SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

CAROLYN MISCHE-HOEGES **Petitioner** **v.** **MATTHEW LEFANDE** **Respondent**	**Case No:** **2010 CPO 002080** **Judge Jose M. Lopez** **Courtroom 114**

MOTION TO VACATE VOID CONSENT ORDER

In accordance with this Court's Civil Rule 60(b)(4), the Respondent hereby moves to vacate the Court's September 21, 2010 Consent Order. This Court has deprived the Respondent of any semblance of due process in the course of this case, thus improperly coercing the Respondent's consent to the September 21, 2010 Order. The Order is thus void and must be vacated.

In support of this Motion, the Respondent states the following:

CIVIL RULE 12-I (a) CERTIFICATION

I hereby certify that on February 25, 2011, I attempted to confer with the Petitioner's Counsel regarding the relief sought herein. Petitioner's Counsel did not respond to my inquiries.

STATEMENT OF FACTS

1. On June 22, 2010, Mische-Hoeges applied for and received a Temporary Protection Order, falsely claiming LeFande was stalking her.

2. No service of process of the Temporary Protection Order was ever made upon LeFande.

3. On July 19, 2010, LeFande, by counsel, moved for leave to conduct discovery. LeFande's motion was denied in its entirety on July 23, 2010.

4. LeFande renewed his motion for leave to conduct discovery on August 2, 2010. LeFande's renewed motion was again denied in its entirety on August 11, 2010.

5. On August 16, 2010, LeFande, by counsel, moved to limit the testimony of a foreign witness never present in the United States for any of the events alleged. LeFande's Motion in Limine was denied in its entirety on August 31, 2010.

6. On September 21, 2010, the parties offered a Consent Order to the Court, providing *inter alia*, that LeFande agreed to remain 100 feet away from Mische-Hoeges' person.

7. Following the hearing on that date, LeFande repeatedly requested a signed copy of the Order from the Clerk of the Court. The Clerk of the Court informed LeFande on each occasion that no order had been entered. Neither LeFande nor his attorney has ever been served with a copy of the signed Consent Order.

8. On November 1, 2010, LeFande filed a civil suit against Mische-Hoeges in United States District Court alleging false arrest, false imprisonment, malicious prosecution, abuse of process, defamation and deprivation of his civil rights under color of state authority. Resp.'s Ex. A. LeFande arranged for service of process upon Mische-Hoeges via Virginia Sheriff's Deputies and by private process server.

9. On November 4, 2010, LeFande received notice that Mische-Hoeges intended to appear as a witness for the Respondent at an evidentiary hearing before the

Public Employee Relations Board in which LeFande is representing the former Chairman of the FOP Metropolitan Police Department Labor Committee as his attorney. Resp.'s Ex. B. The proceedings before PERB involve a claim for reimbursement of some $244,000.00 in attorney's fees by the former Chairman for defense of a lawsuit which was initiated against him in 2001. Mische-Hoeges was not a party to the proceedings and LeFande has no information as to any reason why she would need to be present for the hearing.

10. On that date, LeFande notified the counsel for the Respondent in the PERB case of the pending litigation between LeFande and Mische-Hoeges.

11. On November 5, 2010, counsel for the Respondent in the PERB case moved for a continuance of the PERB hearing. Resp.'s Ex. C. Attached to the motion was an executed copy of this Court's September 21, 2010 Consent Order. This was the first time that LeFande or his attorney learned that the order had been entered. Counsel for the Respondent in the PERB case expressed concern for the ability of LeFande to attend the PERB hearing if Mische-Hoeges was also in attendance. Id.

12. Based on Mische-Hoeges' conduct, on November 8, 2010, LeFande moved to vacate, alter or amend the Consent Order under this Court's Civil Rule 60 (b).

13. Despite the evidence of Mische-Hoeges' fraudulent intent and bad faith in seeking a restraining order against LeFande, on December 20, 2010, this Court refused to vacate the Consent Order.

14. LeFande made a timely Notice of Appeal on January 3, 2011.

ARGUMENT

This Court's Civil Rule 60(b)(4) allows a party to seek relief from a final judgment that is void.

> A void judgment is a legal nullity. *See* BLACK'S LAW DICTIONARY 1822 (3d ed. 1933); *see also* id., at 1709 (9th ed. 2009). Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. *See* RESTATEMENT (Second) OF JUDGMENTS 22 (1980); *see generally* id., § 12.

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1377 (2010).

> Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. *See* United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (CA1 1990); [12 J. Moore *et al*., MOORE'S FEDERAL PRACTICE § 60.44[1][a] (3d ed. 2007)]; 11 C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE & PROCEDURE § 2862, p. 331 (2d ed. 1995 and Supp. 2009); *cf.* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Stoll v. Gottlieb, 305 U.S. 165, 171-172 (1938).

Id. (discussing analogous FED. R. CIV. P. 60(b)(4)) [parallel citations omitted]. *See also* V. T. A., Inc. v. Airco, Inc., 597 F.2d 220, 225 (10th Cir. 1979) (citing Arthur Andersen & Co. v. Ohio, 502 F.2d 834, 842 (10th Cir. 1974) *cert. denied* 419 U.S. 1034 (1974); Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949) *cert. denied* 338 U.S. 816 (1949); Crosby v. Bradstreet Co., 312 F.2d 483 (2d Cir. 1963) *cert. denied* 373 U.S. 911 (1963)).

"[A] civil protection order is quasi-criminal in nature…" Kelm v. Hyatt, 44 F.3d 415, 423 (6th Cir. 1995) BATCHELDER, C.J. concurring in part and dissenting in part. *See also* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 500 (1982) ("prohibitory and stigmatizing effect" of ordinance with only civil penalties). Where such proceedings potentially deprive the Respondent of Constitutional rights and civil liberties, including a right to travel, a right of free association, freedom of speech and the

right to own and carry firearms, each and all of the procedural safeguards of a criminal proceeding are necessary elements of the civil protection process. *See e.g.* M.L.B. v. S.L.J., 519 U.S. 102, 116-119 (1996) (civil parental termination proceedings affected associational rights protected by Fourteenth Amendment); Little v. Streater, 452 U.S. 1, 10 (1981) (civil paternity proceedings implicate criminal due process where subsequent failure to comply with court's order is punishable by imprisonment).

> [Identification] of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

"To deny a defendant an opportunity to present competent proof in his defense constitutes a violation of a fair trial and of due process." Henderson v. Fisher, 631 F.2d 1115, 1119 (3d Cir. Pa. 1980) (citing Clack v. Reid, 441 F.2d 801, 804 (5th Cir. 1971)).

> Whether grounded in the Sixth Amendment's guarantee of compulsory process or in the more general Fifth Amendment guarantee of due process, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). This right includes, "at a minimum, . . . the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); accord Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's

> version of the facts . . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."). Moreover, "[w]hen evidence is excluded on the basis of an improper application of the [evidentiary] rules, due process concerns are still greater because the exclusion is unsupported by any legitimate state justification." United States v. Lopez-Alvarez, 970 F.2d 583, 588 (9th Cir. 1992).

United States v. Stever, 603 F.3d 747, 755 (9th Cir. 2010).

From its onset, this proceeding has been blatantly biased in favor of the Petitioner and has deprived the Respondent of any sort of legitimate due process. "Although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion." Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. N.Y. 1985) (citing ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 997 (2d Cir. 1983); Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir. 1978) (citing Wolff v. Laverne, Inc., 17 A.D.2d 213, 233 N.Y.S.2d 555 (1962); MacLeod v. D.C. Transit System, Inc., 283 F.2d 194, 195 n.1 (D.C. Cir. 1960); 89 C.J.S., TRIAL, § 577 at 355)).

> We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law.

Id. (quoting Wolff, 17 A.D.2d at 215).

> In short, pressure tactics to coerce settlement simply are not permissible. Schunk v. Schunk, 84 A.D.2d 904, 905, 446 N.Y.S.2d 672 (1981); Chomski v. Alston Cab Co., 32 A.D.2d 627, 299 N.Y.S.2d 896 (1969). "The judge must not compel agreement by arbitrary use of his power and the attorney must not merely submit to a judge's suggestion, though it be strongly urged." Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir. 1937).

Id.

a. The June 22, 2010 Temporary Restraining Order was issued in violation of District of Columbia law.

On June 22, 2010, after being denied the same protection orders by the courts in Alexandria and Arlington, Mische-Hoeges applied for a Temporary Protection Order in the District of Columbia. The Petitioner's factual allegations against the Respondent within her petition comprised solely of the following:

- The Respondent sent approximately seven e-mails in about five days. The Respondent sent an e-mail on May 26, 2010 that stated, "I hope you get reassigned to prostitution because you really are a filthy whore."

- On May 28, 2010, the Respondent sent an e-mail that said, "Inquiring minds want to know why are you such a whore?" The Petitioner responded to the Respondent and told him to stop contacting her.

- On May 31, 2010 the Respondent contacted the Petitioner's boyfriend by e-mail and phone.

- On June 1, 2010 the Respondent called the Petitioner from a disguised number.

- On or about June 10, 2010… The Respondent sent the Petitioner a letter and a book.

- On or about June 12, 2010… The Respondent sent the Petitioner flowers.

- On or about June 22, 2010… The Respondent e-mailed a private video of the Petitioner to every employee at the Petitioner's boyfriend's place of work.

During a hearing on that date, Mische-Hoeges admitted in open court that she had absolutely no evidence or even personal knowledge which supported her allegation that the Respondent had emailed a video to any person.

> So to, to clarify I cannot, I can't show conclusively that it came from him at this time but he's the only person I, he's the only other person who could have access to that video and I don't know how he got access to it but –

June 22, 2010 Hr'g Tr. at 3.

Under District of Columbia law, a Temporary Protection Order may be issued only if the Court "finds that the safety or welfare of the petitioner or a household member is immediately endangered by the respondent". D.C. CODE § 16-1004(b)(1). Nothing within the Petitioner's allegations even remotely supported this finding. The Petitioner, an armed Metropolitan Police Officer, made no allegation within her affidavit that the Respondent ever threatened her or any other person in any way. The Petitioner made no allegation within her affidavit that would support any reasonable person fearing for her safety or the safety of another person. The Petitioner made no allegation within her affidavit that the Respondent ever assaulted her or any other person. The Petitioner made no allegation within her affidavit that the Respondent ever attempted to follow, approach or contact her in person since the time of the end of their relationship. The Superior Court was completely without authority to issue the Temporary Restraining Order.

b. The default Civil Protection Order of July 6, 2010 was issued in violation of District of Columbia law.

A hearing was set for July 6, 2010 for Mische-Hoeges' application for a Civil Protection Order. As reflected in the Court's own docket, the Respondent's counsel moved on July 2, 2010 for a continuance due to a scheduling conflict. Despite the request for the continuance appearing in the Court's docket, this Court entered a default Civil Protection Order against the Respondent on July 6, 2010 and issued a bench warrant for the Respondent.

At the July 6, 2010 hearing, Mische-Hoeges offered the Court no further evidence than was offered in support of her petition for the Temporary Protection Order. Nevertheless, this Court issued a default Civil Protection Order against the Respondent.

Within the Civil Protection Order, the Court added several terms not present in the Temporary Protection Order, all of which violated District of Columbia law. The Court's prohibitions against the Respondent speaking to third persons not a party to this proceeding were directly contrary to the prior instruction of the District of Columbia Court of Appeals. The Court's prohibitions that the Respondent could not email or text message other persons about the Petitioner amounted to an impermissible content-based prior restraint of protected speech.

No probable cause existed[1] that the Respondent committed any crime. The Respondent was lawfully entitled to make non-threatening, non-harassing comments to the Petitioner regarding her offensive behavior following the end of their relationship and to make non-threatening, non-harassing statements to other persons.[2] D.C. Code specifically exempts such conduct from its prohibitions against stalking as such conduct ultimately comprises speech protected by the First Amendment.

Absent any kind of express or implied threat, none of the conduct alleged to have been committed by the Respondent can be said to not be entitled to constitutional protection. *See e.g.*, Hanzo v. deParrie, 152 Ore. App. 525, 540 (1998). *See also* Murphy v. Okeke, 951 A.2d 783, 788 (D.C. 2008) ("The Intrafamily Offense Act is designed not just to protect against actual intrafamily violence, but also against the threat of such

[1] This Court employs a "preponderance of the evidence" standard to decide factual issues regarding a protection order proceeding. *See* Cruz-Foster v. Foster, 597 A.2d 927, 930 (D.C. 1991). As this matter was challenged prior to the taking of evidence, the Respondent employed the criminal term "probable cause" to challenge the Petitioner's allegations. If each of the Petitioner's allegations were later proven, which they were not, they still could not support the elements of any offense under District of Columbia law.

[2] No other person who the Respondent is alleged to have communicated with ever appeared before the Court and it is self-evident that Mische-Hoeges had no standing to bring any complaint or petition on any other non-family member's behalf. *See* Richardson v. Easterling, *infra* (quoting Comm. for Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987)).

violence."); Robinson v. Robinson, 886 A.2d 78, 86 (D.C. 2005) ("[T]he broad remedial purpose of the Intrafamily Offense Act . . . is to protect victims of family abuse from both acts and threats of violence.")

The District of Columbia City Council's expression of legislative intent as codified in D.C. Code § 22-3131 makes it clear that the conduct that the Respondent was accused of simply did not fall within the scope of the prohibitions contained within D.C. Code § 22-3133.

> The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Council recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Council enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has even more serious or lethal consequences.

D.C. Code § 22-3131 (a).

There simply did not exist any of the elements of "intrusions on the victim's personal privacy and autonomy" or "risks to the security and safety of the victim and others". Within the Petitioner's allegations, there existed no threats, express or implied. There was no history of domestic violence or assault. Sending non-threatening email or flowers to anyone cannot reasonably be seen to escalate "into behavior that has even more serious or lethal consequences." Absent some actual reasonable basis for alarm or fear, this statute could not be enforced against the Respondent.

A protection order issued under D.C. Code § 16-1001, *et seq.* requires that the Respondent have committed, or threatened to commit, an intra-family offense against the Petitioner. D.C. CODE § 16-1005(c). If conduct is not a criminal offense under District

of Columbia law, it cannot be the basis for a protection order. Richardson v. Easterling, 878 A.2d 1212, 1217-1218 (D.C. 2005). Non-threatening, non-harassing speech is specifically exempted from the District of Columbia stalking statute as constitutionally protected conduct. D.C. CODE § 22-3133(b). *See* Hanzo, *supra*. Non-threatening speech to third parties, while possibly defamatory, "is not, however, a criminal act." Richardson, 878 A.2d at 1217. This Court's reliance entirely upon non-criminal conduct to issue a protective order under D.C. Code § 16-1005 was an "improper factor" which could not "support the conclusion." Coulibaly v. Malaquias, 728 A.2d 595, 603 (D.C. 1999).

By the Petitioner's own allegations, the Respondent called her a name during *one* email exchange between them which occurred between May 26 and May 28, 2009. The Respondent was alleged to have called the Petitioner by telephone *once* since the end of their relationship. The Respondent was alleged to have called and emailed the Petitioner's new boyfriend *once* since the end of her relationship with the Respondent. The Respondent was alleged to have emailed other persons *once* relating to the Petitioner. Neither John Parodi nor Vadim Goremykin were mentioned at all within the factual recitals of the Petitioner's affidavit in support of her application. Parodi's relationship to any of the events alleged by the Petitioner was wholly unknown based upon her application and affidavit.

An application for a protective order was not an invitation for the Petitioner to hogtie the Respondent from any further expressions of his opinion regarding the Petitioner. *See* CPO at 2 ("Respondent shall not send emails or text messages about Petitioner *to anyone*…") [emphasis added, all capitals in original].

> Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of

> statutory or common law, and that there is a "cognizable danger of recurrent violation."

Madsen v. Women's Health Ctr., 512 U.S. 753, 766 (1994) (quoting United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)).

As discussed *supra*, there existed no violation of any law where the Respondent's conduct comprised entirely of non-threatening, non-harassing speech. Where there was no repetition of any act by the Respondent, the Petitioner completely failed to demonstrate any "cognizable danger of recurrent violation." This Court's prohibition of contact with Parodi and Goremykin "or any of his affiliants" [*sic*] directly conflicted with the District of Columbia Court of Appeals in Richardson, 878 A.2d at 1217-1218.

> The evidence presented to the trial court contained only one instance of any direct contact by appellant with the appellee; namely, an e-mail on March 14, 2008. All of the remaining evidence consisted of accusations, arguably defamatory if untrue, of appellee's misconduct made to third parties in blogs on various websites, in a complaint filed with the Metropolitan Police Department, in e-mails to various persons within the Department, and testimony by appellant before the District of Columbia Council. In Richardson v. Easterling, 878 A.2d 1212 (D.C. 2005), we held that statements made to third parties "do not implicate the Intrafamily Offenses Act" because "a defamatory statement is not… a criminal act" and a complainant "ha[s] an obvious remedy in tort." *Id.* at 1217.[2] With respect to the single email directed to appellee, the offense of stalking requires action "on more than one occasion" and "repeatedly." D.C. CODE § 22-404(b). *See* Washington v. United States, 760 A.2d 187, 198 (D.C. 2000) (stalking is "defined as a series of incidents that are part of a course of conduct extending over a period of time"). Because the evidence at its most favorable for Durham showed one non-defamatory communication, the trial court abused its discretion in finding that appellant had committed stalking, and thus the court erred in issuing the CPO.
>
> [2] We also noted that "an order prohibiting [respondent] from making representations to others regarding [petitioner's] allegedly culpable conduct at least arguably *constitutes constitutionally impermissible prior restraint of speech*; ordinarily, 'equity does not enjoin a libel or slander.'" Id. at 1217-18 (internal citation omitted).

Kennedy v. Durham, 991 A.2d 34 (D.C. 2009) (unpublished) [footnote omitted, emphasis added].

The Court's protection order prohibited the Respondent's contact with Parodi and Goremykin. Neither person was before this Court and neither made any type of complaint against the Respondent. The Petitioner was not familially related to either person. The Petitioner did not reside with either person. The Court's protection order further prohibited any email contact with any third parties regarding the Petitioner.

> If, upon the filing of a petition under oath, a judicial officer finds that the safety or welfare of *the petitioner or a household member* is immediately endangered by the respondent, the judicial officer may issue, ex parte, a temporary protection order.

D.C. CODE § 16-1004(b)(1) [emphasis added].

In Richardson, *supra*, the Respondent was prohibited in an *ex parte* Temporary Protection Order from "contacting Richardson's 'colleagues, family members, or neighbors.'" Richardson, 878 A.2d at 1214.

> Richardson's prayer for relief [in his amended petition] was far narrower in scope than was the TPO issued by the trial court, and excluded any request for the *constitutionally dubious remedy* of barring Easterling from contacting or speaking with Richardson's colleagues or neighbors.

Id. at 1214, n.4 [emphasis added].

Richardson speaks plainly to the "constitutionally dubious" nature of issuing an order prohibiting contact with persons not presently before the Court.[3] As cited *supra*, a defamatory statement is not a criminal act and an order which prohibited this Respondent from making representations to others regarding the Petitioner's conduct "at least

[3] D.C. Code § 16-1005 refers to, without providing a definition, "other protected persons". The code section speaks immediately prior thereto of the standing of a parent or guardian to petition on behalf of a minor. No section within this title conveys standing to an adult to petition on behalf of another competent adult. Richardson clearly dictates to the contrary for the reasons stated herein.

arguably constitutes *constitutionally impermissible prior restraint of speech*". Kennedy, 991 A.2d 34 (quoting Richardson, 878 A.2d at 1217) [emphasis added].

c. The Temporary Restraining Order was repeatedly extended by the Court in violation of District of Columbia law.

This Court "may reissue a temporary protection order for a period no longer than fourteen-days (14) duration from the date it is reissued." Thomas v. United States, 934 A.2d 389, 392 (2007). The Temporary Restraining Order was entered on June 22, 2010 and was to expire on July 6, 2010. The extension to August 30, 2010 of the Temporary Protection Order was done by the Superior Court without any input from the Respondent or his attorney and certainly without his consent. The transcript of the August 30, 2010 hearing amply demonstrates that the Respondent protested any further extension, yet this Court ignored its own Rules and extended the Order anyway.

> MR. BRADSHAW: Your Honor, I do not consent to the TPO being in place any further. It's been extended once. And as a matter of course it's got 14 days.
>
> There's been no prior --no contact. There's been no e-mail's [*sic*]. There's been no proximity. But the 14 days is a pretty hard-fast rule.
>
> THE COURT: Again, the policy is that we maintain the status quo with these cases once we have a temporary protection order, and I will not make an exception to that.
>
> Now, again, 14 days from now is the 13th of September. If counsel does not want to consent to extending it 'til the 20th, then we have to come back on the 13th to extend it to the 20th.
>
> MR. BRADSHAW: It's been extended once.
>
> THE COURT: I know that.
>
> MR. BRADSHAW: That's my -- oh – it's already been extended once, and I don't consent --

THE COURT: I understand.

MR. BRADSHAW: Okay.

THE COURT: Okay. See, I am going to extend it.

MR. BRADSHAW: Okay.

THE COURT: The policy is, the policy we'll maintain in these cases we extend the TPO.

Now, the question for you is whether you want to waste your time, come back in 14 days, which is the 13th of September, and, then, again, we'll extend it 'til the 20th. If you don't want to consent, that's what we'll do.

MR. BRADSHAW: Well, I definitely don't consent.

THE COURT: Okay. So you want to come back on the 13th so that we can extend it to the 20th?

MR. BRADSHAW: Uh -- Your Honor, I have no choice.
THE COURT: Okay. So we'll continue the matter until a 13th --

MR. WITKOWSKI: Your Honor?

THE COURT: Yes, sir.

MR. WITKOWSKI: We would be available on the 13th if the Court --

THE COURT: No, no. We, we, we're going to keep the 20th for the trial date. We'll come back on the 13th at which time we'll extend the TPO 'til the 20th. Now, we're just going to extend it to the 13th. You're confused?

MR. WITKOWSKI: Well, I'm going to be requesting attorney fees if we have to do that.

THE COURT: Well, I cannot tell you what to request and what not to request. They have a right under the law to just 14 days. And if they want to waste time and show their emotions about this case, they have that right to do that.

MR. BRADSHAW: I don't perceive it to be a waste of time, Your Honor, because things can change in your mind as well as mine by that time. I wouldn't do it as a waste of time.

THE COURT: It's a waste of time.

> [Pause.]
>
> MR. BRADSHAW: Can you simply -- does it have to be by consent if you have already extended it – I can't consent to it.
>
> THE COURT: Okay, if you can't consent you come back on the 13th and then I'll just force it upon you…

August 30, 2010 Hr'g Tr. at 19-21.

d. The Respondent was unlawfully deprived of <u>any</u> discovery.

DV Unit Rule 8(a) provides for a party to obtain discovery by written interrogatories or production of documents. Such discovery is "limited to matters directly relating to the incident or incidents of abuse alleged in the petition or answer, to medical treatment obtained as a result of those incidents, and to any prayers for relief." D.V. UNIT RULE 8 (a)(1). On two occasions, this Court flatly denied <u>any</u> discovery to the Respondent, despite the Petitioner's repeated reference to documentary evidence she intended to use at trial and the Respondent's August 16, 2010 declaration that he did not possess the evidence himself.

> As already highlighted above, the Petitioner's testimony varies widely depending upon the necessity of her circumstances. She omits passages from certain emails and fails to disclose others. The Respondent is entitled to receive <u>all</u> of the alleged emails and other communications, and for the Court to receive them in their proper context. The appropriate time for the Petitioner to disclose and produce these documents is prior to the hearing, not in the midst of it.

Resp't August 2, 2010 Disc. Mot. at 4.

"An abuse of discretion may be found where denial of discovery has caused substantial prejudice." <u>McMillian v. Wake County Sheriff's Dep't</u>, 2010 U.S. App. LEXIS 22351 (4th Cir. Oct. 28, 2010) (quoting <u>Nicholas v. Wyndham Int'l, Inc.</u>, 373 F.3d 537, 542 (4th Cir. 2004). "Prejudice is established if there is a reasonable probability that

the outcome would have been different had discovery been allowed." Patent Rights Prot. Group, LLC v. Video Gaming Techs., Inc., 603 F.3d 1364, 1371 (Fed. Cir. 2010) (quoting Laub v. U.S. Dep't of the Interior, 342 F.3d 1080, 1093 (9th Cir. 2003)).

> Under the theory advanced by the government, the prosecution, by design or inadvertence, could withhold discoverable inculpatory evidence until the defendant asserted a defense strategy based on the apparent nonexistence of that evidence, thus foreclosing other, possibly viable, defense strategies. Unless a court concluded, based on all the evidence introduced, that the case against the defendant was "not strong," the discovery violation would be considered harmless. We refuse to adopt such a rule, for it would encourage precisely the "trial by ambush" that the Federal Rules of Criminal Procedure were designed to prevent.

United States v. Noe, 821 F.2d 604, 608 (11th Cir. 1987) (citing United States v. Martinez, 763 F.2d 1297, 1315 (11th Cir. 1985)). *See also* United States v. Brodie, 871 F.2d 125, 129 (D.C. Cir. 1989) ("It is well-settled that the Government cannot refuse to disclose discoverable statements of the defendant under Rule 16 and nevertheless 'surprise' the defendant by using those same statements at trial.")

> As a rule, and pursuant to a discovery order entered in this case, any defendant may inspect items in the Government's possession that are "material to preparing the defense." FED. R. CRIM. P. 16(a)(1)(E)(i). "A showing of materiality must include 'some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.'"

United States v. Farah, 2007 U.S. App. LEXIS 19310 (4th Cir. 2007) (quoting United States v. Kirk, 877 F.2d 61, 1989 WL 64139, at *2 (4th Cir. 1989) (unpublished opinion quoting United States v. Ross, 511 F.2d 757, 762-63 (5th Cir. 1975), *cert denied*, 423 U.S. 836 (1975))).

This Court's denial of any discovery for the Respondent, despite the Petitioner's evident reliance on documentary evidence and alleged statements of the Respondent, was

manifestly unjust, seriously impeded his right to a fair trial and thus denied him due process under law. *See* McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

> Due process mandates that a judicial proceeding give all parties an opportunity to be heard on the critical and decisive allegations which go to the core of the parties' claim or defense and to present evidence on the contested facts. *See* Jackson v. DeSoto Parish School Board, 585 F.2d 726, 730 (5th Cir. 1978); Thompson v. Madison County Board of Education, 476 F.2d 676, 678 (5th Cir. 1973). The validity of the release and the special power of attorney upon which it is predicated are critical and decisive issues of petitoner's claim. At virtually every stage of the proceedings, the district court's rulings inhibited Mrs. Chatterjee's ability to substantiate her allegations of fraud and frogery [*sic*]. The court's procedural rulings placed Mrs. Chatterjee in the proverbial Catch-22. She had a property interest at stake and in order to protect that interest she sought procedures to attempt to prove that the release was fraudulently executed. We believe that she was erroneously deprived of this interest by virtue of the district court's rulings. In this regard, petitioner was denied the procedural fairness that the fifth amendment assures to all persons who, whether internationally or by vicissitudes of fate, find their lives, liberty or property in the hands of the courts of the United States.

In re Complaint of Bankers Trust Co., 752 F.2d 874, 890-891 (3d Cir. 1984).

e. This Court improperly denied the Respondent's Motion in Limine.

On August 16, 2010, the Respondent moved to exclude the testimony of a Russian national living in Italy. By the Petitioner's August 9, 2010 Motion for Witness to Testify by Telephone or Leave to Conduct a *De Bene Esse* Depostion, or in the Alternative for a Continuance (*De Bene Esse* Mot.), she alleged that the witness, Goremykin, would "testify to the occurrence of certain facts contained in the Petitioner and the Petitioner's prayer for relief." *De Bene Esse* Mot. at 1. By his Motion in Limine, the Respondent pointed out that Goremykin was intending to testify solely regarding alleged events which occurred entirely outside the District of Columbia and regarding

alleged statements made by the Respondent to persons other than the Petitioner. Mot. in Limine at 1.

The Petitioner claimed Goremykin was her boyfriend referred to in the Petition. *De Bene Esse* Mot. at 1.

> Dr. Goremykin currently lives in Italy, as he is employed by Istituto Agrario di San Michele all'Adige in Italy. He is a citizen of Russia and does not hold the necessary passport and visa allowing him entry to the United States.

Id. at 2.

> He called. He, I, I don't know how he obtained this number. He called my, my boyfriend's student assistant who he, and he told her that, that he was his cooperation partner for, he's a genetics researcher for a research he was doing in the United States and he, that, he obtained his cell phone number. Sorry. That day he also e-mailed, he also emailed [Vadim] and said that he needed to talk to him about me but after that he called, he called his, [Vadim's] student researcher who gave him his cell phone number believing that he was another scientist and then, and then he called [Vadim] on his cell phone.

June 22, 2010 Hr'g Tr. at 7-8.

Goremykin resides, and is employed, in Italy. According to the Petitioner, Goremykin received an e-mail and telephone call from the Respondent while Goremykin was in either Italy or Ireland. There is no allegation within the record that the Respondent called Goremykin in the District of Columbia. By the Petitioner's own claims, Goremykin is disqualified from entering the United States because of his passport. *De Bene Esse* Mot. at 2. There is no allegation that the Respondent, a Virginia resident, was present in the District of Columbia for any of the events claimed by the Petitioner.

The finding of "good cause" that an intrafamily offense occurred within the District of Columbia is a necessary predicate for the issuance of any kind of protective order under D.C. Code § 16-1001 *et seq*.

> Under D.C. Code § 11-923 (b)(1) (1981), "the Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia." We have recently stated that this language is interpreted "to limit the jurisdiction of the Criminal Division of the Superior Court to criminal acts which occur within the geographical boundaries of the District of Columbia." United States v. Baish, 460 A.2d 38, 40 (D.C. 1983) (emphasis added) (citing Jackson v. United States, 441 A.2d 1000, 1004 (D.C. 1982)); In re L.M., 432 A.2d 692, 695 (D.C. 1981); Mundine v. United States, 431 A.2d 16, 17 (D.C. 1981); In re A.S.W., 391 A.2d 1385, 1390 (D.C. 1978).

James v. United States, 478 A.2d 1083, 1085 (D.C. 1984). *See also* Crutchfield v. United States, 779 A.2d 307, 334 (D.C. 2001).

In order for an intrafamily offense to have occurred in the District of Columbia, the victim or the perpetrator must be located in the District of Columbia. Banks v. United States, 926 A.2d 158, 165 (D.C. 2007) (quoting Dyson v. United States, 848 A.2d 603, 610 (D.C. 2004) (citing Baish, 460 A.2d at 43)); Rogers v. Johnson-Norman, 2005 D.C. App. LEXIS 517 (D.C. 2005) (unpublished opinion citing Baish). While it may be presumed "that an offense was committed within the jurisdiction of the court in which the charge is filed", Mitchell v. United States, 569 A.2d 177, 181 (D.C. 1990) (citing Adair v. United States, 391 A.2d 288, 290 (D.C. 1978)), there is no allegation whatsoever that the Respondent traveled to the District of Columbia to call or e-mail Goremykin, and Goremykin evidently was overseas for the entirety of these events. Further, communications to Goremykin could not support a finding of an intrafamily offense. Kennedy v. Durham, 991 A.2d 34 (D.C. 2009) (unpublished MOJ quoting Richardson v. Easterling, 878 A.2d 1212 (D.C. 2005)). There certainly was no allegation of any familial relationship between the Respondent and Goremykin.

> Evidence which is not relevant is not admissible.

D.C. R. EVID. 402.

> Relevance, and the concepts it embodies, determines initially whether a proffered item of evidence will be admissible. Bogorad v. Kosberg, D.C.Mun.App., 81 A.2d 342, 343 (1951). *See also* 1 Wigmore, EVIDENCE §§ 11 & 12 (3d ed. 1940). First, the evidence, to be relevant, must relate logically to the fact it is offered to prove. Fowel v. Wood, D.C.Mun.App., 62 A.2d 636, 637 (1948). This logical relationship is described as a "tendency of evidence to establish a proposition." MCCORMICK ON EVIDENCE § 185 at 435 (2d ed. 1972). Second, the fact sought to be established by the evidence must be material, which is to say that the party must establish that fact as a condition to prevailing on the merits of his case. MCCORMICK, *supra* at 434; *Ahrens v. Broyhill*, D.C.Mun.App., 117 A.2d 452, 455-56 (1955). Finally, the evidence must be adequately probative of the fact it tends to establish.

Reavis v. United States, 395 A.2d 75, 78 (D.C. 1978).

As Goremykin was not present in the District of Columbia for any of the alleged events and Goremykin was not the recipient of communications which did terminate in the District of Columbia, he could not present testimony regarding the commission of an alleged intrafamily offense in the District of Columbia. None of the proposed testimony could have proven any fact in support of a finding of such an intrafamily offense. The testimony was irrelevant and should have been excluded from the case.

By the Petitioner's own recitals, the "Petitioner's boyfriend's place of work" was "Istituto Agrario di San Michele all'Adige in Italy" *De Bene Esse* Mot. at 2. Italy is not in the District of Columbia. It is in Europe. E-mails from Virginia to persons in Italy cannot be considered violative of any District of Columbia law. James, Banks, *supra*. Further, communications to third parties are not violative of D.C. Code § 22-3133. Kennedy, *supra*.

If statements to third parties in Italy or Ireland "do not implicate the Intrafamily Offenses Act" then such statements are not material "which is to say that the party must establish that fact as a condition to prevailing on the merits of his case". Absent such materiality, there is no relevance. Absent such relevance, the evidence, comprising all of

Goremykin's testimony and the testimony of any other person regarding the same subject matter, should have been excluded at the CPO hearing and there was no purpose for conducting any deposition of him. *See* DVU RULE 8(a)(1) ("the scope of discovery is limited to matters directly relating to the incident…")

This Court nevertheless improperly permitted the Petitioner to have Goremykin testify. August 30, 2010 Hr'g Tr. at 15-16. Yet, Goremykin failed to appear for the merits hearing. As the Respondent attempted to demonstrate during this Court's motions hearing, the Petitioner appears to have lied regarding Goremykin's whereabouts at the time of her motion. Goremykin was not stuck in Russia awaiting a new passport. He was at work in Italy and the Respondent's affiant spoke to him on the phone on at least two occasions. Resp't Ex. D. Further, Goremykin was not required to obtain a new passport to travel to the United States, his old passport which permitted him to travel from Russia back to Italy would have afforded him entry into the United States. Resp't Ex. E. The Petitioner lied to the Court regarding this issue or was, in the less likely alternative, simply clueless regarding Goremykin's whereabouts and his passport status.

f. This Court was without jurisdiction to enter <u>any</u> restraining order.

Where there was no evidence of some sort of immediate endangerment by the Respondent and no evidence of any intrafamily offense, <u>Shewarega v. Yegzaw</u>, 947 A.2d 47, 49 (D.C. 2008) (citing D.C. Code § 16-1005 (c)), committed by the Respondent, this Court was without jurisdiction to enter any order, except an order dismissing the case for lack of jurisdiction.

Further, the Court's Order of September 21, 2010 was an impermissible prior restraint on LeFande's speech.

> The 1933 order was extremely broad in its terms. It restrained the defendant from publishing any report, past, present or future, about certain named persons. It is true that the order arose out of a libel action. But even assuming, contrary to authority, American Malting Co. v. Keitel, 209 F. 331 (2 Cir., 1913), that it is proper for a federal court to enjoin a libel, the order here in question was not directed solely to defamatory reports, comments or statements, but to 'any' statements. In fact, from all that appears, it would seem that whatever The Bradstreet Company published in 1932 was not libelous as to Lloyd Crosby.
>
> Lloyd Crosby contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him. We disagree. We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.
>
> The order dated July 8, 1933 was in violation of the First Amendment to the Constitution, *see* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931). Shelley v. Kraemer, 334 U.S. 1 (1948) indicates that the First Amendment limits court action. The order was void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom.

Crosby v. Bradstreet Co., 312 F.2d 483, 485 (2d Cir.) [parallel citations omitted] *cert. denied* 373 U.S. 911 (1963).

> In addition to the First Amendment's heavy presumption against prior restraints, courts have long held that equity will not enjoin a libel. *See* [Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)] ; American Malting Co. v. Keitel, 209 F. 351, 354 (2d Cir. 1913); Kramer v. Thompson, 947 F.2d 666, 677-78 (3d Cir. 1991) (citing cases); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987) ("The usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.") (internal citation omitted). Indeed, for almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases. *See* American Malting Co., 209 F. at 354 ("Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be. This is the universal rule in the United States . . . .") (citation omitted); Crosby, 312

F.2d at 485 (reaffirming the common law rule of American Malting).

Metropolitan Opera Ass'n v. Local 100, Hotel Emples. & Restaurant Emples. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001) [parallel citation omitted]. *See also* In re Halkin, 598 F.2d 176, 190 (D.C. Cir. 1979) *overruled on other grounds in* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984); Parker v. Columbia Broadcasting System, Inc., 320 F.2d 937, 939 (2d Cir. 1963).

CONCLUSION

For these reasons, and for such other reasons as the Court finds to be good and sufficient cause, the void September 21, 2010 Consent Order should be VACATED forthwith.

Respectfully submitted, this 25th day of February, 2011,

_____

Matthew August LeFande
4585 North 25th Road
Arlington VA 22207
Tel: (202) 657-5800
Fax: (202) 318-8019
matt@lefande.com
Respondent, *pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion was served via United States Postal Service First Class Mail, postage prepaid, to the Petitioner's counsel of record at the following address, this 25th day of February, 2011.

Ryan M. Witkowski
Feldesman Tucker Leifer Fidell LLP
1129 20th Street NW Fourth Floor
Washington DC 20036

_____
Matthew LeFande