of limitations. The fact that the victims accepted plea bargains is totally irrelevant. Mr. Webster's efforts then have more to do with outing those criminals, who happen to be wearing badges and robes, in order that they may be prosecuted for their crimes, rather than with the re-litigation of his own 1990 conviction.

E. In the conclusion to Respondent's Brief, page 27 they really pull "facts" out of thin air with the following statement:

The City of San Jose had more than adequate grounds to seek to protect its employee and workplace in the face of threatening statements and conduct. This is particularly true when the statements were *intended to evoke senseless, tragic violence* against government employees. (emphasis added)

Are we talking about the same case here? There were no threatening statements and conduct. And in all of Mr. Webster's flyers, publications, and web page *he is obviously intending to and working to prevent senseless, tragic violence* against the government and its employees as well as the public at large. Is it possible that Respondent is alluding to incidents of harassment and threats of violence carried out by Lt. Herbert's co-workers and fellow police officers against Lt. Herbert that might be a result of Mr. Webster's Free Speech message? Is that why it is so important to silence him?

Mr. Webster believes that if the Government continues on its path of "The Ends Justify the Means" and to hell with peoples Rights, that eventually the People will revolt against that Government, and it will not be a pretty picture. He further believes that the only way to prevent this is to return our Government to being the Servant of the People not their Master; and to restore the confidence of the People in a Government based on Law that respects the Individual Rights of its citizens.

An obvious first step in achieving this is to show the public that even where Law Enforcement personnel and Judges violate the Rights of individuals they will be held accountable for their actions and punished for their crimes.

II. All of Defendants actions concerning Lt. Herbert were pursuing a legitimate purpose.

The applicable civil code used by Plaintiff/Respondent to get the Temporary Restraining Order and Injunction against Mr. Webster is as follows: 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" (Recorder 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).

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⁷ 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. Webster's message to all of the police officers and personnel there and was not targeting Lt. Herbert specifically.

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 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 when Judge Cain refused to allow the deposition of Lt. Herbert he denied Defense the ability to prove that there was a legitimate purpose in Defendant's actions rather than the "course of conduct" of harassment, as Plaintiff/Respondent would have us believe.

III. Defendants actions prior to January 2002 were clearly protected free speech.

In Plaintiff's arguments [CT:123; line 3] their Attorneys state:

For years, Webster had carefully navigated his course of harassment to arguably qualify his actions as protected speech and take advantage of that safe harbor. Even if the statements about Lt. Herbert that he published in the press and on the Internet, to city residents and to her co-workers, were defamatory, her recourse would have been to bring a defamation action, which, Webster revealed, was his intent and desire.

An important concession made here by Attorneys for

Plaintiff/Respondent is that statements made by Mr. Webster to Lt.

Herbert's co-workers is a legitimate avenue for "Free Speech" and that Lt.

Herbert's proper recourse would be to bring a defamation action against

Mr. Webster.

This is important because of all the groups that Mr. Webster has targeted with his accusations of police corruption, it seems to be the good police officers that are most interested in having accusations investigated. These police officers, her co-workers, want to be proud of their department and to keep its reputation clean. And where corruption is found, they want to have the bad cops removed from the force. By comparison the general public and the City Government almost couldn't care less.

Because of this, Defendant has targeted most of his efforts these past years at the average San Jose police officer. The September 1994 incident with Officer Glen McCourtie was only one of over fifteen separate episodes

where Mr. Webster talked extensively with a San Jose police officer about the corruption and illegal activity in the S.J.P.D.'s past

IV. Demanding testimony from Lt. Herbert is not harassment.

A police officer's normal duties include the occasional requirement to testify under oath for private citizens, concerning facts that the officer is aware of. An example is a police officer testifying in Civil Court about a traffic accident or a domestic dispute. In these cases the private party is expected to pay a standard fee for the time and travel expenses of the officer. These fees are even collected up front at the San Jose Police Administration building when serving a subpoena for an officer. The officer then is expected to show up for the trial/deposition, to give truthful answers to questions under oath and then afterwards to return to their normal duties. This is all that was expected of Lt. Herbert.

There is only one reason that either the subpoena to appear at the tax court for Mr. Webster in February 2002, or the subpoena to give a deposition for this case, would cause Lt. Herbert any "Annoyance, Embarrassment or Oppression". That reason is if she were afraid that her answers may bring up facts that point to herself having been involved in Organized Criminal Activity during that 1990 sting. Perhaps on some of the questions she would be able to invoke her 5th amendment rights against self-incrimination. Now wouldn't that be an interesting development.

V. The driving and parking of the Billboard Truck around City Hall and the Police Department was not even targeting Lt. Herbert.

As pointed out in section III above targeting Lt. Herbert's coworkers and fellow police officers with accusations of her illegal activity is a legitimate vehicle for Mr. Webster's Free Speech, and Lt. Herbert's recourse, in Respondent's own words [CT:123; line 3], would be to bring a defamation action against Mr. Webster.

It is fairly obvious that the driving of the billboard truck around the Hall of Justice, the County Government buildings, San Jose City Hall, including slowly driving through the City Hall parking lot, and even the driving in front of the Police Administration Building, had little to do with confronting or harassing Lt. Herbert. It did however have everything to do with blatantly displaying Mr. Webster's accusations of police misconduct to City and County Government representatives and employees, police officers and Police Administration employees, and yes even the public.

In the declaration of Officer Julie Marin [CT:54, line 3-5] she states:

The vehicle [the billboard truck] appeared to be intentionally and strategically placed to give Webster an optimum view of employees leaving work.

Or to put it another way, this would mean that the billboard truck with 8'X10' signs was intentionally and strategically placed *so as to be optimally seen by all the police officers and employees*, that is to say Lt. Herbert's co-workers, leaving work. The intent is fairly obvious, as they

left work they would not be able to ignore the signs on the billboard truck directly in front of them. Mr. Webster often would even wave to the people to make it that much more difficult for them to ignore the billboard truck that was in front of them.

On a number of occasions police officers leaving work had even walked across the street to talk with Mr. Webster while he was parked in his billboard truck. They had asked him to explain the accusations that were on the truck's signs and of course Mr. Webster was more than happy to oblige.

Respondent's Brief, starting in the middle of page 20 states:

This argument [that his actions serve a legitimate purpose] fails for one simple reason:

The restraint sought by the City does not preclude Mr. Webster from petitioning his government or exercising his First Amendment rights; it merely prohibits him from engaging in certain conduct that was a credible threat of violence and which did not advance his asserted legitimate purpose. Mr. Webster can continue to petition governmental officials, he can drive his truck and billboard throughout all of San Jose with the exception of a 300 ft. radius of the police department and Lt. Herbert's house,... [emphasis added; error: 300 yrds. not ft.]

Defendant believes that his driving and parking of the billboard truck around the police department was the only place that his Free Speech was having any real effect. He further believes that it is precisely because it was having an effect there that Attorneys for Plaintiff/Respondent have gone to so much trouble to misrepresent the facts to make it appear as if

Mr. Webster's actions are some kind of "Credible threat of violence" to justify the Restraining Order.

This suggests a whole set of questions that need to be asked of Respondent: Have Lt. Herbert's co-workers voiced reluctance to work with someone they thought might be a "bad cop"? Was Lt. Herbert getting suggestions that she was dragging down the reputation of the San Jose police force and should resign? Where there any actual threats that Lt. Herbert received that may have come from her co-workers or other police officers. Code Civ. Proc. §909 gives this court of review the authority to demand answers to these questions. If these things were happening then it is clear that the motion for a Restraining Order and Injunction is bogus and that instead Lt. Herbert should exercise her option to bring a defamation action against Mr. Webster.

VI. Mr. Webster's stopping by Lt. Herbert's house was not harassment or even threatening in any way.

While Appellant's previous counsel simply pointed out that
Plaintiff had failed to prove that Defendant's two visits to Lt. Herbert's
home were either a form of harassment or any kind of threat, perhaps a
step by step analysis here would make it clearer.

Defendant was originally served with the TRO when he was driving in his billboard truck across from the Hall of Justice on Hedding Street [CT:65]. The officers that served the TRO, Sgt. David Yazzolino

and his partner had asked Mr. Webster where he had gotten the address of Lt. Herbert. Mr. Webster's response was that he had gotten it from the SCC. Records at the Assessors office at 70 W. Hedding. Now one has to believe that the City Attorney would have debriefed those officers, so Plaintiff would have known this shortly afterwards and would have been able to confirmed that indeed Samuel and Brenda Herbert's property was listed in that database and was accessible to the public.

Now Mr. Webster is keenly aware that just because a Brenda

Herbert is listed as part owner in property does not mean she lives there,
the property could be rented out to others, or it might even be that that

Brenda Herbert is not the one that works at the San Jose Police

Department. For example there has been up to three John Websters
besides the Defendant/Appellant of this case that resided in Santa Clara

County.

Now before Mr. Webster could go ahead with sending flyers to the neighbors of Brenda Herbert, telling about her heinous crimes he really would need to verify that the real Lt. Brenda Herbert actually lived there. Otherwise he could end up opening up a real can of worms legally; with lawsuits against him for defaming the wrong Brenda Herbert.

As supposed evidence of the "Harassment and Threats" of Mr. Webster visiting Lt. Herbert's home Plaintiff relies on the sworn statement of Samuel Herbert [CT:7-8] who admits that he did not even come into a face to face contact with Mr. Webster but only observed him through the front door peephole, while giving no indication to Mr. Webster that anyone was home.

Samuel Herbert did elude to the fact that a neighbor's daughter actually talked with Mr. Webster and his companion. Are we to believe that no one from the City Attorneys office interviewed this lady? If they did where is that lady's statement?

The truth is that the lady's statement would not have helped the paranoia that Plaintiff was trying to build for their case. That's why it is not included. Her statement would have been that the couple (Mr. Webster and companion) were courteous and non-threatening and that they said that they were interested in the next door property but had failed on two occasions to find anyone at home. Her statement would confirm that the couple said that they were interested in who actually lived there and whether it was rented out or whether the actual owners lived there.

What actually happened is that the lady volunteered that she could get the phone number of the neighbors so that the couple could call at their own convenience to get their questions answered rather than trying

again and again to catch them at home. It is only after the lady returned and said that she couldn't find the number, that she then volunteered that Samuel and Brenda Herbert actually lived there and that the Brenda Herbert worked "high up" in the San Jose Police Department.

The couple then thanked the lady for all her help and left.

Now don't you agree that Plaintiff's version makes it sound a lot more like harassment and threatening behavior? The problem is that it is intentional deceit by Attorneys of Plaintiff/Respondent to fake a "course of conduct" to justify a Restraining Order.

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

In the section of defendants flyer titled "Bad Cops turn good citizens into Terrorists" [CT:14] the defendant draws a parallel with the FBI and BATF as Bad Cops⁸ who had 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.

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⁸ 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)

Upon analyzing the Recorder's 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, there is just too much at stake. 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.

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. To him it is apparently more important to continue the cover-up of illegal police activity then to reduce the chance of violence resulting from the public's response to that activity.

It is important to note that in all of Mr. Webster's flyers, ads or on his web-site, or even in Judge Cain's court, nowhere has he given any indication that he believes that the Oklahoma City bombing was either a good or a desirable occurrence. He only states that he believed that it was a predictable occurrence resulting from the perception of police corruption at Waco Texas.

Finally, when Judge Cain queries "So the same type of frustration Mr. McVeigh felt towards his Government?" (Recorder's Transcript July 25th, 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:

While Judge Cain's refusal to recuse himself is in itself insufficient cause to justify a re-hearing after his rulings, it does however, in the interests of justice, mandate that this review court scrutinize his rulings and the evidence he accepted to justify those rulings with an extra critical eye.

First Respondent has admitted that Defendant's actions previous to recent events falls within what could reasonably be considered protected Free Speech. Second, a police officer's normal duties include the occasional requirement to testify under oath for private citizens so the requested testimony for the tax court and the deposition for this case are all part of a police officers daily routine and not harassment.

Respondent has further admitted that targeting Lt. Herbert's coworkers with allegations of her previous illegal activities is a legitimate protected Free Speech where Lt. Herbert's recourse would be to bring a defamation action against Mr. Webster.

Targeting Lt. Herbert's co-workers is exactly what

Defense/Appellant was doing when he was driving and parking the

billboard truck with 8'X10' signs so that all the co-workers, police officers

and officials there couldn't help but see it. Plaintiff has him lying in wait

for Lt. Herbert. Defense visits an address that is listed in a public database

to determine if that is where Lt. Herbert actually lives. No one answers the

door there but a neighbor verifies that it is her residence. Plaintiff has him

being there to harass 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/Respondent disappear upon close examination.

But to top it off, all of Defendant/Appellant's actions were clearly intended to alert the public at large, Lt. Herbert's co-workers and fellow police officers, about what Mr. Webster knows to be true. That they have a Bad Cop in their midst who needs to be brought to justice for her crimes. But to actually prove that his accusations of Lt. Herbert were true and not just some way of trying to make her life miserable Defendant needed that deposition.

Unfortunately Judge Cain had a direct conflict of interest with allowing that deposition. If indeed Lt. Herbert's testimony showed her as being part of an organized criminal conspiracy than it might also show that Judge Cain, by sealing documents for her, was knowingly part of the coverup of that same conspiracy.

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. (Code Civ. Proc. §657.1)

Judge Cain arbitrarily ended the hearing, in favor of the Plaintiff, over a dispute with Defendant about the role that Federal Agents had in causing the Oklahoma City Bombing. The Judge had not even allowed Defendant to explain his answer to a fairly ambiguous question that the Judge had asked (Reporter's Transcript, page 55, line 26). By doing this he prevented Counsel for the Defendant from presenting evidence of other important issues.

Counsel was prepared to present a witness that would explain why Mr. Webster went to Lt. Herbert's residence and what actually happened there. Mr. Webster himself was prepared to explain his intent with the driving and parking of the billboard truck around the Police Administration Building and why he resorted on occasion to using a pair of binoculars.

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. (Code Civ. Proc. §657.6)

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 was calculated to provide evidence that would have been used to

show that Defendant's actions were serving a legitimate purpose and therefore could not be part of a "Credible threat of violence". That is a very relevant subject and clearly admissible. The arguments in section IV and in the above Summary also clearly show such a deposition would not be harassment.

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. (Code Civ. Proc. §657.7)

It is clear that Attorneys 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.

In this document Appellant has suggested facts that

Plaintiff/Respondent most certainly would have know about but apparently intentionally left out because those facts would not have supported their paranoid view of Defendant's actions. There is also the likelihood that Lt.

Herbert has received harassment from her co-workers and other police officers, such facts would explain Plaintiff/Respondent real intentions.

This Court of Appeal has the authority under Code Civ. Proc. §909 to

question Attorneys for the Respondent as to their knowledge of all those exculpatory facts.

Because of all the above 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 defendent to take the deposition of Lt. Herbert concerning her part in that 1990 sting⁹.

Dated: August 4, 2004

Respectfully submitted

John H. Webster appellant pro-per

⁹ Since Respondent is apparently aware that Mr. Webster accusations are true, and would predictably drop the motion for injunction rather than allow a deposition of Lt. Herbert, justice would be better served by this court requiring such a deposition before it reaches its final ruling. Such a deposition of Lt. Herbert should be in the presence of Mr. Webster and an officer of Internal Affairs to ensure her cooperation.