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Superior Court of California, County of Contra Costa

Keri Evilsizor, Petitioner, Joseph Sweeney, Respondent, John and Mary Evilsizor, Claimants.	Case No.: **D13-01648** Department: 29 Date: 8/12/2016 Time: 10:00 a.m. Judge: Bruce C. Mills **RESPONDENT'S TRIAL BRIEF FOR CONTEMPT ACTION**

Summary

This contempt proceeding involves a Domestic Violence Restraining Order issued on 4-11-2014. The order is not a physical restraining order; rather, it is an order to prevent the disclosure of data downloaded from cell phones used by Petitioner (Evilsizor) and Respondent (Sweeney) during their marriage. These matters are not run of the mill, they are complicated and involve fundamental constitutional rights that must be considered carefully by the Court.

However, *this contempt proceeding should be easily dismissed on its face* because Evilsizor waived privacy of the information that she alleges constitute violations of the order *by publishing the information herself numerous times* before and after the issuance of the DVRO, including in these very contempt pleadings and in the appellate proceedings. The information is now permanently included in the public record. On June 20, 2016, Department 39 denied Petitioner's request to retroactively seal the records because proper sealing procedures were not followed.

The website in question is DivorcingTheEvilsizors.com, which was created by Sweeney's *company*, Court Reform LLC, to expose problems in family courts. The website details some of the

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ongoing matters in the dissolution, civil, and appellate actions. Evilsizor alleges that Sweeney violated the DVRO by creating certain content on the website. By stipulation of the parties, the website has been down since March 2016 pending resolution of Petitioner's RFO in the family court to determine if any material should be permanently removed.

Evilsizor alleges that Sweeney is in violation of the order and that Sweeney created the website for the purpose of harassing her and her family. Court Reform LLC's record shows a different story.

Court Reform LLC is an advocacy firm that promotes increased transparency and accountability in California's judiciary. Several news outlets, including the Chronicle, Center for Investigative Reporting, Daily Journal, The Recorder, and many others, including radio stations and bar-related publications, have featured the firm's work.

In March 2016, Sweeney testified before the California Assembly regarding the practices of the Commission on Judicial Performance, which resulted in the tabling of the agency's budget request. Court Reform LLC's direct work resulted in the first audit of the Commission on Judicial Performance in California history. The request was approved by unanimous vote of the Assembly on August 10, 2016 after it received bi-partisan and bi-cameral support and was signed onto by the Chairs of the Senate Judiciary Committee, Assembly Judiciary Committee, and Accountability & Administrative Review Committee. It was also supported by the California Judges Association and more than 20 other state and local organizations.

In addition, as a result of his work, Sweeney has accepted an invitation to teach a State Bar accredited Minimum Continuing Legal Education class on judicial ethics this month.

Petitioner's painting of Respondent and her contentions are false, and Sweeney will demonstrate that the contempt should be dismissed on its face for numerous reasons, including waiver and unconstitutionality. If the Court does not dismiss on its face, Sweeney will demonstrate at trial that Evilsizor knowingly fabricated numerous of the alleged violations, and that he is not in contempt of the order.

Sweeney raises the following affirmative defenses:

(1) Evilsizor waived her right to privacy of the information.

(2) The order is narrowly tailored to restrain data *downloaded* from the phones. None of the data on the website was downloaded from the phones;

(3) The information on the website was publicly disclosed prior to and subsequent to the issuance of the DVRO on numerous occasions;

(4) Even if data from the phones was disclosed, only data that is private and sensitive is subject to the restraining order;

Sweeney raises the following collateral attacks on the constitutionality of the order. While the Court of Appeal affirmed the order, Sweeney did not raise the following arguments in the appeal:

(5) The "disturbing the peace" provision of the Domestic Violence Prevention Act violates the rights to due process and equal protection because it does not pass a strict scrutiny test;

(6) The order violates the Eighth Amendment because the Domestic Violence Prevention Act is overbroad;

(7) The order violates the right to due process and equal protection because it creates an exclusionary rule.

STATEMENT OF FACTS

1. Background.

Evilsizor and Sweeney were married in November 2010. Evilsizor used two cell phones during their marriage. At some point Evilsizor conferred ownership of one of the phones to her son (Sweeney's stepson). Sweeney claims that he had regular access to the phones and they were not password protected. Evilsizor claimed she added a password to the phones after the couple moved during the summer of 2012, and conceded that Sweeney had some access to the phones. Evilsizor's parents also claimed ownership of the phones.

Evilsizor gave birth to the couple's daughter in November 2012. Around this time, Sweeney became concerned that he might not be the biological father after he read a text message on his stepson's phone leading him to believe that Evilsizor had received fertility treatments without his knowledge. He then downloaded the contents of the phones using software that made it easier to read the information. Sweeney testified that he thought is was unnecessary to get Evilsizor's permission before downloading the data because he had regular access to the phones and had "previously backed up the phone to the computer" at her request. Evilsizor denied asking Sweeney to back up the phones and denied knowing he had done so.

Sweeney reviewed the text messages, discovering information he believed indicated that prior failed pregnancies were not his, and that Evilsizor had received fertility treatments without his knowledge. Sweeney is the biological father of their child, the result of a third pregnancy. In early 2013, he confronted Evilsizor with the information.

That month, the parties separated, and dissolution proceedings were soon initiated. Disputes arose over various issues, and the trial court characterized it as a "highly contentious case." One such dispute was over child and spousal support, attorney fees, and sharing costs for a custody evaluation. On 8-30-13, Evilsizor filed a request to modify support payments, claiming that her father had fired her from the family's business. Sweeney alleged that Evilsizor had colluded with her parents to improperly resolve support, fees, and costs.

Sweeney attached text messages to his declaration to support his opposition. One was from

October 2012, during the marriage, meant to demonstrate that Evilsizor was misstating the assets at her disposal. The text message refers to three cases of diamond rings Evilsizor owned. Another message was dated January 2010, during a pending child support motion with her son's father (Sweeney's stepson). Sweeney claimed the messages demonstrated a pattern of manipulating finances for the purpose of improperly resolving support.

In response to her text messages being disclosed, Evilsizor filed a request for a restraining order under the DVPA to prevent further disclosure. She alleged that Sweeney had downloaded her private text communications to third parties without her consent. Evilsizor claimed that as a result she suffered "extreme embarrassment, fear, and intimidation." She also alleged that Sweeney threatened to reveal publicly more text messages and e-mails for leverage in the dissolution proceedings. She sought an order prohibiting Sweeney from further disseminating her text messages. Sweeney alleged that Evilsizor filed the DVPA application for tactical reasons and to censor information.

2. DV proceedings.

Evilsizor submitted the DVPA application on 10-18-13. The trial court denied the initial application for a temporary order. At the preliminary hearing on 11-18-13, the trial court again denied issuing a temporary order, but on Evilsizor's request set a trial for 7-1-14. During a discussion of possible interim orders, Sweeney's counsel objected to any order "that would sound like it's a DV [domestic-violence] order. So if there's a stipulation outside of a DV order, that's fine." Counsel contended that Sweeney should be allowed to share "whatever he wishes" with the custody evaluator but that he would agree not to disclose information to anyone else. The trial court directed the parties to execute a stipulation, and remarked, "I'm hoping that the hearing will not be necessary." Optimism was misplaced. The day after the hearing, Sweeney's attorney wrote to Evilsizor's attorney stating he was looking forward to a draft of a non-DVPA order regarding protection of the information on the phones. But Evilsizor *never* drafted a stipulation or requested a protective order.

In December 2013, Sweeney provided the custody evaluator with text messages regarding the

fertility treatments and prior pregnancies. Sweeney also disclosed messages to corroborate his concerns that Evilsizor suffered problems that would "have a major impact in determining child custody."

In February 2014, the case was assigned to a new trial judge after Evilsizor's parents, who had been joined to the proceedings, filed a peremptory challenge to the original judge. Despite Sweeney's objections that his request for attorney fees be heard first, the DVPA trial was expedited by 3 months, to 4-11-2014.

At trial, Evilsizor testified that it had been "incredibly incredibly difficult to deal with" the dissemination of the information, stating, "I have sleepless nights. I'm sick to my stomach. My friends are mad at me, embarrassed as if I let him. I didn't know he was even doing any of this. My parents are upset, you know. Why did I marry him? I didn't know that things were going - I didn't know. Yeah. It's been incredibly challenging to live with." She further testified that she had suffered shock and embarrassment and feared for her safety because of the disclosure. Evilsizor also alleged that Sweeney threatened to reveal information to the Internal Revenue Service.

After the close of evidence, the trial court remarked that the narrow issue to decide was whether there was a need to prevent dissemination of the information from the phones. It stressed, "I'm not making any conclusive decision about whether [the text messages] were properly acquired. I'm not deciding what [e]ffect it has on attorney/client privilege." The court concluded that even if Sweeney legally obtained the information, an issue left unresolved, "if it disturbs her peace because you're going around either disclosing or threatening to disclose to third parties for no particular reasons intimate details of your lives, I can enjoin that under the DVPA, and that's what I think is happening here."

The court prohibited Sweeney from "using, delivering, copying, printing or disclosing the messages or content of [Evilsizor's] text messages or e-mail messages or notes, or anything else downloaded from her phone or from what has been called the family computer except as otherwise authorized by the court."

ARGUMENT

1. Evilsizor waived her right to privacy.

The DVRO was issued on 4-11-2014. Prior to that time, Evilsizor and Sweeney publicly disclosed in the court file the information that Evilsizor alleges violates the order. Moreover, even *after* the order was made, Evilsizor and Sweeney disclosed all of the information in the A142396 appellate proceedings in their briefs and during oral argument in front of the Court of Appeal. Further, even after the appellate proceedings were concluded and the order was affirmed, Evilsizor disclosed the website information in the public court file by attaching the website pages she alleges are violations to these very contempt pleadings, filed 12-14-2015, and to her motion to have the website taken down, which she filed before the contempt proceeding on 11-17-2015. Thereafter, Petitioner sought to have those pleadings retroactively sealed. Department 39 denied the motion to seal on June 20, 2016 after it found that proper sealing procedures were not followed. **Thus, the website content Petitioner alleges are violations of the order is permanently included in the public court file by Petitioner's own doing.**

Additionally, the trial court never found that there was a reasonable expectation of privacy of the information in the first place. Sweeney alleged the phones were not password protected, and that he had unrestricted access, and regularly used them. Evilsizor did not contest Sweeney's allegations until cross-examination at the DV trial, only then alleging that she added a password after moving in 2012 (the parties married in 2010). Even accepting Evilsizor's allegation that the phones were not password protected until 2012, anyone could have accessed information on the phones prior to that time, including a stranger if the phones had been lost or stolen. Evilsizor conferred ownership of one of the phones to her son (Sweeney's stepson), and also conceded that Sweeney used the phones to some extent. Even the Court of Appeal opinion identifies one of the phones as the "stepson's phone." Further, Evilsizor's parents alleged ownership of the phones. Thus, there was no reasonable expectation of privacy. See e.g. Holmes v. Petrovich Development Company LLC (2011) 191

Cal.App.4th 1047 (attorney-client privilege waived in e-mails because the employee did not have a reasonable expectation of privacy given the company's usage policy). Further, Evilsizor never drafted a stipulation to protect the information following the preliminary hearing, thereby waiving any claim of privacy. Neither the trial court nor the Court of Appeal addressed a waiver of privacy argument. Sweeney asks this Court to rule on the matter.

2. The order is narrowly tailored to restrain data *downloaded* from the phones. None of the information on the website was downloaded from the phones.

The order reads:

> "Respondent is prohibited from using, delivering, copying, printing, or disclosing the messages or content of Petitioner's text messages or email messages or notes, or anything else downloaded from her phone or from what has been called the family computer except as otherwise authorized by the court."

In its published opinion, the First District Court of Appeal wrote:

> "As we construe the order, it is directed at Evilsizor's data that Sweeney surreptitiously *downloaded* (italics original) … We acknowledge that a prohibition on "disclosing" the "content" of Evilsizor's text messages could arguably cover information that Sweeney knew independently of the review of Evilsizor's information. But given that the order is directed only at the data Sweeney "downloaded," we believe the order was sufficiently tailored to the harm it was meant to prevent - namely, disclosing or threatening to disclose the information."

The Court of Appeal clearly indicated that the order is narrowly tailored to only *data downloaded* from the phones. Despite Evilsizor's allegations, no content on the website was downloaded from the phones. If Sweeney disclosed a screenshot of text messages, or reproduced a text message conversation verbatim, that could be construed as a violation of the order, but Sweeney has not disclosed any such content. As documented herein, all information posted on the website was publicly disclosed prior to and subsequent to issuance of the DVRO.

3. The information on the website was publicly disclosed prior to and subsequent to the issuance of the DVRO on numerous occasions;

Even if Sweeney initially discovered information on the phones, the information was discussed

with Evilsizor and numerous other people and was publicly disclosed numerous times prior to and subsequent to the issuance of the DVRO, including in pleadings, testimony, and argument in the trial and appellate courts, to numerous of the parties' friends and family members.

No order was made to restrain any information until nearly *one-and-a-half years later,* by which time any allegedly sensitive information had been disclosed by *both* Sweeney and Evilsizor. The trial and appellate court files and transcripts of proceedings in open court are replete with details about the pregnancies, fertility treatments, discovery of other men that Evilsizor may have dated, and the termination of a pregnancy.

While Evilsizor would like the Court to believe that Sweeney indiscriminately disclosed content from the phones, such an assertion is false. *Evilsizor* first disclosed the fertility treatments and termination of a pregnancy in her initial dissolution pleadings and numerous pleadings thereafter, including in appellate briefs. *Evilsizor's* trial and appellate attorneys spoke about the abortion and fertility treatments in open court. The only time Sweeney disclosed information was in confidence to their custody evaluator.

It is a fundamental principle of free speech that once information has been disclosed publicly, it cannot be retroactively restrained. The Supreme Court has described prior restraints as the "most serious and least tolerable infringement on First Amendment rights." Nebrasks Press Ass'n v. Stuart (1976) 427 U.S. 539. Even if records were in a public court file for one day they cannot be subject to a prior restraint. See Hurvitz v. Hoefflin (2000) 84 Cal.App.4th 1232 ("once the information is released, unlike a physical object, it cannot be recaptured and sealed").

Evilsizor is requesting a finding of contempt for posting information that was publicly disclosed by herself and her counsels. Regarding the discussion of Evilsizor's terminated pregnancy, the Court of Appeal even wrote in their Opinion, "The information Sweeney disclosed to Evilsizor's father was personal and sensitive, but it was not information Sweeney had learned from the downloaded text messages."

The Court of Appeal did not conclude that Sweeney's verbal and written speech about *any* content related to the phones is subject to a prior restraint. The order only restrains Sweeney from

reproducing the actual *downloaded* data, such as a screenshot or verbatim transcription of the text messages. For example, information about family vacations may also be included on the phones – Sweeney is not restrained from discussing those vacations merely because there is content about them included on the phone.

4. Even if information from the phones was disclosed, only information that is private and sensitive information is subject to the restraining order.

On March 21, 2016, Sweeney appeared before Department 39 - the Court that issued the order - on a motion by Evilsizor to remove content from the website. Evilsizor alleged that content on the website was contained on her phones, in violation of the restraining order and requested that it be removed. The matter has been continued for a long-cause hearing on July 11.

However, at the hearing the Court remarked that even *if* information on the website was contained on Evilsizor's phones, it is not subject to the restraining order unless it is sensitive and private information and could not be obtained elsewhere. Quoting from the transcript of proceedings:

> "THE COURT: I do have some questions about the photos, which is, you know, if it's an intimate photo or a private photo, that's one thing, but a photo of somebody taken in a public place is not materially different from lots of other photos that somebody might have. Might not be something that has to be protected.
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> [¶] Remember, the point here is there was information that was either just Ms. Evilsizor's or just shared between Mr. Sweeney and Ms. Evilsizor that's very private. It's not the kind of thing other people would know about, and it's disturbing her peace to have it out there circulating around. That's what we're looking for.
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> [¶] That's the other thing is, if it was -- was it only on her phone or was it on her phone and also in five other places? For example, one of the pictures appear to be a wedding photograph in the chapel. It's -- even if that was on Ms. Evilsizor's telephone, I'm having some difficulty understanding why that's a particular problem."

The Court's remarks indicate that not all information on the phones is subject to the restraining order. Rather, only information adjudicated as private and sensitive and that was not previously disclosed.

If the issuing court does not interpret the order as a restraint on all information contained on

the phones, then how is a layperson to interpret the order? If Sweeney discloses information that is not sensitive or private, and could be obtained elsewhere, can he be held in contempt of court? The issuing court doesn't think so. The Court of Appeal opined that the order is only restricted to *data downloaded* from the phones. Even if Sweeney discussed information from the phones with Evilsizor, those conversations are considered an independent source. A person cannot be restrained from talking about the content of conversations with others or information that has been publicly disclosed.

5. The "disturbing the peace" provision of the Domestic Violence Prevention Act is unconstitutional because it does not pass a strict vagueness test.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford 408 U.S. 104. A statute is void for vagueness unless it "provide[s] a person of ordinary intelligence fair notice of what is prohibited." Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489; United States v. Williams (2008) 553 U.S. 285.

The First District Court of Appeal has established even stricter requirements: "Due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. [Citations.]" People v. Martin (1989) 211 Cal.App.3d 699. "[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential element of due process of law. [Citation.]" Ibid.

To determine if an action constitutes "disturbing the peace" under the DVPA, the following course of study must be taken:

First, section 6203 reads:

(a) For purposes of this act, "abuse" means any of the following:

(1) Intentionally or recklessly to cause or attempt to cause bodily injury.

(2) Sexual assault.
(3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
(4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.

Second, section 6320 reads:

(a) The court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in Section 528.5 of the Penal Code, falsely personating as described in Section 529 of the Penal Code, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and in the discretion of the court, on a showing of good cause, of other named family or household members.

Third, because "disturbing the peace" is not defined in the code, one must unearth *Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, which concludes on the tenth page of the decision, "the plain meaning of the phrase 'disturbing the peace of the other party' in section 6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party." (*Nadkarni is nonbinding on the First District*).

Fourth, one must decide if an action might destroy the mental or emotional calm of the other person, presumably by weighing their knowledge of the person's sensitivity, inner strength, current mood, and other relevant factors.

Statutes that infringe on constitutional rights demand the most scrutiny. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489. The order infringes upon Sweeney's First Amendment rights, and has the following collateral consequences:

(a) Revocation of the Second Amendment right to possess a firearm. (section 6218 and Cal. Penal Code 29825) District of Columbia v. Heller (2008) 554 U.S. 570 ("The Second Amendment protects an individual right to possess a firearm"); McDonald v. Chicago (2010) 561 U.S. 742 (Second Amendment right applies to all states through incorporation by Due Process Clause of Fourteenth Amendment).

(b) Mandatory presumption against having sole or joint custody of a minor child under section 3044. Troxel v. Granville (2000) 530 U.S. 57 ("it cannot now be doubted that the Due Process

Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children");

(c) Becomes a factor when adjudicating support and attorney fees. See sections 4320 and 2030. Thus, infringing upon Due Process Clause of Fourteenth Amendment again.

Therefore, a strict vagueness test is mandated because the DVPA interferes with several constitutional rights. It takes careful study of sections 6203, 6320, and a statutory construction found in Nadkarni (nonbinding on the First District), to discover yet another vague, subjective definition that one must guess as to its application. This very case demonstrates the statute's failure of the vagueness test:

(a) The original trial judge, who presumably exceeds the "person of ordinary intelligence" requirement, denied a temporary restraining order based on Evilsizor's application. Thus, the trial judge did not find that Sweeney's actions constituted domestic violence;

(b) The original trial judge again denied a temporary order after further argument at the preliminary hearing;

(c) After department transfer, based solely on Evilsizor's testimony, the new trial judge granted the permanent order after merely finding, "if it disturbs her peace because you're going around either disclosing or threatening to disclose to third parties for no particular reasons intimate details of your lives, I can enjoin that under the DVPA, and that's what I think is happening here."

(d) Two months later, Sweeney requested a DVPA order against Evilsizor. A temporary order was granted. An extension was granted at the preliminary hearing. At trial Sweeney entered a dozen exhibits into evidence to support his application. But a permanent order was denied. The trial court concluded, "…in the context of this case, is it's my conclusion that what we have here does not quite rise to the level of justifying a domestic violence restraining order; although, if there's much more of this…there probably would be a justification for an order." The trial court then issued a non-DVPA physical restraining order barring Evilsizor from custody exchanges.

It is impossible to discern what legal standard was applied in these situations, which ultimately resulted in a non-physical DVPA restraining order against Sweeney, and a non-DVPA physical restraining order against Evilsizor.

The DVPA casts an unconstitutionally broad net as described in Boos v. Barry (1988) 485 U.S. 312: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained,

and who should be set at large." The reason for a strict vagueness test is one of basic principle: "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." Grayned v. City of Rockford 408 U.S. 104. Thus, the "disturbing the peace" provision of the DVPA is unconstitutional.

6. The order violates the Eighth Amendment because the Domestic Violence Prevention Act is overbroad.

Because the DVPA is vague and overbroad, it causes orders like the one at hand to violate the Eighth Amendment of U.S. Constitution and California Constitution Article 1, Section 17, prohibiting cruel and unusual punishment. Punishment that is "inflicted in wholly arbitrary fashion" or is "patently unnecessary" is cruel and unusual. Furman v. Georgia (1972) 408 U.S. 238.

The serious consequences of a DVPA order are universally enforced, regardless of the severity of the action. The trial court found that Evilsizor's safety was not at risk and accordingly did not issue a physical restraining order. Therefore, revoking firearm rights is wholly arbitrary and patently unnecessary. Moreover, Sweeney tried to protect his child by disclosing information he believed would greatly impact child custody; creating a presumption that he should not have sole or joint legal custody because of that action is cruel. Exemplifying the arbitrary infliction of the presumption, a custody evaluator subsequently recommended that Sweeney have sole legal custody of their child.

Likewise, factoring some actions into adjudicating support and attorney fees (state interests) the Family Code requires is wholly arbitrary. The damage to a person's reputation causes additional, immeasurable harm. In this case, Sweeney owns a tutoring company and works with children.

Thus, DVPA is unconstitutional because the severe consequences are inflicted in arbitrary fashion across an overbroad spectrum of actions and speech. The DVPA treats severe physical abuse the same as disclosing text messages from a family phone, which causes the DVPA to violate the Eighth Amendment as it has here. Thus, the restraining order is unconstitutional.

7. The order violates the rights to due process and equal protection because it creates an exclusionary rule.

The exclusionary rule renders illegally obtained information inadmissible in a criminal court. The rule is intended to protect Fourth Amendment rights by deterring illegal searches and seizures by government agencies. United States v. Jeffers (1951) 342 U.S. 48; People v. Cahan (1955) 44 Cal.2d 434. The exclusionary rule does not apply to evidence unlawfully obtained by private individuals. Burdeau v. McDowell (1921) 256 U.S. 465; Ecker v. Raging Waters, Inc. (2001) 87 Cal.App.4th 1320 ("there was no legal impediment to the trial court's consideration of a videotape seized by a private citizen"). The exclusionary rule does not apply in a civil proceeding. INS v. Lopez-Mendoza (1984) 468 U.S. 1032 ("Consistent with the civil nature of a deportation proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing"); Pennsylvania Bd. of Probation and Parole v. Scott (1998) 524 U.S. 357 ("the Court has repeatedly declined to extend the rule to proceedings other than criminal trials").

The exclusionary rule is controversial even in criminal proceedings because of its social costs. As Supreme Court Justice Scalia summarized in Hudson v. Michigan (2006) 547 U.S. 586:

> Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," United States v. Leon, 468 U.S. 897, 907 (1984, … We have therefore been "cautious against expanding" it, Colorado v. Connelly, 479 U.S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking…presents a high obstacle for those urging [its] application," Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364–365 (1998) (citation omitted). We have rejected "indiscriminate application" of the rule, Leon, supra, at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," United States v. Calandra, 414 U.S. 338, 348 (1974) – that is, "where its deterrence benefits outweigh its 'substantial social costs,'" Scott, supra, at 363.

Sweeney is a private individual *and* he admitted evidence in a civil proceeding *and* the evidence was not obtained illegally. None of the criteria have been meet to create an exclusionary rule here.

The exclusionary rule is also narrowly applied because, "it would require extensive litigation to determine whether particular evidence must be excluded." United States v. Calandra (1974) 414 U.S. 338. The trial court's order restrains information "except as otherwise directed by the court." Should a request for disclosure be made every time information is important to resolve a matter?

Should a continuance be granted until the request for disclosure has been decided? Does the court have to determine if the "peace" would be disturbed every time a request for disclosure is made and balance accordingly? Do some matters override disturbing the peace, but others do not? What are the criteria for the balancing test(s)? Can the court determine if information is important, or weigh it against the matter, prior to the hearing?

A civil court does not have inherent power to suppress evidence on an ad hoc, subjective basis. Such actions violate the constitutional rights to due process and equal protection. Thus, the restraining order is unconstitutional.

Respectfully submitted,

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James D. Morrison