IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON,			No. 08-09-51846
			DA 2143619-1
Plaintiff,			
v.			
			STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE
PHILIP SANO			
Defendant.			

Comes now Michael D. Schrunk, by and through Ryan Lufkin, Deputy District Attorney, and respectfully responds to defendant's motion to suppress.

I. FACTS

6/13/08 - Article entitled "Video, witness, reveal more about Taser incident" posted on bikeportland.org
6/20/08 - A comment made under the name "Cam" appears as comment #56 related to the article. In it, the poster claims to have been an eye witness to the event.
9/25/08 - Information filed with warrant
10/2/08 - Affidavit & protective order executed in support of order to disclose for bikeportland regarding the witness.
10/3/08 - Motion to seal affidavit and order granted by Judge Jones.
10/10/08 – Order for bikeportland to disclose signed by Judge Albrecht.
10/20/08 - Service on Jonathan Maus (bikeportland) with Court Order.
10/20/08 - Mr. Maus contacts the DA's office indicating his belief that he is not required to follow the court order but will make voluntary contact with the poster to determine if the poster agrees to have his information released to the DA's office.
10/29/09 - Mr. Maus provides information for witness Cameron Lovre and informs that Mr. Lovre gave permission to disclose his information.

II. POINTS AND AUTHORITIES

Standing / Protected Interest

While a criminal defendant "always has standing to challenge the admission of evidence introduced by the state" State v. Tanner, 304 Or 312 (1987), the important question for a court considering a defendant's challenge to proposed state's evidence is whether the defendant is asserting a claimed violation of *his* rights. As the Supreme Court held, "Central to our analysis was the idea that in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights…Thus, we held that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy…" Minn. v. Carter, 525 U.S. 83, 88 (U.S. 1998). See also, State v. Morton 326 Ore 466 (1998) "It was logical for the Court of Appeals to address first the issue whether any constitutionally protected interest of defendant had been invaded by the seizure of the container because, if none were invaded, defendant was not entitled to have the evidence suppressed." Thus under both federal and state standards, as articulated by the Supreme Court of the United States and of Oregon, a defendant is not entitled to a suppression remedy where the defendant has not alleged a violation of a personal protected privacy right.

Exclusion As a Remedy Under Federal Standard

The Supreme Court's view of suppression as a remedy has been limited to violations of the Fourth Amendment where the effect of deterrence outweighs societal cost. See, Hudson v. Michigan, 547 US 586 (2006):

> 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, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, *Colorado* v. *Connelly,* 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. of Probation and Parole* v. *Scott,* 524 U.S. 357, 364-365, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). We have rejected "[i]ndiscriminate application" of the rule, *Leon*, *supra*, at 908, 104 S. Ct. 3405, 82 L. Ed. 2d 677, 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, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) --that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott, supra*, at 363, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (quoting *Leon*, *supra*, at 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677).

Media Shield Law

Oregon's media shield law limits access to sources of information used by media in preparation or distribution of communication. ORS 44.520(1). The Appellate court has discussed this statute where criminal defendants have attempted to gain discovery from media sources and observed a distinction between sources of information and personal observation of a person: "Wernick's newsgathering did not include Wernick's *personal* observations, to the extent that those observations were of events that took place in public, were made with the naked eye, and did not relate to work product, informants or confidential sources." State v. Pelham, 136 Ore. App. 336 (1995).

III. ARGUMENT

Defense has asked the court to create a new process for suppression of evidence under Federal law. Defense has not raised any Oregon Constitutional challenges and rests on the 14th amendment to the US Constitution as a basis for suppression. It is important to note that the defense is asserting that a purely Oregon statutory protection, the Oregon Media Shield law, somehow violates the defendant's Federal 14th amendment rights. The state contends that it would be a strange fit say that the federal constitution and law (which has no media shield) would be offended by a violation of an Oregon statutory media shield. Moreover, it is clear from both Oregon law, where suppression stems from violations of individual defendant's rights and from Federal law, where suppression stems from a goal to deter violation of the Fourth Amendment; that the defendant has no protected interest in the information obtained to warrant suppression. A defendant, under either Constitution, must have a protected privacy interest in order to warrant an inquiry and here, the defendant does not have such an interest nor does counsel allege that the defendant does. The state finding a witness by the means used does not infringe on the defendant's protected privacy interests. Counsel cites two cases using language of "outrageous government conduct" as a possible method for reaching suppression but fails to note that both cases cited: US v. Ryan, 548 F.2d 782 (1976) and US v. Russell, 411 US 423 (1973) deal with this term as an extension of the defense of entrapment. In fact, US v. Russell discusses the very principle inherent in the state's reply as being alive and well, "Unlike the situations giving rise to the holdings in *Mapp* and *Miranda* [discussing implementation of the exclusionary rule], the Government's conduct here violated no independent constitutional right of the respondent." *Id.* [bracketed material added for explanation].

Exclusion is not the remedy under the federal analysis that defense posits. As the Supreme Court went to pains to illustrate in Hudson v. Michigan, the exclusionary rule has a significant societal cost and must be weighed against the possible deterrence. Here, the societal cost is the loss of an eye witness to the events in question. Weighed against the state action that had no practical effect. Whether the court views the Affidavit & Order as proper or improper, said order was not followed but rather the contact information for the eye witness was voluntarily turned over. The deterrent effect of the state seeking an order, having it signed and approved by a court after review of an affidavit, followed by non-compliance with that order and an alternative and voluntary communication of information is negligible.

The order to compel was valid court order. A media shield law is not a sword for the defendant, it is a protection for use by the media. Here, the information sought was the contact

information not for a source of any information used in the communication of the reporting by bikeportland but a public comment attached to that story. The media are held to standards, both professionally and legally for the content of their works. To assume that all postings that are freely attached to an article are subject to the media shield law is to assume that all such postings are subject to the same professional standards and liabilities that afford the media it's protections in the first place. The end result of such a logical landslide is that any posting on a publically accessible website is subject to the media shield law regardless of whether or not the media establishment utilize this information in any way. Additionally, since such a holding would inherently mean that the commenter's are "sources" of information, the media allowing such postings would be responsible for their veracity and credibility as they would traditional sources. The exception, providing specific protections for the media, would consume the law that traditionally favors production of evidence. Additionally, there already is built into the Oregon Media Shield law an exception that allows for disclosure with informants consent. ORS 44.540 "If the informant offers the informant as a witness, it is deemed a consent to the examination also of a person described in ORS 44.520 on the same subject.". Consent, in this case, was obtained from the witness.

IV. CONCLUSION

The state respectfully requests the court deny the defendant's motion to suppress on all grounds. In addition to any other findings, the state would specifically request findings that: (1) The defendant has not alleged that a protected personal right, subject to an exclusion remedy, was violated, (2) The defendant has no protected personal right that would afford him possible suppression of evidence under these facts, (3) The 14th amendment of the US Constitution is not offended by a possible violation of Oregon's media shield law, (4) A possible violation of Oregon's Media Shield law does not warrant suppression under a Federal balancing test of societal cost versus deterrent effect, (5) Oregon's media shield law does not protect from disclosure a commenter who is not otherwise a source for the media, (6) Having voluntarily allowed his information to be turned over, the media shield is inapplicable on these facts.

Respectfully submitted this 6th day of February 2009.

Michael D. Schrunk
District Attorney
Multnomah County, Oregon

By _____
Ryan Lufkin, 074779
Deputy District Attorney

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