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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
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11 THE PEOPLE OF THE STATE OF  
CALIFORNIA,

12 Plaintiff,

13 vs.

14 FRANCIS SHIVERS,

15 Defendant.  
16

) CASE NO. 2WA00673  
)  
)

) DEFENDANT FRANCIS SHIVERS' BRIEF  
) RE PROBATION VIOLATION  
)

) DATE: May 1, 2014  
)

) TIME: 8:30 a.m.  
)

) DEPT: 146  
)

) The Honorable Kathryn Solorzano  
)

17 The alleged probation violation initiated by Deputy City Attorney Elizabeth Gertz is nothing  
18 less than a patent attempt to infringe upon the Defendant, Francis Shivers' Constitutionally protected  
19 speech pursuant to the First Amendment of the United States Constitution and relevant sections of  
20 Article 1, Section 2 of the California Constitution. Defendant has provided cases and statutes herein,  
21 in support of the aforesaid.

22 The basis for the alleged violation revolves around Deputy City Attorney Elizabeth Gertz  
23 (hereinafter "Gertz") accessing the Facebook page of Defendant Shivers. The Court is reminded  
24 that, as a condition of bail, while the Court prohibited the Defendant from using his Twitter account  
25 which, in and of itself, may have been a Constitutional violation, the Court did permit the Defendant  
26 to continue using Facebook. It is that very Facebook account of the Defendant Shivers that the  
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1 aforesaid Gertz accessed and from which Gertz printed out the various pages which form the basis of  
2 her initiation of the probation violation hearing, for which this Brief in opposition thereto is  
3 submitted.

4 Defendant submits that the Court should conduct an inquiry into the motive for Gertz's  
5 conduct. "It is Gertz who is asserting that the statements reflected on the subject Facebook pages are  
6 in violation of the terms and conditions of Defendant's probation, not the complaining party in the  
7 underlying criminal case, Laura Perrett. In fact, there is no supporting declaration from Perrett  
8 accompanying the Facebook pages that form the basis of the violation, wherein Perrett states that she  
9 was even aware of the content of the subject pages. Is Gertz, as a public employee paid with public  
10 funds, conducting a witch hunt in violation of Shivers' First Amendment rights, for her own  
11 misguided agenda? Defendant submits that this question must be asked by this Court in an analysis  
12 of the alleged violation, in order for the Court to arrive at a reasoned decision.

13 The issue at bar is content determinative, not contact determinative. Simply put, content of  
14 the subject pages was never forwarded by Shivers to Perrett in violation of Penal Code §653m, nor  
15 did Shivers employ third parties to forward the subject Facebook pages to Perrett. In truth and fact,  
16 Gertz clandestinely accessed the Shivers' proprietary Facebook page, copied them and assumedly  
17 forwarded them to Perrett or, at the very least, informed her of said content.

18 On page 2713 of the Reporters Transcript on Appeal, the Court in addressing the Protective  
19 Orders emanating from the case, stated that "you must not harass, strike, threaten, assault, follow,  
20 stalk, molest, destroy or damage the personal property, disturb the peace, keep under surveillance,  
21 log the movements of Pauley Perrette". It categorically does not state that Shivers is restrained from  
22 expressing his Constitutionally protected opinions, which anyone can access if they access said page,  
23 as did Gertz. Therefore, Defendant submits that the updating by Shivers of his Facebook account,  
24 assumes no element of targeting a message at Perrett, and would not qualify as contacting her, even  
25 if she were able to view the posting by accessing Shivers Facebook account.

26 The line of Federal and State cases that address the issue is long and exhaustive and

1 therefore, the Defendant provides, for the benefit of the Court, a limited number of cases and  
2 citations reflective of Defendant's position regarding the First Amendment protections. The  
3 California Constitution and California cases can and do, in certain circumstances, give greater  
4 protection to the expression of free speech than does the United States Constitution. Gonzales v.  
5 Superior Court 180 Cal.App3d 1116, 1122 (1986) citing Robins v. Pruneyard Shopping Center 23  
6 Cal.3d 899, 903 (1979). Golden Gateway Center v. Golden Gateway Tenants Association 26 Cal.4th  
7 1013, 1019 articulates that "The State Constitutional provisions are more protective and inclusive of  
8 the rights to free speech ... than the Federal counterpart." In fact, the case of Mardi Gras v. City of  
9 San Luis Obispo 189 F.Supp.2d 1018, 1034-36 (C.D. Cal. 2002) quoting Gonzales at 1123 states  
10 that "Where State law affords greater protection to expression or free speech than Federal law, State  
11 law prevails."

12 The Restraining Order after hearing, which was the basis of the criminal prosecution states  
13 that Defendant Francis Coyote Shivers (aka Coyote Shivers), as he is referred to in the Court Order  
14 issuing therefrom, is not to "contact (either directly or indirectly), telephone, or send messages or  
15 mail or email". The subject Facebook pages, which form the basis of the alleged probation violation,  
16 do not in any form, shape or fashion, violate the aforesaid language contained in the aforesaid Order.

17 The First Amendment of the United States Constitution, and the Fourteenth Amendment of  
18 the United States Constitution, are implicated in Article 1, Section 2 of the California Constitution as  
19 it applies to free speech. The California Constitution provides that "[E]very person may freely  
20 speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this  
21 right. The law may not restrain or bridge liberty of speech or press." See California Constitution,  
22 Article 1, Section 2, sub. (a). It is common knowledge, or at the very least understood, by a wide  
23 segment of the population, that freedom of speech prohibits the Government from interfering with  
24 ones own speech. What is less well known is that the same prohibition extends to interfering with  
25 the right to hear what someone else has to say, such as the content contained on Shivers Facebook  
26 page, which is a matter of interest to all who access said page, perhaps with the exception of the

1 aforesaid Gertz, for her own ulterior purposes.

2 “As a general matter, the Liberty of Speech clause in the California Constitution is more  
3 protective of speech than its Federal counterpart.” Wilson v. Superior Court 13 Cal.3d 652, 658 and  
4 companion cases People v. Glaze 27 Cal.3d 841, 844 (1980) and Dailey v. Superior Court 112  
5 \*Cal.94, 97-98 (1896).

6 It is well settled law that prior restraints are not permitted. Temporary restraining orders and  
7 permanent injunctions forbidding speech activities constitute prior restraint. See Alexander v. U.S.  
8 509 U.S.544, 550 (1993) and New York Times v. U.S. 403 U.S.713 (1971).

9 As a general matter, the First Amendment means that Government has no power to destroy  
10 expression because its message, its ideas, the subject matter or its content is objectionable by a  
11 disparate party. Facebook is a platform for Freedom of Expression. It is the contemporary version  
12 of the now archaic “soapbox” from which legions of people in the past have freely expressed their  
13 ideas, opinions, political, apolitical, non-political or otherwise.

14 Given the absence of a Declaration by Perrett, is Gertz attempting to convince this Court that  
15 the expressions contained on the Facebook pages of the Defendant were “abusive”, or placed Perrett  
16 in “fear of imminent serious bodily injury”? That would be incredulous absent the Declaration of  
17 Perrett so stating and, even in the face of positive affirmations by her. Foti v. City of Menlo Park  
18 146 F.3d 629, 636 (1998) stated that “the Court must determine content of expression to determine if  
19 they are abusive defined as fear of imminent serious bodily injury; harassed, threatened; contain  
20 obscene language,” and was directed to Perrett. None of this can be determined in the absence of a  
21 Declaration from Perrett but, nonetheless, the Court in analyzing the issue would be bound by the  
22 precedential citations contained in this Brief.

23 One cannot burden expression by stating that an individual is in reasonable fear. That theory  
24 was rejected by the Supreme Court in Snyder v. Phelps 131 S.Ct.1207, 1219 (2011); R.A.V. v.  
25 City of St. Paul, Minnesota 505 U.S.377, 380 and Cohen v. California 403 U.S. 15, 26 (1971). Also  
26 see City of Houston v. Hill 482 U.S. 451, 461 (1987)

1 Content based restrictions are presumed invalid ... and that the Government bears the burden  
2 of showing their Constitutionality. Ashcroft v. American Civil Liberties Union 535 U.S. 564, 572  
3 (2002) Ashcroft v. American Civil Liberties Union 542 U.S. 656, 660 (2004).

4 In closing, Defendant addresses Code of Civil Procedure §425.16 commonly referred to as  
5 the Anti-SLAPP Motion, and the entirety thereof specifically, Section (e)(2) which states “Any  
6 written or oral statement or writing made in connection with an issue under consideration or review  
7 by a legislative, executive or judicial body, or any other official proceeding authorized by law ...”.  
8 The Court is reminded that the Defendant Francis Shivers presently has a pending appeal from the  
9 underlying criminal conviction entitled Shivers v. People of the State of California, Appellate  
10 Division Case Number BR051060. Opening Briefs on said appeal are presently scheduled for June,  
11 2014.

12 Said Statute is the civil remedy for infringement on free speech, the cases for which obtain in  
13 the context and setting of the alleged probation violation hearing. Also see Braun v. Chronicle Pub.  
14 52 Cal.App.4th 1036, 1043-45 (1997) and Lafayette Morehouse, Inc. v. Chronicle Pub. 37  
15 Cal.App.4th 855, 863-64 (1995).

16 Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 639 stated that “A meritless suit filed  
17 primarily to chill the defendants exercise of his First Amendment right”, is subject to a 425.16  
18 Motion to Strike. California’s Anti-SLAPP Statute, the above stated Code of Civil Procedure  
19 §425.16, expressly prohibits any such lawsuits which are brought primarily to chill defendant’s valid  
20 exercise of the Constitutional Right of Freedom of Speech and/or Petition for redress of a grievance.  
21 Gertz’s attempt to violate Defendant Shivers because of his Constitutionally protected statements on  
22 his proprietary Facebook page constitutes a “meritless lawsuit” and an attempt to chill Shivers valid  
23 exercise of his Constitutional Right to “Freedom of Speech” and/or “Petition for redress of a  
24 grievance”.

25 Addressing the procedural aspects of the alleged violation, Defendant submits that he is in  
26 possession only of the subject Facebook pages and no other pleadings of any kind. Furthermore, the  
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1 Defendant has the right to confront and cross-examine adverse witnesses, and submits that both  
2 Perrett and Gertz should be required to testify at said hearing, for disparate reasons. Addressing  
3 Perrett, her testimony is imperative to ascertain initially if she was even aware of the Facebook  
4 postings and the content thereof and whether or not, to the extent she was made aware by Gertz, that  
5 that is a sufficient basis to initiate a probation violation hearing in the first instance.

6 Secondly, it would be important for the Court to ascertain, to the extent Perrett had  
7 knowledge of the Facebook pages, what her state of mind was with respect to the reaction to said  
8 content, juxtaposed against the various cases cited above.

9 With respect to Gertz, it is absolutely imperative that she testify in this matter to ascertain her  
10 true motive for accessing the subject Facebook pages of Shivers, including but not limited to inquiry  
11 as to whether or not she was receiving direction and/or instructions from Perrett and/or other  
12 individuals, or requesting that she access the Facebook account and, having done so, her conduct  
13 subsequent thereto. See Black v. Romano (1985) 471 U.S. 606, 612. Morrissey v. Brewer (1972)  
14 408 U.S. 471, 789 and People v. Malabag (1997) 51 Cal.App.4th 1419, 1422. It should be noted that  
15 the right to confront witnesses in probation violation hearings stems from the Due Process Clause of  
16 the Fourteenth Amendment, rather than the Confrontation Clause of the Sixth Amendment. People  
17 v. Johnson (2004) 121 Cal.App.4th 1409.

18 Additionally, hearsay evidence is generally not admissible at hearings of this type, (see  
19 People v. Arreola (1994) 7 C.4th 1144. Transcripts of trial proceedings involving the probationer as  
20 a defendant cannot be introduced against the probationer in a probation revocation/violation hearing  
21 unless the prosecution can demonstrate good cause for its admission in lieu of live testimony. Good  
22 cause, which is determined on a case by case basis, exists when the declarant is unavailable.  
23 Therefore, no good cause exists for not having Perrett appear at said hearing. See People v. Arreola  
24 supra and People v. Shepherd (2007) 151 Cal.App.4th 1193, 1202.

25 In order for the Court to determine whether or not Shivers violated the terms and conditions  
26 of probation, a clear analysis must be conducted by this Court taking into consideration all of the  
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1 cases and statutes cited above.

2 For all the reasons stated above, and cases and statutes cited herein, Defendant submits that  
3 he exercised his First Amendment Right to Free Speech by posting content on his proprietary  
4 Facebook page and that in no form, shape or fashion did Defendant attempt to, either directly or  
5 indirectly, contact Perrett nor communicate the subject Facebook pages to Perrett. To the extent that  
6 Perrett did acquire knowledge of the Facebook content, the question as to how that manifested  
7 should be placed directly in the lap of Deputy City Attorney Elizabeth Gertz.

8 Respectfully submitted, LAW OFFICES OF SANFORD M. PASSMAN

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10 DATED: April 16, 2014 By: Sanford M. Passman, Attorney for Defendant Francis Shivers  
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