ANSWERING BRIEF

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DISTRICT COURT
CLARK COUNTY, NEVADA

JOSE DECASTRO,

Appellant,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-24-381730-A
(23-CR-013015)
DEPT NO: XII

RESPONDENT'S ANSWERING BRIEF

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits this Answering Brief.

This Brief is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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STATEMENT OF THE CASE

On March 15, 2023 at roughly 4:30 p.m., Jose DeCastro (hereinafter "Appellant") was arrested and cited for one count of Obstructing a Public Officer (NRS 197.190) and one count of Resisting a Public Officer (NRS 199.280). On June 13, 2023, counsel for Appellant appeared in Justice Court for an arraignment. Counsel entered a not guilty plea on behalf of his client.

On September 1, 2023, Appellant's counsel filed a Motion for Production of Discovery and a Renewed Motion for Discovery on November 28, 2023. On November 30, 2023, the Justice Court denied Appellant's motions on the basis that the State had provided discovery to Appellant that was in its possession.

On March 18, 2024, Appellant's counsel filed a Bench Memorandum with the Justice Court.[1] RA001-004. The Bench Memorandum made the argument that filming officials conducting their official duties does not violate the First Amendment. Counsel's Bench Memorandum asked the Justice Court to consider this law when reviewing the evidence at trial.

A bench trial commenced in this matter on March 19, 2024. At the trial, Officer Branden Bourque testified, and Appellant testified on his own behalf. At the conclusion of the trial, the Justice Court found Appellant guilty beyond a reasonable doubt on both counts and sentenced him to ninety (90) days on each count in the Clark County Detention Center to run consecutively. This appeal now follows.

STATEMENT OF THE FACTS AT TRIAL

On March 15, 2023, Las Vegas Metropolitan Police Officer Branden Bourque initiated a traffic stop near the Target located at 4155 South Grand Canyon in Las Vegas, Nevada. AA 23-24. Officer Bourque was wearing a Metro uniform when he initiated the stop in his marked patrol vehicle. AA 24. Officer Bourque made the stop because the license plate of the driver was showing that it was expired and suspended. Id. When Officer Bourque approached the driver and informed her of the reason for the stop, the driver was

[1] Appellant did not include his attorney's work in his appendix. Since there is an ineffective assistance of counsel claim, the State has included this document in its own Respondent's appendix.

cooperative but seemed confused. Id. Officer Bourque asked the driver for her identifying information, registration, and insurance, and then he returned to his vehicle to continue his investigation. Id. The driver was entirely cooperative with Officer Bourque.

While Officer Bourque was in his patrol vehicle, Appellant approached the area and began recording the traffic stop. Id. When Officer Bourque noticed Appellant recording, he continued on with his records check. AA 25. Appellant then approached the driver and began speaking with her from roughly five to ten feet away. Id. At that point, Officer Bourque exited his vehicle and ordered Appellant to back away from the driver. Id.

Officer Bourque explained that he did not know anything about Appellant, but that he was concerned about his safety and the safety of the driver that he had initially stopped. Id. Officer Bourque went on to explain that Appellant could continue recording as long as he backed up and gave him an appropriate distance to work. Id. Despite multiple warnings to back up, Appellant refused to do so more than a couple of feet. Id. Instead of backing up, Appellant simply continued to argue with Officer Bourque. AA 30. Officer Bourque further explained that he was trying to back Appellant up to roughly twenty-one feet due to safety concerns for everyone involved. AA 28. Officer Bourque explained that backing someone up to roughly twenty-one feet so that he can continue doing his job without interference is commonly taught in training.

Officer Bourque was concerned for his own safety as well as the safety of the driver he had stopped because he did not know anything about who Appellant was, what his motivations were, or whether Appellant was armed. AA 30. However, Appellant continued to argue and refuse to move which caused Officer Bourque to be concerned about having to split his attention between the driver of the vehicle and Appellant's unknown aims. AA 34.

During Officer Bourque's interaction with Appellant, Appellant informed Officer Bourque that he was part of the press. AA 35. Although Officer Bourque did not know who Appellant was and did not know if he was part of the press as he claimed, Officer Bourque explained that he would treat media reports and standard citizens the same. Id.

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Officer Bourque then informed the driver of the initial traffic stop that she was free to go, and then he ordered Appellant to the front of his patrol vehicle because he was being detained for obstructing his traffic stop. AA 26. Appellant refused to go in front of the patrol vehicle as he continued to film. Id. Officer Bourque attempted to escort Appellant over to his patrol vehicle but Appellant swatted his hand away. Id. Officer Bourque then grabbed Appellant by the shirt and spun him around so that he was in front of his patrol car.

Once in front of the patrol car, Appellant continued to ignore commands. Id. Officer Bourque told him multiple times to face his patrol vehicle, but Appellant refused. Appellant was told to turn around, but he refused. Finally Officer Bourque informed Appellant that he was going to jail because he was refusing to listen to the commands. Appellant then submitted to allowing the handcuffs to be placed on him.

Appellant also testified at the trial and explained that he films police officers for a living as a member of the press. AA 34. Appellant said he was only willing to take a couple of steps back when he was ordered to move away from the stopped vehicle. Id. Appellant stated that his understanding of obstructing was a **physical** act where he would have to get in the way (emphasis added). Id.

Appellant stated that when ordered to back up, he backed up a foot or two and was at least ten feet away from the driver who was pulled over. Id. When the officer explained that the driver deserved privacy, Appellant instructed Officer Bourque to "go get in your car little doggy and write your ticket." Id. According to Appellant, he was willing to comply with anything the officer asked him that "was within reason." AA 35.

ARGUMENT

Appellant argues that his convictions must be reversed based on his First Amendment right to record Officer Bourque's traffic stop. While Appellant had a First Amendment right to record the traffic stop, Appellant did not have an unfettered right to record the interaction in the time, place, and manner that he thought he was entitled to film. The issue in this case is not about whether Appellant, either as a member of the press or member of the public, could film the officers. Instead this case is about whether Appellant obstructed the officer's

investigation and subsequently resisted his arrest for obstructing the investigation.[2]

Convictions based upon constitutional issues involved are subject to de novo review. Davidson v. State, 124 Nev. 892, 896 (2008). The First Amendment encompasses the public's right of access to information about their officials' public activities. *See* Fields v. City of Philadelphia, 862 F.3d 353, 359 (3rd Cir. 2017). It "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 of Bos. V. Bellotti, 435 U.S. 765, 783 (1978). It is well-recognized that recording police activity falls squarely within the First Amendment right to access information. Branzburg v. Hayes, 408 U.S. 665, 684 (1972). This right to record applies equally to the press as well as the public. Id.

However, the way one exercises his First Amendment rights is not absolute and the exercise of such rights are subject to reasonable time, place, and manner restrictions that are narrowly tailored to serve a significant government interest. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Whether an individual is a member of the press or not, general laws still apply and individuals expressing their First Amendment freedoms must still obey the law. Zemel v. Rusk, 381 U.S. 1, 17 (1965) (the right to speak and publish does not carry with it the unrestrained right to gather information). "Otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." Branzburg, 408 U.S., at 683. Reasonable restrictions on the right to film may be imposed when the circumstances justify them. Gericke v. Begin, 753 F.3d 1, 7-8 (1st Cir. 2014). From time to time, reasonable orders to maintain safety and control may also be permissible. ACLU of Ill. V. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012).

The United States Supreme Court has recognized that traffic stops are inherently dangerous for police officers. *See* Arizona v. Johnson, 555 U.S. 323 (2009) ("[T]raffic stops

[2] Appellant references the 2020 case of George Floyd as a basis for arguing that his conduct was lawful. However, he also questions whether a Black person would have been charged with these crimes. For Appellant to evoke the Floyd case but to simultaneously argue that he is only being charged because he is a white demonstrates that he has no true convictions about what happened to Floyd.

are especially fraught with danger to police officers. The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized…if the officers routinely exercise unquestioned command of the situation.") (some alterations). Based on the potentially dangerous nature of traffic stops, not all First Amendment activities are given complete and unfettered protection. Colten v. Kentucky, 407 U.S 104, 109 (1972). In Colten, the United States Supreme Court recognized the State's interest in enforcing traffic laws and the right for officers investigating those laws to be free from interference or interruption from others. Thus, despite Appellant's protestations that his actions are immune from prosecution, the law does not permit him the freedom to obstruct a traffic stop.

Appellant maintains that because the First Amendment encompasses the right to film the police, this right cannot be restricted in any way. To the contrary, every court that has recognized that the First Amendment protects the right to record public police conduct has also recognized that this right is subject to reasonable restrictions. See Irizarry v. Yehia, 38 F.4th 1282, 1292 n.10 (10th Cir. 2022) ("This right [to film the police] is subject to reasonable time, place, and manner restrictions."); Askins v. U.S. Dep't of Homeland Sec., 899 F.3d 1035, 1044 (9th Cir. 2018) (finding that the First Amendment right to record matters of public interest is subject to reasonable, content-neutral, time, place, or manner restrictions); Turner v. Lieutenant Driver, 848 F.3d 678, 688 (5th Cir. 2017) ("a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."); Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017) ("The right to record police is not absolute. It is subject to reasonable time, place, and manner restrictions.") (internal quotation marks omitted); Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014) ("Reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them."); Am. C.L. Union of Illinois v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012) (the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations).

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While an officer surely cannot issue a "move on" order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs."); Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) ("the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions."); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("[the plaintiffs] had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."). See also Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753 (1989) ("even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech."). Ultimately, the totality of the case law pertaining to recording officers in public does not provide for an unfettered right to interrupt police investigations simply because one has the right to record.

A. Appellant was charged and convicted with violating NRS 197.190

NRS 197.190 makes it a crime for any person who, after due notice, willfully hinders, delays, or obstructs any public officer in the discharge of official powers or duties. Officers are tasked with investigating traffic infractions and making stops based upon infractions. NRS 484B.827. In investigating traffic offenses, a person is precluded from obstructing the officer in his or her duties. Even an attorney representing a client is not permitted to interfere with an officer's traffic investigation. Stubbs v. Las Vegas Metropolitan Police Department, 792 Fed. Appx. 441 (9th Cir. 2019) (unpublished). Nor is the attorney free to ignore the commands of the officers conducting the traffic stop, which may include a command to step away. Id.

Much like the situation in Stubbs where the attorney argued that his actions were meant to represent his client and that he did not mean to interfere with the official duties of the officers, Appellant makes a similar argument that his intent was to merely exercise his First Amendment right to video record the officer and not to obstruct. However as the Ninth Circuit wrote in Stubbs, "Stubbs points to no case, and we are aware of none, holding that the right to counsel authorizes an attorney to: (1) stand shoulder-to-shoulder with this client;

(2) during a traffic stop; (3) while armed with a firearm; and (4) refuse repeated, reasonable law enforcement requests to step aside. We have serious doubts that the right to counsel encompasses such conduct." Id., at 443.

Although the State recognizes that some of the specific facts in Stubbs differ from this case, the overall principle remains the same that an individual is not permitted to obstruct an investigation. Thus whether it is a regular person, member of the press, or even an attorney-client relationship, there are still limitations that can spillover into unlawful conduct.

Similarly, Appellant's actions in talking with the driver of the stopped vehicle was not necessarily protected speech. In King v. Ambs, the officer was questioning a third party when the defendant interrupted and told the third party not to speak with the officer. 519 F.3d 607 (6th Cir. 2008). The defendant was at first warned, but he continued to tell the third party not to talk to the officer. The defendant was then arrested for obstructing. The court there held that the defendant was interfering with the performance of the officer's duties, and that his conduct was not protected free speech.

Appellant cites Glik v. Cunniffe to advance his argument that he was improperly arrested for filming the officers. 655 F.3d 78 (1st Cir., 2011). However, Glik is distinguishable from this case because the individual filming was in no way interfering with the officers. The First Circuit recognized that Glik filmed from a "comfortable remove" and "neither spoke to nor molested them [the officers] in any way." Glik, 655 F.3d, at 84.

The difference here is that Appellant was actively interfering and obstructing the police investigation by approaching the driver and refusing to back up so that the officer could safely conduct his investigation. Officer Bourque made a lawful traffic stop of a vehicle. Pursuant to that stop, he was required not to prolong the encounter any longer than was necessary for him to investigate the infraction(s). State v. Beckman, 129 Nev. 481 (2013); see also NRS 171.123(3) ("A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes").

However, Appellant's conduct, which is seen in body worn video, was preventing Officer Bourque from carrying out his official duties in an orderly and safe manner.

Appellant was incredibly aggressive and argumentative with Officer Bourque when Officer Bourque instructed him to move back. Again, the issue here is not whether Appellant had a right to film the encounter, as Officer Bourque even told him he had a right to do so. However, Appellant did not have a right to ignore or resist the reasonable commands that Officer Bourque gave him to record from a reasonable distance away from the traffic stop. Even Appellant himself testified that he was only willing to back up "a couple feet" because he felt he was a sufficient distance away by his own standards. Moreover rather than obeying the reasonable commands of Officer Bourque, Appellant instead argued with him and excitedly told the officer that he was not required to move. Instead of physically moving back an adequate distance, Appellant instead told the officer to "go get in your car little doggy and write your ticket." AA34. The result of Appellant arguing and refusing to obey the commands was that Officer Bourque's investigation into the traffic infraction(s) was being willfully hindered, delayed, and/or obstructed in violation of NRS 197.190. Given that the violations had occurred, Officer Bourque was permitted to detain Appellant for either the issuance of a citation or to arrest him.

Furthermore, although Appellant believed that his actions did not amount to obstructing an officer, Appellant admitted on the stand that he did not actually know the statutory language. Appellant stated that Officer Bourque's commands were unlawful because he is only prohibited from physically interfering with the investigation. This incorrect understanding of the law explains why Appellant erroneously thought he was free to argue, harass, delay, and otherwise obstruct Officer Bourque's investigation. It is well established that "mistake or ignorance of the law is not a defense to a criminal action." Whiterock v. State, 112 Nev. 775 (1996). As such, Appellant was properly convicted for obstructing an officer.

B. Appellant was also charged and convicted for resisting a public officer pursuant to NRS 199.280

Appellant was also cited and convicted with resisting a public officer pursuant to NRS 199.280. NRS 199.280 makes it illegal for "[A] person who, in any case or under any

circumstances not otherwise specifically provided for, willfully resists, delays or obstructs a public officer in the discharging or attempting to discharge any legal duty of his or her office." The Nevada Supreme Court has held that even when a seizure is illegal, the individual being seized does not have a right to violate NRS 199.280. State v. Lisenbee, 116 Nev. 1124 (2000) (Lisenbee fled from officers after an initially illegal seizure). Moreover absent an "imminent and serious bodily harm at the hands of the police officer," individuals are not permitted to actively resist arrest. Batson v. State, 113 Nev. 669, 676 n.3 (1997).

As stated above, Appellant was detained for obstructing an officer while the officer was investigating a lawful traffic stop. The detaining, citation, and conviction for Appellant's violation of that statute was permissible. However, Appellant's behavior upon being arrested was a separate violation of the laws of Nevada notwithstanding his culpability for obstructing an officer. The First Amendment does not protect him from his resisting conduct. Even though Appellant believed he had a right to film in the manner he did, it did not then provide him with immunity from violating other laws. Here, the Justice Court heard the testimony of Officer Bourque and watched video of body worn cameras showing Appellant resisting his arrest. Appellant refused to go in front of the officer's vehicle. On the stand, Appellant admitted that he told Officer Bourque "no" when he was ordered to move to the front of Officer Bourque's vehicle.

Appellant then struggled with Officer Bourque when Officer Bourque wanted Appellant to get in front of his vehicle. Appellant admitted on the stand that he swiped at Officer Bourque because he was receiving unlawful commands, was a member of the press, and any swatting was the result of his training as a wrestler and martial arts specialist. Appellant refused to place his hands behind his back to be handcuffed. He continuously resisted, delayed, and obstructed his arrest in violation of NRS 199.280. The Justice Court lawfully convicted him for violating this statute.

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II. NRS 197.190 is not unconstitutionally vague

Appellant argues that Count #1 must be dismissed because NRS 197.190 and NRS 199.280 are void for being unconstitutionally vague. Count #1 is a single charge of obstructing an officer pursuant to NRS 197.190. Appellant's conviction for resisting an officer pursuant to NRS 199.280 was Count #2. Appellant's brief calls for Count #1 to be dismissed because NRS 197.190 and NRS 199.280 are unconstitutionally vague and ambiguous, but these are two entirely different statutes prohibiting different conduct.

The constitutionality of a statute is a question of law that is reviewed de novo. Sheriff v. Burdg, 118 Nev. 853, 857 (2002). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." Id. The challenger must make a clear showing of invalidity. Id.

A statute is unconstitutionally vague and subject to a facial attack if it "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." Id., at 507. A statute involving criminal penalties or constitutionally protected rights is facially vague if "vagueness so permeates the text that the statute cannot meet these requirements in most applications." Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 512-13 (2009).

The relevant portion of NRS 197.190 reads as follows:

> 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 197.190 is directed towards specific willful conduct. It applies to a person who willfully hinders, delays, or obstructs a public officer from performing his duties.

The Nevada Court of Appeals recently had the opportunity to consider the constitutionality of NRS 197.190. Willson v. First Judicial District Court, 140 Nev. Adv. Op 7 (published 84353- February 22, 2024). The Court of Appeals held that NRS 197.190 provides sufficient notice of what is prohibited and that the statute is "not so standardless so as to authorize or

encourage seriously discriminatory or arbitrary enforcement." Wilson, 140 Nev. Adv. Op., at 10. Because NRS 197.190 requires a specific intent to hinder, delay, or obstruct a public officer in the discharge of official duties or powers, a person of ordinary intelligence would have fair notice of when their conduct constitutes a criminal offense. Id. Similarly, the specific intent requirement further prevents law enforcement officers from citing or arresting persons for conduct that incidentally interferes with their duties. Id., at 11. Enforcement of the statute only applies to physical conduct and fighting words. Id., at 8. The Court of Appeals further clarified that blocking the path of an officer or refusing to obey a lawful order could constitute the "physical conduct" requirement of the statute.

As applied to Appellant, his conviction pursuant to NRS 197.190 is not unconstitutional. Appellant approached the driver of a lawful traffic stop and started talking to her. Appellant was instructed by Officer Bourque that he needed to move back, but Appellant instead chose to harass and argue with the officer. Officer Bourque testified that he told Appellant to move back because he was concerned both about the privacy of the driver as well as the safety of him and the driver. AA 25. It was not up to Appellant to dictate the distance that he felt he should be able to film the encounter.

Appellant argues that the officer had nothing to fear because he identified himself as a member of the press and that he has thousands of YouTube videos of the police, but there is no indication that Officer Bourque was aware of Appellant's background. Moreover, there was no reason for Officer Bourque to believe Appellant simply because Appellant said so. Instead, from the perspective of Officer Bourque, he was conducting a records check during a traffic stop when he noticed Appellant filming. Officer Bourque only interacted with Appellant after Appellant started talking to the driver of the stopped vehicle. Officer Bourque ordered Appellant away from the vehicle, but Appellant refused to move away at a sufficient distance and instead angrily yelled at the officer. Officer Bourque had no way to know if Appellant was simply a person filming or if he presented a threat to himself or the driver. As such it was reasonable for Officer Bourque to order Appellant to an area where he would not be interfering with the investigation. Appellant's refusal to move to an appropriate

distance for filming the encounter evidences his specific intent to hinder, delay, or obstruct Officer Bourque from performing his official duties, and an ordinary person would realize that such conduct is not permissible via the statute.

Again, Appellant lumps NRS 199.280 (resisting an officer) in as unconstitutional, but he really only challenges NRS 197.190. However, applying the same logic as to why NRS 197.190 is not unconstitutionally vague, the same would be true of NRS 199.280. A person of ordinary intelligence would understand that willfully resisting, delaying, or obstructing an officer in doing his duties is violative of the statute. NRS 199.280 is not unconstitutionally vague.

III. There was no basis for the Justice Court's disqualification in Appellant's case

Appellant cites to various incidents that occurred during his proceedings to support his self-serving argument that the Justice Court was biased against him. His argument of judicial bias lies in the Justice Court asking him to empty his pockets to ensure that he was not recording the proceedings. He argues he was "chastised" by the court because he called the court's a marshal a "pig."

Appellant did not seek to have the Justice Court removed from his case. Disqualification of a judge is waived by the failure to timely assert that a court should be removed. City of Las Vegas Downtown Redevelopment Agency v. Hecht, 113 Nev. 644, 651 (1997). Thus, this argument is waived absent plain error that exists that affects a defendant's substantial rights. Leonard v. State, 117 Nev. 53, 63 (2001).

Nevada Revised Statute 1.230 provides the statutory grounds for disqualification of a court. The statute in pertinent part provides:

> 1. A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.
> 2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
> (a) When the judge is a party to or interested in the action or proceeding.
> (b) When the judge is related to either party by consanguinity or affinity within the third degree.

(c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

3. 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.

4. A judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case.

In Nevada, a judge is presumed to be not biased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988) (overturned on other grounds, see Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007)). The burden is on the party asserting bias "to establish sufficient factual grounds warranting disqualification." Goldman, 104 Nev. at 644. A motion to disqualify will be insufficient where there are no facts that support a reasonable inference that a judge entertained bias against the defendant. Id. at 650. Therefore, a defendant's bare allegation of bias is not sufficient to overcome the presumption that the court is not biased. Id. at 644,; Sonner v. State, 112 Nev. 1328, 1335 (1996). "[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1170, 1171 (1998).

In Nevada, "a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification." Millen v. Dist. Ct., 122 Nev. 1245, 1253 (2006). NRS 1.230 prohibits a judge from presiding over any matter when actual or implied bias exists on the part of the judge. Furthermore, Nevada Canons of Judicial Conduct ("NCJC") Rule 2.11(A) in relevant part states that "[A] judge shall disqualify herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the

proceeding.

The filming of court proceedings in Nevada is governed by Nevada Supreme Court Rules 229-246 on the rules of electronic coverage of court proceedings. Rule 230 requires any news reporter wanting to provide electronic coverage of a proceeding to seek permission from the judge.

In this case, the justice court indicated that it had received two requests for electronic coverage of the proceedings, but not any from the Appellant himself. AA 22. The court made a decision to ensure that no one else was going to film the proceedings without the court's permission. Id. In response to the court's concerns, Appellant called the court's marshal a pig. The court warned him that it would find him in contempt if he continued with that type of behavior, and the court indicated it was not its desire to impose contempt. AA 23.

There is nothing about the court's conduct in this case to assume that it could not be fair and impartial towards Appellant. If anything, the court indicated its desire not to hold Appellant in contempt. Appellant's own conduct resulted in the court's concerns and eventual admonishment towards him.

Moreover, Appellant cites to calling the Justice Court referencing Appellant's calling of the court's marshal a pig at sentencing as evidence of its judicial bias towards him. The Justice Court explained its sentiment about this case, and Appellant even agreed with the Justice Court. The Justice Court stated the following:

> THE COURT: When you say he doesn't wish to engage in wrongdoing, it seems to me from observing him in the video he wants – he wants this. He wants to get arrested. He wants to get into an altercation with police officers. He welcomes this. This helps his YouTube channel. He called the offers here in my courtroom today pigs. He called - - and he's nodding his head up and down.
>
> THE DEFENDANT: I agree.

Based upon Appellant's own words, he agreed with the Justice Court's sentiments about this case because the court's observations about his behavior were clearly accurate. Even though Appellant originally agreed with what the Justice Court said, he now wants to make it seem

like the court ruled against him because of a bias that it had against him. This argument contradicts his earlier sentiment in which he agreed with the Justice Court. Now upon being convicted, he wants to argue that the Justice Court must have been biased against him without being able to provide any support for his assertion. There was absolutely no basis for the Justice Court to recuse itself from his case, and his argument should fail.

IV. Appellant received effective assistance of counsel

Appellant argues that his trial counsel was ineffective for not filing a pretrial motion to dismiss Counts 1 and 2 due to violations of freedom of speech and freedom of the press. In this brief, Appellant has only attempted to argue that his conduct did not amount to obstructing an officer. As argued above, even an initially illegal arrest does not give an individual reason to then resist the officers absent a compelling concern of severe injury or death. However, given the law required to prevail on an ineffective assistance of counsel claim, Appellant fails to show deficiency and prejudice.

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective

counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

Here, Appellant fails to show that his counsel's performance at trial fell below a reasonable standard. Appellant argues that counsel should have filed a pretrial motion to dismiss based upon the protections of the First Amendment and because the statutes involved are unconstitutionally vague and ambiguous. Appellant's trial counsel filed a bench memorandum which included law that was relevant to his First Amendment claim. Moreover, judges are presumed to know the law and to apply it in making their decisions. Jones v. State, 107 Nev. 632, 636 (1991). The Justice Court that decided this case is presumed to know the law. As mentioned above, this case is not about whether Appellant had a right to film. The question in this case is whether his conduct was violative of the statute. The Justice Court found that it was.

Furthermore, Appellant cannot show prejudice as to counsel not raising this claim to the trial court because he cannot show that his conduct was legally protected by the First Amendment or that the statutes are unconstitutionally vague and ambiguous. Given that his

conduct would still result in the convictions he received, Appellant fails to satisfy the second prong of Strickland and is not entitled to habeas relief.

Appellant raises one additional argument that his trial counsel was ineffective for failing to admit video evidence that Appellant recorded. First Appellant fails to show that not showing his video was objectively unreasonable. Appellant makes no assertion of what contents are in his own recording that differed from the two body-worn camera videos that were introduced at trial. The fact that he cannot show what evidence from his own video would have altered the outcome of his trial means that Appellant is unable to demonstrate prejudice from his counsel not introducing his video.

CONCLUSION

The evidence in this case supports the Justice Court's verdict that Appellant had violated NRS 197.190 and NRS 199.280. Although Appellant wants to make this case about the First Amendment, his actions that day were not at all about individuals rights and instead were a deliberate attempt to obstruct and resist the officers. The State respectfully requests that this court affirm the Justice Court's verdict.

DATED this 5th day of June, 2024.

Respectfully submitted,

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BY ***/s/ Alexander Chen***
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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 5th day of June, 2024, by electronic transmission to:

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BY */s/ Andrea Carrera*
Andrea Carrera
Secretary for the District Attorney's Office