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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 APPENDIX

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6 **LAS VEGAS JUSTICE COURT**

7 **CLARK COUNTY, NEVADA**

8 STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 JOSE DECASTRO,

12 Defendant.

CASE No. 23-CR-013015

Dept. No.: 8

13 **BENCH MEMORANDUM**

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16 COMES NOW, Defendant, JOSE DECASTRO by and through his attorney of record,
17 MICHAEL MEE, ESQ., of LIBERATORS CRIMINAL DEFENSE, and hereby files the
18 following BENCH MEMORANDUM This motion is based upon the points and authorities
19 herein and upon any other pleadings filed in this case.

20 DATED this 18TH DAY OF MARCH, 2024

21
22 /s/ Michael Mee, Esq.
23 Michael Mee, Esq.
24 Nevada Bar No. 13726
25 400 S. 4th St. #500
26 Las Vegas, Nevada 89101

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MEMORANDUM OF POINTS AND AUTHORITIES

“In summary, 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.” *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

In *Dyer v. Smith*, a federal court recognized that the right to film officers falls squarely within a crystal-clear constitutional right: “Dyer's allegations fall squarely within this "crystal clear" right. *See Glik*, 655 F.3d at 85 (explaining "the brevity of the First Amendment discussion" in many "circuit court opinions that have recognized a right to film government officials or matters of public interest in public space" as evidence of "the fundamental and virtually self-evident nature of the First Amendment's protections in this area"); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) ("An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."). *Dyer v. Smith*, Civil Action No. 3:19-cv-921, at *15 (E.D. Va. Feb. 23, 2021)(overturned on other grounds, specifically overturned as the District Court’s opinion created a new category of *Bivens* action, but not overturned on the validity of the First Amendment right at issue; *see Dyer v. Smith*, 56 F.4th 271 (4th Cir. 2022)).

Distinct from these right to record cases, the Ninth Circuit Court of Appeals has also recognized "a qualified right of access for the press and public to observe government activities." *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). The *Leigh* court acknowledged that "[t]he [Supreme Court of the United States] recognized 'the common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" *Id.* at 898 (3d alteration in original) (quoting *Globe Newspaper Co. v. Superior*

1 Court, 457 U.S. 596, 604, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982))

2 Indeed, officers are generally not even permitted to claim qualified immunity for unlawful
3 restrictions on filming traffic stops:

4 Subsequently, the First Circuit Court of Appeals considered the right to film a traffic
5 stop. *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014). Gericke filmed an officer
6 performing a traffic stop of a friend's vehicle. *Id.* at 3-4. The officer was aware of her
7 presence, and never asked her to stop recording. *Id.* Gericke was arrested and charged
8 with unlawful interception of oral communications, and brought suit against the
9 officers under 42 U.S.C. § 1983. *Id.* at 4. The *Gericke* court reiterated a statement the
10 court made in *Glik* acknowledging that "a traffic stop is worlds apart from an arrest on
11 the Boston Common in the circumstances alleged [in that case.]" *Gericke*, 753 F.3d at
12 7 (quoting *Glik*, 655 F.3d at 85).

13 The *Gericke* court went on to state, "[i]mportantly, an individual's exercise of her First
14 Amendment right to film police activity carried out in public, including a traffic stop,
15 necessarily remains unfettered unless and until a reasonable restriction is imposed or
16 in place." *Gericke*, 753 F.3d at 8. The court of appeals upheld the district court's
17 denial of qualified immunity to the officers, but did not consider whether the
18 wiretapping statute amounted to a reasonable time, place, and manner restriction on
19 speech. *Id.* at 9-10.

20 *Jacobson v. U.S. Dep't of Homeland Sec.*, No. CV-14-02485-TUC-BGM, at *12-13 (D. Ariz.
21 Sep. 14, 2015).

22 As it relates to alleged obstruction of justice and alleged instances of resisting arrest,
23 *Wright v. Georgia*, 73 U.S. 284, 291–292, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963), supports the
24 conclusion that one cannot be punished for failing to obey the command of an officer if
25 that command is itself violative of the Constitution. Where a defendant refuses to comply with
26 unlawful orders, he cannot be charged with resisting or obstructing, so long as he does not escalate
27 to using physical force to resist officers. *People v. Moreno*, 491 Mich. 38, 78 (Mich. 2012)

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CONCLUSION

Based on the above, Defendant requests the court to consider the above legal memorandum, when appropriate, when issues relating to the above may be raised at the time of trial.

DATED this 18th day of March, 23024.

/s/ Michael Mee, Esq.
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CERTIFICATE OF SERVICE

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I HEREBY SERVED this BENCH BRIEF via online e-filing on the below date upon the Clark County District Attorney’s office via electronic service and e-mail to the designated District Attorney handling this matter.

DATED this 18th day of March, 23024.

/s/ Michael Mee, Esq.
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Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Respondent's Answering Brief. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY /s/ A. Carrera
Employee, District Attorney's Office