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DISTRICT COURT
CLARK COUNTY, NEVADA

JOSE DECASTRO Appellant, vs. STATE OF NEVADA, Respondent.	CASE NO.: C-24-381730-A 23-CR-013015 DEPT: XII

APPELLANT'S OPENING BRIEF

COMES NOW, Appellant, JOSE DECASTRO, by and through his attorney of record, CHRISTOPHER R. ORAM, ESQ., hereby submits this Opening Brief and Appendix.

This Brief is made and based upon the pleadings and papers already on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

Dated this 6th day of May 2024.

Respectfully submitted.

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PROCEDURAL HISTORY

Appellant Jose DeCastro was charged with two (2) misdemeanor violations of Obstructing a Public Officer and Resisting a Public Officer when he was arrested on the 15th day of March 2023, while filming a traffic stop that occurred in a commercial parking lot. Mr. DeCastro appeared for an Arraignment on June 13th, 2023, in the Las Vegas Township Justice Court, Department 8. Bench trial began on March 19th, 2024, and judgment was entered on the same day. On March 19th, 2024, Mr. DeCastro was sentenced to one-hundred and eighty (180) days in the Clark County Detention Center.

Following his sentencing, on March 19th, 2024, Mr. DeCastro filed a timely Notice of Appeal from the Judgment of Conviction.

STATEMENT OF FACTS[1]

On March 15, 2023, Ofc. Branden Bourque had been employed with the Las Vegas Metropolitan Police Department for approximately eight (8) years (1AA p.23). At approximately 4:30 PM, Ofc. Bourque conducted a vehicle stop on a Hyundai that had a license plate that was expired or suspended (1AA p.24, 31). The vehicle was pulled over in a target parking lot, located at 4155 S. Grand Canyon, Las Vegas, Clark County, Nevada (1AA p.27).

Ofc. Bourque was dressed in his uniform and was driving a clearly marked black and white Las Vegas Metropolitan Police Department official vehicle. The sole occupant of the vehicle was a female who was cooperative and provided a picture of her license on her phone (1AA p.24).

[1] The Statement of Facts and rendition of testimony by transcript is provided to perfect the record. It must be noted that the body camera video admitted as 416(b) at trial (1AA p.28) is the best evidence to demonstrate the context of the facts and the totality of video in this case provides the best evidence of the facts.

During the vehicle stop, Mr. DeCastro, a member of the press, began filming the police encounter. Mr. DeCastro owns a YouTube channel for the purpose of covering police activities because he believes police misconduct is an epidemic in the country. Mr. DeCastro testified that he only films the police in their official capacity, and he works as a member of the press and is known “across the country and the world”. (1AA p.33).

Mr. DeCastro testified that within ten (10) seconds of filming this incident, he identified himself as a member of the press. (1AA p.34). Ofc. Bourque confirmed that Mr. DeCastro stated he was a member of the press. However, he testified "but again independent media would approach us more respectfully than Mr. DeCastro". (1AA p.32).

In a pretrial motion, trial counsel stated "Mr. DeCastro is a prominent member of the media and new media. Mr. DeCastro has 353,000 subscribers on YouTube. See Ex. A - YouTube page "Deletelawz”, which is a page that deals with (as the name suggests), law, politics, and philosophical issues related to law enforcement." (1AA p.9-11).

This entire encounter is captured by the body camera of Ofc. Bourque and video taken by Mr. DeCastro. Unfortunately, trial counsel failed to introduce Mr. DeCastro's video when Mr. DeCastro testified at trial. Ofc. Bourque testified that his body camera inadvertently turned off just prior to handcuffing Mr. DeCastro. (1AA p.27).

Mr. DeCastro testified that he took a couple of steps back when Ofc. Bourque instructed him to back up. He further explained that he backed up a foot or two and was at least ten feet from the Hyundai (1AA p.34). Ofc. Bourque admitted that Mr. DeCastro backed up, but he did not "substantially back up." (1AA p.29). However, he also stated that "[h]e did not back up" (1AA p.29). The video demonstrates that the officer is clearly wrong.

Mr. DeCastro asked the driver if she was okay but did not make any further comments after the police officer instructed him not to talk to the driver (1AA p.34). The officer instructed

Mr. DeCastro to back up on several occasions but never stated how far, claiming he had no opportunity because Mr. DeCastro would argue with him (1AA p.31).

Obviously, the officer admitted that he observed no weapons on Mr. DeCastro because Mr. DeCastro was holding two (2) cell phones in each hand. (1AA p.32, 34). Mr. DeCastro explained that the officer stated that the driver was entitled to privacy. At that point, Mr. DeCastro told the officer to "go get in your car little doggy and write your ticket". Mr. DeCastro then explained "at that point his face turned beet red and his veins in his neck stuck out because we were over twenty feet away. You had to holler to hear each other because the wind was 30 miles an hour" (1AA p.34).

Ofc. Bourque then moves rapidly towards Mr. DeCastro, having decided to let the motorist go, and instead concentrate his attention on Mr. DeCastro (1AA p.25-26). Mr. DeCastro believed he was complying with the officer's commands. He backed up when the officer told him to do so, as the officer admitted. Then, the officer aggressively grabbed Mr. DeCastro informing him he was detained. He then escorted Mr. DeCastro approximately thirty-five feet to his police cruiser. Mr. DeCastro admitted that at first, he refused but complied when the officer grabbed him (1AA p.34-35).

Mr. DeCastro testified that he stated he was a member of the press on numerous occasions. That he made no effort to physically swat at the officer, or resist. Mr. DeCastro correctly surmised that "... I think from the Officer's testimony we can see he's scared of the driver, scared of me, scared of everything. They teach them to be afraid of everything." (1AA p.34).

The officer’s irrational fear was confirmed by his own testimony. Although the officer explained that the sole female occupant, pulled over for a minor traffic offense, was cooperative, he stated, she could have been armed because he had not pulled her out of the

vehicle and “hadn’t pat her down.” (1AA p.31). Additionally, the officer claimed that Mr. DeCastro could have been armed and dangerous even though he identified himself as a member of the press and was holding cell phones in his hands while filming the officer. (1AA p.25).

Officer Bourque testified that Mr. DeCastro was as far as ten (10) feet from him when he first observed him filming (1AA p.25). The officer’s trial testimony concerning officers’ safety belied the video evidence, wherein, the officer is clearly agitated and frustrated with Mr. DeCastro and does not appear fearful in any manner. He is aggressive as depicted in the video, not fearful at all.

The officer testified to a technique utilized in the police academy, whereby an attacker can reach a police officer within twenty-one (21) feet, under certain circumstances. He labeled this the “21-foot rule”. (1AA p.28). Therefore, the officer concluded that he has some type of imaginary legal rule that permits him to arrest citizens/members of the press that have the audacity to film him within those twenty-one (21) feet.

This was presented as a valid piece of evidence by the State without regard to any legal authority. The court permitted this arbitrary and capricious rationale utilized by the officer for his justification for the arrest. However, Officer Bourque admitted he never instructed Mr. DeCastro to back up a particular distance. Perhaps, Mr. DeCastro should have known by telepathy that the police officer wanted him to move back twenty-one (21) feet, pursuant to this imaginary rule of law.

The officer admitted he was familiar with police training regarding First Amendment auditors. The officer was asked the following question: “do you recall during interactions with the defendant that you told him that you believed First Amendment auditors often pullout guns and shoot people?” The officer replied. “I didn't say that they often do that". (1AA p.29,33).

Additionally, the officer testified that the driver probably would not want a random person approaching and recording. This has nothing to do with the charged offenses. (1AA p.30). Again, the officer seemed confused as to his motives for the arrest. The video also demonstrates that Ofc. Bourque could have completed the citation if he had not become so frustrated that he decided to let the driver go so he could pursue his unconstitutional behavior.

When questioned as to how Mr. DeCastro's behavior obstructed his ability to complete the traffic stop, he stated "again I don't know what his intentions is. I don't know if he's armed. All I saw was him recording which again I had no issue with and I told him I didn't have an issue with." (1AA p.31). Again, his testimony is contradictory. On the one hand, he recognized that Mr. DeCastro was a member of the press who was filming him; on the other hand, he does not know Mr. DeCastro's intentions and whether he was armed and/or dangerous.

As can be easily depicted from the video, the distance between Mr. DeCastro and the officer can easily be compared to the infamous image of citizens, filming from the back of the police cruiser during the murder of George Floyd, in May of 2020. The picture provided has become synonymous with American culture and history. It establishes citizens filming with their cell phones, and heckling the officers, convicted of murdering, and violating the civil rights of George Floyd. Those citizens, during the murder of George Floyd, were filming in closer proximity to the police/convicted murderers of Mr. Floyd than Mr. DeCastro was in this case. (State v. Chauvin, 989 N.W.2d 1 (Minn. Ct. App. 2023)).

Would the State of Nevada prefer that the State of Minnesota and the federal government prosecute the filmers of the George Floyd murder and perhaps suppress the evidence? In order to sustain a conviction here, this is what the State of Nevada is arguing. Neither the federal government nor the State of Minnesota had any ridiculous notion that the bystanders filming the murder should be prosecuted based on the imaginary "21-foot rule".

Additionally, an off-duty firefighter testified at the Floyd trial that she was harassed while informing officers that Mr. Floyd was in distress. Id.

This is exactly why Mr. Castro's actions are constitutionally protected and why the officer's hostile conduct is unconstitutional. So, because Mr. DeCastro did not capture police brutality against the motorist, he must be guilty - although, in Federal Court, Mr. DeCastro will be able to bring a federal lawsuit against the officer for his brutal treatment, when Ofc. Bourque grabbed Mr. DeCastro during this unlawful arrest in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution. Alternatively, if he had captured police brutality towards the motorist and it was covered all over the mainstream press, Mr. DeCastro would be named a hero and would not have been found guilty of the allegations. This provides absolute proof of the arbitrary and capricious nature of this prosecution.

It never seemed to occur to defense counsel, the prosecutor, nor the trial court that the imaginary "21-foot rule" would have caused prosecution of the bystanders filming during the murder of Mr. Floyd. It seemed to go over everyone's head.

Additionally, a question of concern must be addressed: if Mr. DeCastro was an African American and the driver of the vehicle was an African American female, would the State have prosecuted this case? Noting, Mr. DeCastro simply asked the driver if she was okay. These will be questions for this Court and, potentially, for federal review.

ARGUMENT

I. Mr. DeCastro's Convictions Must Be Reversed Based Upon Violations of the First Amendment to the United States Constitution.

1. First Amendment Protections.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances".

The issue before this Court is whether Mr. DeCastro had a constitutional right pursuant to the First Amendment to the United States Constitution to film a police officer, while the police officer is conducting a minor traffic stop? To affirm these convictions, this Court would have to determine that Mr. DeCastro, as a member of the press and a member of the public, does not have the right to film a police officer conducting his ordinary daily duties. This legal rationale would violate clearly and historically established federal law.

As a member of the press, the U.S. Supreme Court has provided important dicta regarding the importance of the status of the press. Consider the views of Justice Stewart and Chief Justice Burger:

> The Free Press guarantee is, in essence, a structural provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties for specific rights of individuals. The Free Press Clause extends protection to an institution. The publishing business is the only organized private business that is given explicit constitutional protection. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.
>
> Stewart, "Or of the Press," 26 Hast. L.J. 631, 633 - 634 (1975).

By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two. In setting up the three branches of the Federal Government, Founders deliberately created an internally competitive system. The primary purpose of the constitutional guarantee of a Free Press was to create a fourth institution outside the Government as an additional check on the three official branches. *See* also Anderson, the Origins of the Press Clause, 30 UCLA L. Rev., 455 (1983).

Did Mr. DeCastro have a First Amendment right either as a member of the public or a member of the press to film a police officer conducting his ordinary duties? The trial judge determined that Mr. DeCastro was guilty of obstruction. At no point did the trial judge address

whether Mr. DeCastro had a right pursuant to the First Amendment to film the interaction.[2] In fact, at no point in the trial or pretrial proceedings was a single legal authority cited regarding the most fundamental rights guaranteed to the public and the press under the First Amendment.

2. The Constitutional Right to Film Public Officials.

The constitutional right to film public officials has been firmly established by the federal courts. In Glik v. Cunniffe, 655 F. 3rd 78 (2011), the United States Court of Appeals for the First Circuit considered the case of the plaintiff who brought a suit pursuant to 42 U.S.C.S sec. 1983, claiming that his arrest for filming defendant officers with his cell phone constituted a violation of his rights under the First and Fourth Amendments. In the appeal, the police officers challenged an order of the U.S. District Court for the District of Massachusetts denying them qualified immunity on plaintiffs' constitutional claim. Id.

In Glik, Mr. Glik was arrested for using his cell phone to film several officers arresting a young man on the Boston Common. He was arrested in violation of Massachusetts wire statutes, disturbing the peace and aiding in the escape of a prisoner, which were subsequently judged baseless and dismissed. He then brought a suit claiming the officers violated his First and Fourth Amendment rights. The officers claim that they had qualified immunity. 655 F 3rd 78, 79.

Glik overheard bystanders commenting on a young man being arrested, believing officers were using excessive force, he began filming from approximately ten feet away. Id. This is the exact distance the police officer stated that Mr. DeCastro was away when he

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[2] Trial Counsel for Mr. DeCastro attempted to raise the issue at trial in a bench motion. However, prosecutors moved to strike the motion due to it being filed untimely. As such, the trial court was never properly briefed on this vital constitutional issue. In fact, the trial court explained that she had never received a copy of the memo. (1AA p.36).

observed Mr. DeCastro filming. Officers subsequently arrested Glik just as Mr. DeCastro was arrested. Id.

The Boston Municipal Court noted that the fact the "officers were unhappy they were being recorded during an arrest... Does not make a lawful exercise of a First Amendment right crime." Id at 80.

The First Circuit Court of Appeals provided a tremendous First Amendment summary in Glik v. Cunniffe, 655 F. 3d 78, Court of Appeals, 1st Cir. (2011):

> The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and [**10] other circuits, answer that question unambiguously in the affirmative.
>
> It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws "abridging the freedom of speech, or of the press," and encompasses a range of conduct related to the gathering and dissemination of information. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." First Nat'l Bank v. Bellotti, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); *see* also Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) ("It is ... well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" Houchins v. KQED, Inc., 438 U.S. 1, 11, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (quoting Branzburg v. Hayes, 408 U.S. 665, 681-82, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972))". Glik v. Cunniffe, 655 F. 3rd 78 (2011).

In support of Mr. DeCastro's First Amendment Constitutional rights, the courts have further announced that, "[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, [**11] fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). Moreover, as the Court has noted, "[freedom of expression has particular significance with respect to government because 'lilt is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" First Nat'l. Bank, 435 U.S. at 777 n. 11 (alteration in original) (quoting Thomas Emerson, Toward a General Theory of the First Amendment (1966)).

This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Cf. Gentile v. State Bar of Nev., 501 U.S. 1030, 1035-36, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) (observing that "[the public has an interest in [the] responsible exercise" of the discretion granted police and prosecutors). Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, see id. at 1034-35 (recognizing [**12] a core First Amendment interest in "the dissemination of information relating to alleged governmental misconduct"), but also may have a [*83] salutary effect on the functioning of government more generally, *see* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (noting that "many governmental processes operate best under public scrutiny"). Glik v. Cunniffe, 655 F. 3rd 78 (2011).

In a direct endorsement of Mr. DeCastro's right to free speech and freedom of the press the Glik Court further elaborated:

"In line with these principles, we have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties. In Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), a local journalist brought a § 1983 claim arising from his arrest in the course of filming officials in the hallway outside a public meeting of a historic district commission. The commissioners had objected to the plaintiff's filming. Id. at 18. When the plaintiff refused to desist, a police officer on the scene arrested him for disorderly conduct. Id. The charges were later dismissed. Id. Although the plaintiff's subsequent § 1983 suit against the arresting police officer was grounded largely in the Fourth Amendment and did not include a First Amendment claim, we explicitly noted, in rejecting the officer's appeal from a denial of qualified immunity, [**13] that because the plaintiff's journalistic activities "were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the officer| lacked the authority to stop them." Id. at 25 (emphasis added). Glik v. Cunniffe, 655 F. 3rd 78 (2011).

The courts have further concluded that, "[o]ur recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts. *See*, e.g. Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); Demarest v. Athol/Orange Cmty. TV, Inc., 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (finding it "highly probable" that filming of a public official on street outside his home by contributors to public access cable show was protected by the First Amendment, and noting that, "[alt base, plaintiffs had a constitutionally protected right to record matters of public interest"); Channel 10, Inc. v. Gunnarson, 337 F.

Supp. 634, 638 (D. Minn. 1972) [**14] (holding that police interference with television newsman's filming of crime scene and seizure of video camera constituted unlawful prior restraint under First Amendment); cf. Schnell v. City of Chi., 407 F.2d 1084, 1085 (7th Cir. 1969) (reversing dismissal for failure to state a claim of suit claiming police interference with news reporters and photographers' "constitutional right to gather and report news, and to photograph news events" under the First Amendment (internal quotation mark omitted)), overruled on other grounds by City of Kenosha v. Bruno, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973); Connell v. Town of Hudson, 733 F. Supp. 465, 471-72 D.N.H. 1990) (denying qualified immunity from First Amendment claim to police chief who prevented freelance photographer from taking pictures of car accident)". …

Changes in technology and society have made the line between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.

The video evidence in the instant case depicts a police officer frustrated and agitated by Mr. DeCastro's provocative statements and filming. The images belie the testimony that the officer was concerned for his safety. The images belie the officer's false testimony that Mr. DeCastro refused to back up. The officer's testimony was designed to claim obstruction and resistance. Just as the officers that arrested others mentioned in the cases cited above, Ofc. Bourque didn't like being filmed and couldn't maintain his professional composure in the face of challenging criticism.

Mr. DeCastro's filming of the officer and challenging criticism is constitutionally protected speech. The State and the trial court failed to address these fundamental concepts. Undoubtedly, the State will argue there was proof of obstruction. At trial, the State elicited a new and bold concept, Mr. DeCastro violated the imaginary "21-foot rule". At first, the officer claimed that Mr. DeCastro would never back up. Then, the State attempted to interject a complete falsehood, the "21-foot rule". As outlined by the Federal Court of Appeals for the First Circuit, filming from a distance of ten (10) feet is protected. More importantly, the case law supports a lack of immunity for the officer in this type of arrest.

Images of bystanders filming police murdering George Floyd are etched into American culture and history. The infamous images depict several of the public standing in close proximity to the police while criticizing and filming. The images of the police officer attempting to back the bystanders up while being taunted are memorable. As the Glik Court reasoned, the police didn't like being filmed. Police in the George Floyd case didn't like being filmed. Ofc. Bourque didn't like being filmed. They also didn't like being criticized.

In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. *See* City of Houston v. Hill, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). Indeed, "[the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Id. at 462-63. The same restraint demanded of law enforcement officers in the face of "provocative and challenging" speech, Id. at 461 (quoting Terminiello v. Chicago, 337 U.S. 1, 4. 69 S. Ct. 894, 93 L. Ed. 1131 (1949), must be expected when they are merely the subject of videotaping

that memorializes, without impairing, their work in public spaces". Glik v. Cunniffe, 655 F. 3rd 78 (2011)

The court summarized the issue as, "though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment. Accordingly, we hold that the district court did not err in denying qualified immunity to the appellants on Glik's First Amendment claim". Glik v. Cunniffe, 655 F. 3d 78, Court of Appeals, 1st Cir. (2011).

This summary provides a comprehensive outline of the protections guaranteed to the public and press in filming police officials. Mr. DeCastro testified that he films police for a living. Here, both he and the officer admitted that he was approximately ten (10) feet away while filming. This is constitutionally protected as outlined above. The federal courts have made clear that law enforcement must be able to demonstrate restraint under public criticism even in the face of "provocative and challenging" speech. Unfortunately, Ofc. Bourque was unable to demonstrate restraint demanded by the United States Constitution and clearly established federal law.

Interestingly enough, the prosecution elicited testimony from Ofc. Bourque that Mr. DeCastro refused to "back up" even after multiple warnings. The prosecutor asked the following question: "[d]id he obey those orders?" Ofc. Bourque answers: "[n]o, he did not." (1AA p.16). This evidence is false. The body cam footage establishes that Mr. DeCastro backed up a few feet when commanded. Observing the video, the viewer can easily distinguish Mr. DeCastro's body in front of a line for a parking space that he then backed out of. This is blatantly obvious. The Officer had no right to testify that Mr. DeCastro refused to move backwards. The United States Supreme Court has condemned the conviction of an individual

based on knowingly false testimony. *See* Napue v. Illinois 360 U.S. 264 (1959) (holding failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment).

As noted by clearly established federal law, the difference between our society and a totalitarian society are these basic freedoms. Admittingly, Mr. DeCastro would be harshly treated for this behavior had it occurred in Russia, China or Iran. Undoubtedly, Mr. DeCastro's language and filming would result in severe punishment in those countries. Here, the trial court sentenced him to jail for six (6) months. The First Amendment was designed to prevent this type of conviction.

This conviction is chilling to the protections guaranteed by the First Amendment. This conviction chills free speech. This conviction may cause the public to fear filming police conduct for fear of arrest. The insulted officer, highly sensitive, simply stated that while filming, Mr. DeCastro refused to back up, even though the video evidence proves otherwise. The officer then also claimed that he could not carry out his duties because of officer safety.

In finding Mr. DeCastro guilty, the trial court cited the safety of the officer and the driver. The trial court also noted that the driver had not requested help. Mr. DeCastro had interfered with the investigation. The trial court's reasoning rings hollow because it could be applied to any of the cases cited above. Bystanders in the Floyd case could be accused of interfering with the officer's safety. In Glik the officers could easily have claimed officer safety. Additionally, at no time was George Floyd heard requesting help from passersby. Therefore, the same reasoning could be applied to convict those filming bystanders.

Here, Mr. DeCastro desired to film the police officer from at least ten (10) feet away. While criticizing the officer, it became apparent that the anger and frustration was too much for

this officer. The officer then used hostile physical conduct to exact revenge for his feelings of irritation. The same tactics used to justify the arrest of other individuals cited above is being utilized to convict Mr. DeCastro.

Mr. DeCastro has a right to film public officials and simultaneously communicate in a "provocative and challenging manner". The Glik Court held the officers blatantly violated Glik's Fourth Amendment rights based upon the arrest, so too did Ofc. Bourque violate Mr. DeCastro's Fourth Amendment rights.

Pursuant to clearly established federal law, Mr. DeCastro had a right to film the officer in this case. Mr. DeCastro had a right to address the officer in the manner he did. The officer had not probable cause pursuant to the Fourth Amendment to arrest Mr. DeCastro. In fact, the officer's conduct will ultimately be deemed to be a violation of Mr. DeCastro's civil rights in a federal lawsuit. These convictions must be reversed.

II. Count #1 Must Be Dismissed Because NRS § 197.190 and NRS § 199.280.3 Are Void Due to Being Unconstitutionally Vague and Ambiguous.

NRS 197.190 states in relevant part:

> Obstructing public officer. Every person who… shall willfully hinder, delay or obstruct any public officer in the discharge of official powers or duties, shall, where no other provision of law applies, be guilty of a misdemeanor.

NRS 199.280.3 states in relevant part:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his or her office shall be punished: …
>
> (3) Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

The Nevada Supreme Court has held, "[a]n unconstitutionally vague law invites arbitrary enforcement in this sense if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case or permits

them to prescribe the sentences or sentencing range available." Beckles v. United States, 580 U.S. 256, 256, 137 S. Ct. 886, 888 (2017).

It is the vagueness of the Nevada statute that underscores the unconstitutionality of NRS 197.190 and NRS 199.280.3. The vague and ambiguous language of the statutes precludes this Court from applying specific standards to alleged criminal conduct, thereby encouraging, authorizing, or even failing to prevent the State from arbitrarily and discriminatorily enforcing theses statutes against any number of accused individuals. Therefore, Mr. DeCastro respectfully requests that this Court dismiss Count 1 and Count 2 because they are void for vagueness and ambiguity.

Furthermore, due to the broad nature of NRS 197.190 and NRS 199.280.3, they are unconstitutionally vague and should thus fall under the void-for-vagueness doctrine that has its origins within the Due Process Clause of the Fifth and Fourteenth Amendments. Pimentel v. State, 133 Nev. 218, 222, 396 P.3d 759, 764(2017) (citing Carrigan v. Comm'n on Ethics,129 Nev. 894, 899, 313 P.3d 880,884 (2013).

Statutes such as NRS 197.190 and NRS 199.280.3 are unconstitutionally vague and subject to facial attack if they:

1. Fail to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and

2. Lack specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct 839 (1972).

The first prong is concerned with guiding those who may be subject to potentially vague statues, while the second–and more important–prong is concerned with guiding enforcers of

statutes." Silver v. Eighth Judicial Dist. Court ex rel. County of Clark,122 Nev. 289, 293, 129 P.3d 682, 684-85 (2006).

The second prong relates to the application of the law by the State. "[t]he second prong is more important because absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to pursue their personal predilections." id.

1. *NRS 197.190 Fails to Provide a Person of Ordinary Intelligence Fair Notice of What is Prohibited.*

With Nevada's vague definition of "obstruction" and "resisting" failing to sufficiently define the elements of the crime, NRS 197.190 and NRS 199.280.3 fail to provide a person of ordinary intelligence such as Mr. DeCastro with fair notice of what conduct is prohibited. Therefore, the statutes are unconstitutionally vague.

2. *NRS 197.190 Is so Standardless That It Authorizes or Encourages Seriously Discriminatory Enforcement*

The second prong of the test when determining whether a criminal statute is unconstitutionally vague is more consequential because, absent adequate guidelines, "a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to pursue their personal predilections." Silver v. Eighth Judicial Dis. Court,122 Nev. 289, 293, 129 P.3d 682, 685 (2006).

The standards within which the definition of "obstruction" and "resistance" applies are so vague that the State has the flexibility and liberty to choose to prosecute, or not, somebody under these statutes. The vague and ambiguous language within NRS 197.190 and NRS 199.280.3 precludes this or any court in Nevada from applying specific standards to alleged criminal conduct, thereby encouraging, authorizing, or even failing to prevent the State from

arbitrarily and discriminatorily enforcing these statutes against any number of accused individuals.

In the instant case, NRS 197.190 and NRS 199.280.3 fail both prongs of the Void for Vagueness test rendering them unconstitutionally vague. Therefore, Mr. DeCastro respectfully requests that this Court dismiss both Count 1 and Count 2 because they are void for vagueness and ambiguity.

1. Vague and Ambiguous

Mr. DeCastro was convicted of obstruction of an officer. A review of the state's summation and the trial court's brief delivery of the verdict relies on reasoning that permits arbitrary and discriminatory enforcement of the statute as condemned by the United States Supreme Court and Nevada law.

Both the trial court and prosecutor cited officer safety and the driver's safety as partial reasons for the obstruction charge. Nothing was preventing the officer from issuing the citation to the driver. Video evidence depicts the officer becoming agitated with Mr. DeCastro after he received insults.

The prosecutor argued the imaginary "21-foot rule" to support the conviction (1AA p.35). The prosecutor further argued that the defendant did not back up when ordered to do so (1AA p.36). The prosecutor insisted that had Mr. DeCastro complied he would not have been charged with either count (1AA p.36). Fortunately, the video clearly shows Mr. DeCastro complying by backing up a few feet, into another parking space as outlined on the pavement.

Nothing obstructed the officer from completing his abilities to cite the driver. The video demonstrates that he concentrated on Mr. DeCastro because he was annoyed by Mr. DeCastro.

On video, the officer is seen requesting assistance with the situation because he did not appear to know how to proceed with Mr. DeCastro's antics.

It is obvious there is no "21-foot rule". Again, we have seen images of by standers filming police, closer than Mr. DeCastro, where they are not charged. Traffic stops occur on the Las Vegas strip routinely. Obviously, many bystanders walk within twenty-one (21) feet of the police and their vehicle. Police have no idea whether the bystanders are armed or not. The enforcement of these charges is entirely arbitrary and capricious. Mr. DeCastro never attempted to physically interfere with the police officer's ability to write a ticket.

The law as applied in this case is completely arbitrary and discriminatory and requires reversal based upon a violation of the United States Constitution.

III. Mr. DeCastro Was Denied His State and Federal Constitutional Rights When His Trial Was Presided Over by a Judge with a Prejudice Against Mr. DeCastro, and Bias in Favor of the Metro and the State

From the onset of the relatively brief trial, the trial judge repeatedly chastised Mr. DeCastro. Almost immediately, the trial court twice warns Mr. DeCastro regarding his behavior.

The trial begins with the trial court announcing the granting of two media requests. The trial court then orders Mr. DeCastro to empty all his pockets. Mr. DeCastro replies, "What's that?". The trial court then reiterated its an order to empty his pockets which is echoed by the marshal who also orders Mr. DeCastro to "give up your phones" (1AA p.22). Mr. DeCastro clarified whether he was required to surrender his phones. The trial court responds "[y]ep, I don't really want to be part of your You Tube channel" (1AA p.22). Mr. DeCastro states "[y]ou already are".

During the exchange, Mr. DeCastro refers to the court marshal in a derogatory manner. (Referring to him as a "pig"). The trial judge immediately admonished Mr. DeCastro that he could be held in contempt for speaking in that fashion (1AA p.22-23). Although the trial judge mentions contempt and possible jail time, no contempt proceedings were ever initiated pursuant to NRS 199.340.

Immediately thereafter, the judge states "[s]o I need you to empty your pockets too. Suit pocket. Pants pocket". Mr. DeCastro replies "[t]his is illegal. This is a violation of my Fourth Amendment". The trial court also specifically ordered defense counsel to turn off his phone (1AA p.23).

At sentencing, the trial court noted Mr. DeCastro's reference to her marshal as a "pig". The trial court also stated, "[s]o apparently he hates every law enforcement officer in the United States". Mr. DeCastro was then sentenced to one hundred and eighty (180) days in jail even though the prosecutor had requested a suspended sentence of ninety (90) days concurrent on each count (1AA p.37).

1. The Legal Standard Implied Bias.

"The Due Process clause" requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case.'" Smith v. Mahoney, 611 F.3d 978, 997 (9th Cir.), cert. denied, 131 S. Ct.461 (2010) (quoting Bracy v. Gramley, 520 U.S.899, 904-05 (1997)); *see* also Ward v. Monroeville, 409 U.S.57, 62 (1972) (Due process guarantees litigants a "neutral and detached judge in the first instance.") When a defendant's right to have his case tried by an impartial judge is compromised, there is structural error that requires automatic reversal. *See* Tumey v. Ohio, 273 U.S. 510 535 (1927); *see* also Chapman v. California, 386 U.S.18, 23 (1967).

The Nevada Code of Judicial Conduct("NCJC") "provides substantive grounds for judicial disqualification." PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 435, 894 P.2d 337, 340 (1995), overruled on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005).

The Nevada Code of Judicial Conduct Canon 3E(1) states that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer...." Pursuant to NRS1.230(1), applicable to judges other than Supreme Court justices, a judge cannot preside over an action or proceeding if he or she is biased or prejudiced against one of the parties to the action. "This rule promotes public confidence in the judiciary and encourages efficiency and finality in litigation." Hogan v. Warden, 112 Nev. 553, 560, 916 P.2d 805, 809 (1996). NRS 1.230(3) provides that "[a] judge, upon the judge's own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias."

A judge's failure to disqualify himself is reviewed for abuse of discretion. PETA, 111 Nev. At 437, 894 P.2d at 341. However, the question of a judge's impartiality is a legal question, and "[t]he test for whether a judge's impartiality might reasonably be questioned is objective," id.,111 Nev.at 436, 894 P.2d at340, and presents "a question of law [such that] this court will exercise its independent judgment of the undisputed facts," id. at 437, 894 P.2d at 341. Because a judge is presumed to be impartial, "the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), abrogated on other grounds by Halverson v. Hardcastle, 123 Nev. 245, 266, 163 P.3d 428, 443 (2007); *see also* PETA, 111 Nev. at 437, 894 P.2d at 341. In addressing this Canon 3E, this Court must determine "whether

a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judge's] impartiality." PETA, 111 Nev. at 438, 894 P.2d at 341. In analyzing and applying NCJC Canon 3(E), this Court has looks to the federal analog—28 U.S.C. §455—for guidance. Towbin Dodge, L.L.C. v. Eighth Judicial Dist., 121 Nev. 251, 259-60, 112 P.3d 1063, 1068-69 (2005).

2. The Legal Standard Actual Bias.

Due process requires disqualification when a jurist has either a personal pecuniary stake in the outcome of the case or has become embroiled in the battle. Such circumstances rebut the presumption of judicial impartiality, and it becomes constitutionally intolerable to permit the affected jurist to continue to preside over the matter. These protections have been applied to government administrative hearings as well. *See* Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995).

> "A party alleging unconstitutional bias may prove this claim by introducing extrajudicial statements by the adjudicator that are inconsistent with the role of impartial decisionmaker. Jenkins v. Sterlacci, 270 U.S. App. D.C. 296, 849 F.2d 627, 634 (D.C. Cir. 1988)." Stivers v. Pierce, 71 F.3d 732, 744 (9th Cir. 1995).

This Court should find that Mr. DeCastro has alleged sufficient facts to find it is plausible that Mr. DeCastro demonstrated impermissible bias against himself, in violation of his right to due process.

Stivers nonetheless instructs that appearance of bias is sufficient to warrant recusal. "[T]he adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an appearance of partiality that violates due process, even without any showing of actual bias." Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995).

3. Judicial Bias

Nevada and federal law dictate implied bias, or the appearance of partiality violates due process, without having to show the bias. In this case, the trial judge began the proceedings by singling Mr. DeCastro out for a search. Including ordering his attorney to power off his phone.

This order may well have been based on a letter received by the court claiming that Mr. DeCastro would be filming the proceedings (1AA p.60).

The trial court threatened contempt against Mr. DeCastro from the onset based on this derogatory comment to the marshal. At this point, the trial court had not taken evidence in the trial, the trial court should have disqualified herself based upon implied bias. Admittedly, Mr. DeCastro's comment to the marshal required admonishment by the trial court. The openly contentious proceedings are captured in the transcript.

Rather than proceed to trial, the trial court could potentially have carried out any further proceedings regarding the alleged contemptuous behavior and still recused herself from hearing the trial. The trial court even raises the derogatory comment made by Mr. DeCastro and his general dislike of law enforcement, before sentencing him to six months in jail and immediately taking him into custody.

Based on the foregoing arguments and state and federal law, Mr. DeCastro was entitled to reversal of his convictions based upon implied judicial bias in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

IV. Mr. DeCastro Received Ineffective Assistance of Counsel.

The Standard of Review for Ineffective Assistance of Counsel.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. Counsel's performance fell below an objective standard of reasonableness.
2. Counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsels' error

the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U.S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. The Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the United States Supreme Court in Strickland v. Washington, requiring the petitioner to show that counsel's assistance was deficient, and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. DeCastro must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence

in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,783 P.2d 430 Nev. 1989); Olausen v. State, 105 Nev. 110,771 P.2d 583 Nev. 1989).

In the instant case, Mr. DeCastro's proceedings were fundamentally unfair. Mr. DeCastro received ineffective assistance of counsel.

1. Mr. DeCastro Received Ineffective Assistance of Trial Counsel Due to Failure of Trial Counsel to File a Pretrial Motion Dismissing Counts 1 and 2 Due to Violations of Freedom of Speech and Freedom of Press

Mr. DeCastro received ineffective assistance of counsel for failure to file a pretrial Motion to Dismiss Counts 1 and 2 due to the violation of Mr. DeCastro's First Amendment rights (freedom of speech and freedom of the press).

In the instant case, the question at the center of the charges levied against Mr. DeCastro is whether or not he was operating within the bounds of his First Amendment Rights as guaranteed by the U.S. Constitution. As demonstrated *Supra*, in the instant case, Mr. DeCastro's filming of law enforcement officers and critical comments made towards the officer were constitutionally protected. As such, it was imperative that the issues of freedom of speech and freedom of the press be raised by trial counsel prior to trial for the trial court's review. Had these issues been raised pretrial, the trial court would have been fully briefed on federally established case law that would have required all charges to be dismissed against Mr. DeCastro.

Failure to raise these issues denied Mr. DeCastro effective assistance of counsel as required by the Sixth Amendment of the U.S. Constitution. If these issues were raised prior to trial the trial court would have certainly dismissed all charges for violation of Mr. DeCastro's constitutional rights. Therefore, Mr. DeCastro has demonstrated that Trial Counsel's performance was both deficient and fell below the objective standard for reasonableness resulting in a trial that was fundamentally unfair, satisfying both prongs of the standard

established by the Strickland Court and amounting to ineffective assistance of counsel. Strickland, 466 U. S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

2. Mr. DeCastro Received Ineffective Assistance of Trial Counsel Due to Failure of Trial Counsel to File Pre-Trial Motion Dismissing Count 1 and Count 2 Due to Being Unconstitutionally Vague and Ambiguous.

In this instant case, Mr. DeCastro received ineffective assistance of counsel for his trial counsel's performance was deficient and fell below the objective standard of reasonableness as established by the Strickland Court.

As Mr. DeCastro has demonstrated *Supra*, there is overwhelming evidence that the statutes are unconstitutionally vague and ambiguous as applied. Clearly, Mr. DeCastro's trial counsel had a duty to file a pretrial motion to dismiss the vague and unconstitutional statutes that were applied to Mr. DeCastro's counts. When trial counsel failed to file the appropriate pretrial motion to dismiss the respective counts, Mr. DeCastro was subsequently convicted of both counts that have clearly been shown to be vague and unconstitutional.

These issues were raised in argument two, *Supra* but should have been presented pretrial.[3] Had trial counsel filed a pretrial motion to dismiss the respective counts, the trial judge would have had the opportunity to consider the vagueness and unconstitutionality of the statutes and there is a reasonable probability that the result of the Mr. DeCastro's trial would have been different.

Therefore, Mr. DeCastro has demonstrated both the ineffectiveness of trial counsel and the prejudice that resulted from counsel's deficient representation, satisfying both prongs necessary to reach the standard of ineffectiveness established in the Strickland Court. Id.

[3] Trial Counsel for Mr. DeCastro is different from Appellant Counsel.

3. Mr. DeCastro Received Ineffective Assistance of Counsel When Counsel Failed to Admit Video Evidence

Mr. DeCastro received ineffective assistance of counsel due to trial counsel's failure to perfect the record by introducing video evidence that clearly depicts the encounter and subsequent arrest of Mr. DeCastro by Officer Bourque.

Upon review of the video footage captured by Mr. DeCastro of his encounter with Officer Bourque, the evidence shows that Mr. DeCastro was neither obstructing a public officer nor resisting arrest as charged by the State. In fact, the video evidence shows that Mr. DeCastro was practicing his constitutionally protected rights by filming an officer within ten (10) feet as protected by clearly established federal law.

In the instant case, it was imperative that the video evidence was admitted, and this issue be raised prior to trial. Trial counsel had the duty to clarify the circumstances surrounding the encounter and arrest of Mr. DeCastro by presenting the most effective evidence possible before the trial court. The video evidence provided proof that Mr. DeCastro was not in violation of Nevada law and that his subsequent arrest was a clear violation of his constitutional rights.

Had trial counsel for Mr. DeCastro raised this issue pretrial or at trial the trial judge would have had the opportunity to view the video evidence and consider the impact of the exculpatory evidence.

In summary, trial counsel for Mr. DeCastro had a duty to raise these issues and brief them before the trial court. Therefore, Mr. DeCastro's trial counsel's performance was deficient and fell below the objective standard for reasonableness satisfying both prongs established by the Strickland Court and amounting to ineffective assistance of counsel. Id.

CONCLUSION

Wherefore, based upon the above and foregoing, Mr. DeCastro respectfully requests that this Court reverse his convictions.

Dated this 6th day of May 2024.

/s/ *Christopher R. Oram*
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2024, I served a true and correct copy of the foregoing document entitled **DEFENDANT'S OPENING BRIEF** to the Clark County District Attorney's Office and all other parties associated with this case by electronic mail as follows:

CLARK COUNTY DISTRICT ATTORNEY
motions@clarkcountyda.com
pdmotions@clarkcountyda.com

By: /s/ Tyler G. Perry
An employee of Christopher R. Oram, Esq.