In the Supreme Court of the State of Nevada

IN THE MATTER OF JOSHUA RAMOS, AKA ERNESTO JOSHUA RAMOS, an individual
Appellant

vs.

DANA WHITE, an individual; UFC HOLDINGS, LLC, ZUFFA, LLC, doing business as the ULTIMATE FIGHTING CHAMPIONSHIP, a Nevada limited liability company; DOES I through X inclusive; and ROE CORPORATIONS I through V, inclusive;
Respondent.

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Eighth Judicial District
District Court Case No.: A-20-813230-C
Hon. David M Jones, presiding

PETITION FOR EN BANC RECONSIDERATION

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PETITION FOR EN BANC RECONSIDERATION

Petitioner Josh Ramos hereby petitions this court for En Banc Reconsideration of Order of Affirmance dated 3-17-22

The panel denied the Petition for review on 4-15-22.

This Petition is only directed to the Panel's Order as it pertains to dismissal of the unjust enrichment claim, pursuant to the limitations for grounds for en banc reconsideration under though NRAP 40 A (a) and (c). Appellant does not concede the balance of the Order is correct.

The Panel's error in affirming the dismissal of unjust enrichment was set forth in its Order:

"…his (Appellants) silence up until June 30, 2016, is only an incidental benefit conferred upon respondents because Ramos had an **independent legal obligation to not disclose certain facts under the protective order."** (emphasis supplied).

Reconsideration is appropriate as the Panel's Order conflicts with all prior precedent of this Court, the 9th Circuit and US Supreme Court which hold prior restraint of speech is presumptively unconstitutional and prohibited and its holding sets precedent for courts imposing prior restraint on defendants and witnesses in court proceedings without meeting the *Levine* standards.

The Panel's basis for dismissing the claim of unjust enrichment is premised on Appellant having a "legal obligation" pursuant to the Protective Order in the

underlying criminal case. This factual/legal finding/conclusion is contrary to the express language of the Protective Order and paragraph 76 of the Complaint. This Court's adopted of the *Levine* standards for imposing prior restraint in *Johanson v. Eighth Judicial District Court,* 182 P. 3rd. 94, 98 (2008) see *Levine v. US District Court*, 764 F. 2d 590 (Cal 1985) which:

1. Requires a finding for any order that the restrained speech poses an imminent threat to a protected interest.
2. That any protective order be narrowly drafted.
3. Limits the scope of Limits the scope of restraints to counsel and court personnel and excludes defendants and witnesses from prior restraint.

The Court can note that the US Supreme Court's decision and *Levine al*l deal with factually distinct issues of prior restraint of "participants" at trial and news media.

Levine takes care to note that parties (defendants) and witnesses were excluded from the restraining order at issue in *Levine.*

The protected interest recognized in those cases is the defendants sixth Amendment right to fair trial. A defendant has the inherent right to waive those protections and no court can restrain a defendant from public comment on his case.

In addition to unconstitutionally expanding the Protective Order to restrain Appellant speech the order ignores the specific averment in paragraph 76 of the Complaint that Appellant could disclose White's identity during the times at issue.

The Panel's Order also is contrary to the holdings of *Johanson*, supra, and *Levine*, supra, that protective Orders be "narrowly drafted". The Panel's expansive reading of the Protective Order finding Appellant subject to a "legal obligation" is in direct conflict with established precedent of this Court, the 9th Circuit and the US Supreme Court, and involves a substantial constitutional issue and the Panel's Order would support future imposition of unlawful prior restraint.

En Banc review is appropriate under NRAP 40 (a) & (c).

The protection of Constitutional rights at issue herein is always a matter of public interest, as Constitutional rights cannot be eroded without a threat to those very rights.

The affirmance of the dismissal of the unjust enrichment claim rests on the reading of the October 2015 Protective Order *(Appendix Ramos 039-040)* in the underlying criminal proceeding as imposing a " legal obligation" on Appellant to not publicly disclose White's identity. This is a factual issue the Panel

improperly resolved against Appellant on a motion to dismiss, contrary to allegations in the Compliant. The Protective Order's prior restraint was, as in Levine, directed only at the "trial participants" and not Appellant.

Recognizing that the Protective Order did not "gag" Appellant White's lawyers contacted Appellants criminal attorney in late October 2015, after the Protective Order was issued, seeking a NDA from Appellant. White continued to seek the NDA and negotiate payment through 7-5-2016 only 4 days before the sale of the UFC by respondents for $4.2 billion dollars was announced on 7-9-2016.

The United States Supreme Court views prior restraint as presumptively suspect

and any restraint must be narrowly drafted, read and restricted, see *Nebraska Press Association v Stuart* 427 US 539, 54 (1976), *Levine v. US District* Court 764 F 2d 590 (9th Cir. Cal 1985).

The parties to the stipulation for Protective Order, Appellant's attorney and the AUSA all understood the limits under Levine for the Protective Order. The Panel's decision ignores the constitutional limitations and adds language not found on the face of the Protective Order.

The Protective Order was narrowly drawn, cognizant of *Levine*, by the Federal Court and must be narrowly construed. The Panel's Order expansively reads the Protective Order to create a "legal obligation" on Appellant's conduct outside of court proceedings. The Protective Order created no "**legal obligation"** on Appellant to conceal White's identity and only governed the proceedings in Court. To hold otherwise is an improper expansion of a protective order and an improper weigh of evidence against Appellant on a Motion to Dismiss.

Though Petitioner does not concede the upholding of the dismissal contract claims, it is clear that the dismissal of the unjust enrichment claims is contrary to established precedent and is premised on unconstitutional prior restraint.

The Panel's Order also must not be viewed as authorizing and approving unlawful prior restraint which would kill the constitutional right to speech. As with statutory interpretation, the Protective Order should be read as complying with constitutional limitations when possible, not read as imposing unconstitutional restraints, see State v. Castaneda, 245 P. 3d. 550, 553 (2010) .

In upholding the dismissal the Court sets the groundwork for future concealment of matters of public interest and free speech.

The concealment of the identity of White's extramarital sexual exploits/ predation, is an unusual if not unprecedented favor to White so that he could

profit from the unimpeded sale of the UIFC and remain as it's President only makes that unusual favor more offensive to justice.

Holding that Appellant could be prohibited from speaking about his case, on the basis of an order which did not do so, would authorize and allow courts to routinely silence defendants being prosecuted for crimes. Such secrecy and concealment is a milepost on the road to tyranny.

Because all the elements of unjust enrichment were pled and the benefit to Respondents was not "incidental" but rather an understood and requested benefit and Appellant' Complaint states a prima facie claim of unjust enrichment and dismissal thereof is error.

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Respondents, the District Court and the Panel all recognized the benefit conferred upon Respondents by Appellants silence and their failure to pay for that benefit. This Court cannot find that Appellant under the applicable standard of review **could not prevail.**

The following brief is submitted in support of this Petition.

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STATEMENT OF THE CASE

Petitioner seeks En Banc Reconsideration of the Order of Affirmance dated 3-17-20, the Petition for Review was denied on 4-15-22.

The decision of the panel conflicts with established precedent, ignores the law of the case as enunciated by Judge Navarro and is based on an expansive interpretation of a "narrowly drafted" protective order that would result in a violation Appellant's constitutional rights.

The panel's expansive and incorrect interpretation of the Protective Order was a necessary factual finding to uphold dismissal of the unjust enrichment claim and is contrary to established precedent which preclude the Panel's holding. The Protective Order created no "legal obligation" of prior restraint on Appellant's extrajudicial speech and any benefit to Respondents was not therefore "incidental".

SUMMARY OF FACTS

In October 2014 White and the UFC flew Ms. Doe to Brazil in connection with a fight. During the trip White had sexual relations with Doe, Appellants live-in girlfriend with whom he has a child.

Doe recorded the sexual activity which Appellant was later given by Doe.

White paid Doe $10,000.00 on her return, through the UFC Chief of

Security and the strip club that Doe danced at.

White, through his counsel, had the US Attorneys office and the FBI entrap Appellant into offering to sell the video to White for money, which resulted in his prosecution in federal court and a guilty plea.

In October 2015 the US Attorney and Appellant counsel stipulated to a protective order which limited references in court, trial and proceedings to White as "Victim 1" and only limited Appellant to viewing discovery in his counsel's presence.

Consistent with the holding in Levine, supra, absent from the Protective Orders any limitation on Appellant from making **public comment**.

After the Protective Order was issued in October 2015 White's counsel solicited a NDA from Appellant. Over the next 8 months payment for the NDA was discussed by Appellant and Respondent, including a failed mediation followed by subsequent offers to pay Appellant.

On July 5, 2016 Respondents counsel unilaterally terminated discussion of payment for an NDA advising Appellant counsel they no longer need a NDA nor would they pay for one. At that point Respondent had benefited from the silence of Appellant for 8 months and enjoyed the full benefit they desire'd.

On July 9, 2016 Respondents announced they sold the UFC for $4.2 Billion

dollars.

The 9th Circuit's opinion in *Levine*, supra, was careful to specify that the District Court removed "parties and witnesses" at p. 593 from the Order and that it only applied to and restricted disclosure by "trial participants" i.e. counsel.

The Federal District Court herein cognizant of *Levine* similarly limited the Protective Order to disclosure of White's identity by counsel in the Court proceeding and intentionally did not apply the restriction to Appellant.

A judge may limit counsel's comments during pending case, it cannot limit "participant's" (defendant's) speech.

The Panel's Order's reading of the Protective Order ignores and exceeds the limits imposed by *Levine* and interprets the Protective Order in a manner that renders it unconstitutional prior restraint and was not intended. The Protective Order was drafted consistent with *Levine* and should be read that way.

In *Gentile v. State Bar of Nev*., 501 U.S. 1030 (1991) the US Supreme Court explained the right to publicly comment on a pending criminal matters. Even though the US Supreme Court indicated counsel could be subject to some limitations, Gentile underscores that a defendant's rights to publicly address a pending criminal matters involves a fundamental constitutional right. The Court in *Gentile* affirmed the importance of those limitations at pages 1034-1035:

> "There is no question that speech critical of the exercise if the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged government misconduct, which only last Term we described as " speech which has traditionally been recognized as lying at the core of the First Amendment." Butterworth v. Smith, 494 U.S. 624, 632 (1990).
> The judicial system , and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See, e.g., Landmark Communications, Inc v. Virginia, 435 U.S. 829, 838-839 (1978). "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Richmond Newspaper, Inc v. Virginia, 448 U.S. 555, 575 (1980). Public vigilance serves us well, for "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power… Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." In re Oliver, 333 U.S. 257, 270-271 (1948). As we said Bridges v. California, 314 U.S. 252 (1941), limits upon public comment about pending cases are
> *likely to fail not only at a crucial time but on the most important topics of discussion……"

The unusual facts in this case raised issues of public concern of the judicial system and preferential treatment of White as delimited in the Compliant and will be supported by the facts.

Appellant did not disclose White's identity and negotiations, which continued and were ongoing until those discussions were unilaterally terminated by Respondents on July 5, 2016, 4 or 5 days before announcement of the sale of the UFC for $4.2 Billion dollars.

Judge Navarro had expressly allowed Appellant and Respondent to agree to a NDA *Appendix RAMOS 063 L 1-7*

ISSUES

1. The Panel's Order affirming the District Courts dismissal of the unjust enrichment claim rests on a finding that Appellant was under a "legal obligation" not to disclose White's (Respondent) identity publicly, expanding a erroneously drafted protective order to unconstitutionally create prior restraint an Appellant which conflicts with this courts adoption of *Levine* standards in *Johanson.*

2. If Appellant personally was under no legal duty not to disclose White's identity, was it error to dismiss the unjust enrichment claim?

DISCUSSION

ISSUE I

The Panel's Order affirming the District Courts dismissal of the unjust enrichment claim rests on a finding that Appellant was under a "legal obligation" not to disclose White's (Respondent) identity publicly, expanding a erroneously drafted protective order to unconstitutionally create

prior restraint an Appellant which conflicts with this courts adoption of Levine standards in Johanson.

The panel upheld dismissal of Appellants claim for unjust enrichment asserting that the protective order in Appellants criminal case imposed a "**legal obligation"** not to disclose the identity of White.

By doing so the Court held that the US District Court's Protective Order effectuated prior restraint on Appellant. The US District Court could not do so "legally" or constitutionally and did not.

This Court has consistently cited, followed and restated the law governing prior restraint, an examples being *Johanson v Eighth Judicia District Court,* supra, Which followed with approval the *Levine* case which followed *Near v Minnesota 283 US 697 (1931)* and *Nebraska Press Association v Stuart, supra.* The *Levine* standards were reaffirmed in *Las Vegas Review Journal v. Eighth Judicial District Court 412 P. 3d. 23,26* (2018). Without meeting the *Levine* standard a Protective Order restricting speech could not and should not issue. A Court should not read and enforce a facially unconstitutional order as imposing unconstitutional prior restraint.

Even under the *Levine* test to impose prior restraint there must be an imminent threat to a "protected interest". In Nevada the legislature does not

recognize disclosure of White's activities, including publishing the video, as a "protected interest, see NRS 200.770(2) (c) which excludes from its protections “public figures”. As the face of the UFC White clearly is a “public figure”. Additionally, concealment of sexual predation, extramarital affairs and violation of the Mann Act are not a recognized protected interests, nor should they be.

In *Levine* the trial Court had issued an order directed at comments made by counsel to the press. After initially restricting "parties" and witnesses as well as counsel from publicly discussing the case, the trial court recognizing it had gone too far, altered its order allowing the parties and witnesses to discuss the facts publicly. *Levine* went on to delineate the considerations in making any restriction and remanded the consideration to the trial court, Levine p. 593

In *Levine* the order, as here, only restrained speech by the "participants", i.e., the government and defense lawyers and court personnel. The power of the courts to regulate the conduct of counsel does not extend to the power of prior restraint of individuals, and per *Gentile*, supra, even that is limited.

The Panel's decision ignores the limitations on prior restraint and instead reads a "narrowly drafted" protective order expansively to unconstitutionally extend to Appellant personally.

The need to protect White from harm caused by disclosure of his Brazilian tryst is rebutted by his epiphany upon the sale of the UFC in July 2016 that disclosure of his Brazilian tryst was no longer necessary.

The Defendant was only charged in Federal Court for the "instrumentality' offense of using a phone to assist a violation of Nevada Law. No Nevada charges were ever brought. As previously noted, under NRS 200.770(2)(c) the underlying agreement at issue was for White to purchase the video which would appear to be a legal transaction and not a crime.

Appellants guilt or innocence is not at issue in this case Appellant having exhausted his appeals.

There was no finding of prospective harm, threat to a fair trial or other grounds expressed as basis by the US District Court sufficient to have justified anyimposition of prior restraint on Appellant under *Levine.*

Instead consistent with Appellant's position herein Judge Navarro confirmed Appellant was free to name White when she expressly stated the parties were free to negotiate and privately reach an agreement, *Appendix RAMOS 063 L 1*-7. This Panel must respect the holding of Judge Navarro as the law of this case. That ruling was made in a lengthy hearing which is not before the Court except for the above limited excerpt of record.

White's experienced counsel recognized that Appellant was not and could not be restrained by the/a Protective Order which prompted their request for the NDA **only after the protective order was issued**. The Panel should not retrospectively do what the USDistrict Court did not do and could not do.

The Panel's finding of Appellant having a “legal obligation” not to disclose White’s identity ignores paragraph 76 of the complaint which alleges that Appellant was free to disclose White's identity after sentencing "**…or earlier…",** see Appellants Reply Brief page 7.

There is at a minimum a question of fact contravening the finding by the Panel' s that Appellant was under a "legal obligation" not to disclose White's identity. The Panel is constrained to resolve that issue in a light most favorable to Appellant.

As discussed above, the Complaint specifically averred that Appellant was not constrained from disclosing White's identity by the Court and there is nothing before the Court sufficient to ignore to paragraphs 76' s averment that Appellant could have disclosed White identity earlier than the conclusion of the case.

Paragraph 76 is diametrically opposed to that conclusion when it states the following:

"[Nothing in the plea agreement or, ***the protective order*** or the terms of

supervised release as directed by the court ***constrained in any way Ramos from disclosing the events at issue or White's activities*** subsequent to completion of his sentence ***or earlier."*** (emphasis added) see Appellants reply brief page 7.

The Protective Order, *Appendix Ramos 035-040* notably contains only one directive concerning Appellant, #2, which reads "Defendant shall not be permitted to have or view discovery materials outside the presence of Defense Counsel of Record.". The remainder of its provisions all pertain to conduct of defense counsel and that in part 4 that "During all proceedings in this case...." White is to be referred to by the pseudonym "Victim 1 ".

The Court should note the Protective Order's language **"…all proceeding in this case…"** Is consistent with the *Levine* mandate that prior restraint orders be "narrowly drafted".

The facetious nature of the need to protect White's identity is established byhis termination of his request for a NDA concurrent with the sale of the UFC.

That disclosure that the UFC president was transporting and paying women for sex withthe knowledge and support of the UFC would adversely affect a sale of the UFC would be an invalid and rejected basis to support or justify prior restraint.

The Panel's conclusion that Appellant had a "legal obligation" created by

the Protective Order is not found on the face of the Order, is contrary to this Court's precedent limiting prior restraint and contrary to the averment in paragraph 76 of the Complaint that Appellant was not prohibited from disclosing White's identity.

As that finding of a "legal obligation" is the basis to dismiss unjust enrichment see issue 2.

ISSUE 2

"If Appellant personally was under no legal obligation not to disclose White's identity, was it error to dismiss the unjust enrichment claim?"

The Panel's Order sets out the elements of unjust enrichment per *Certified Fire Protection v Precision Construction Inc.* 283 P. 3d. 250, 257 (2012).

To state a claim for unjust enrichment a party must confer a benefit which is appreciation of that benefit and there is acceptance and retention of the under circumstances such retention without payment is inequitable, see *Certified* at page 257.

The uncontroverted facts set forth in the Complaint which the Panel and the District Court's ruling are premised on set forth a prima facie claim of unjust enrichment.

The defense and the grounds for the Panel's Order of Affirmance, that

Appellant had a legal duty to not disclose White' s, being rejected as factually and constitutionally in error, all elements of unjust enrichment are pled and supported under the standard of review on a motion to dismiss:.

1. The Respondents requested performance of an NDA.

2. The Respondents indicated they would pay Appellant for an NDA.

3. The Appellant and respondents negotiated compensation for the NDA until July 5, 2016, some 8 months, during which time Appellant provided Respondents with the requested benefit, not disclosing White's identity.

4. The Respondents enjoyed the full benefit of the performance and did not pay Appellant for that benefit.

5. The Respondents having received and retained the full benefit the apparently required and refusing to honor their offer to pay for the performance byAppellant is inequitable and unjust enrichment remedies apply.

Appellant asserts the temporal proximity of the withdrawal of the request and offer to pay Appellant on July 5, 2016 establishes the reasons for the NDA were related to the sale.

The Complaint's assertions taken in the most favorablelight sufficiently state and support a claim for unjust enrichment upon which Appellant can prevail upon at trial.

As this is a petition for en banc reconsideration, without leave of this Court for further briefing Appellant reserves other Argument.,

CONCLUSION

En banc reconsideration is appropriate as the dismissal of the unjust enrichment claim is premised on a finding that Appellant was under a "legal obligation" imposed by a Protective Order in his criminal case and thus any benefit to respondents was incidental and failed to support the unjust enrichment claim.

That "legal obligation" is not found in the Protective Order, and if it did, would be an unconstitutional imposition of prior restraint contrary to established precedent,

The Panel's Order of Affirmance erred in expansively extending the Protective Order to impose a legal duty on Appellant and thus dismissing unjust enrichment because any benefit to White was incidental to a "legal obligation".

Unjust enrichment is the remedy herein in the absence of contract. Appellant provided the benefit of his silence a at respondents request and they retain the benefit thereof without paying for the requested performance. Appellant has pled a prima facie case of unjust enrichment and averred sufficient facts in support thereof.

The Appellant does not concede that the Order of affirmance is correct on other points but under the limitations of NRAP Rule 40A they are not addressed herein but can be considered at the Panel's discretion.

Dated this 28th day of April 2022.

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NRAP 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman and is double-spaced.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(i)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14points or more, and contains 4212 words.

Finally, I hereby certify that I have read this Petition for Reconsideration, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I did, pursuant to NRAP 25(c), electronically file the foregoing Petition for Reconsideration with the Clerk of the Court by using its electronic filing system on the 28th day of April, 2022. I further certify that the following participants in the case are registered electronic filing system users, and will be served electronically:

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