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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN J.,

Appellant.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to defending the Bill of Rights. The ACLU does so by advocating for the constitutional principles of liberty and equality. Part of this work is a dedication to protecting the First Amendment rights of individuals to critique police, and other government officials and observe police officers who are acting in their official capacity. Furthermore, the ACLU is a longstanding advocate and supporter of reform efforts aimed at ensuring police accountability across the state, including advocating for the Seattle Police Department to implement policy changes to avoid misuse of Washington State's obstruction statute.

II. RELEVANT FACTS

On February 14, 2011, Geraldine J., Jordan's mother, called the police because her step-daughter Ruby was intoxicated, belligerent and refused to leave the family's property. RP 14-17. Two Seattle Police Department ("SPD") police officers responded to Geraldine's call. RP 14. When the officers arrived Ruby had already left the property. RP 15. The officers spoke with Geraldine J., then left the property, and resumed their patrolling duties. RP 15. Soon after the officers left Geraldine's property, Geraldine called the police again for assistance, and reported that her step-

daughter Ruby had returned, was again belligerent, and refused to leave. RP 15. Four officers responded to this call. RP 15, 18. The officers found Ruby in a room in the house and escorted her outside. RP 17. Once outside the officers attempted to deescalate the situation, and encouraged Ruby to voluntarily leave the property and take a bus to another location. RP 17-18, 27-28, 68-69. An officer even obtained bus money from Geraldine so that Ruby could take a city bus to a safer location. RP 18.

Soon after the police escorted his sister outside, Jordan followed to watch the officers interact with Ruby and to encourage Ruby to leave the property voluntarily. RP 27. Jordan was 10-15 feet away from the location where the officers engaged Ruby. RP 30. Ruby did not comply with the officers' directives and instead continued to be belligerent and refused to leave. RP 70. The officers clustered around Ruby, and Jordan continued to encourage his sister to leave. RP 27.

However, when Jordan observed an officer unsheathe his nightstick he began to question the officers' actions, call them names, and criticize the officers for actions that he believed would result in injury to his sister.[1] RP 69-70. An officer directed Jordan to go inside of the house. RP 70-71. Jordan did not immediately comply with the officer's directive,

[1] According to the officers, Jordan called them "fat fuck," "mother-fucker," and "bitches." RP 44.

RP 70-71, and instead continued to critique the police and assert his right to observe police conduct occurring on his family's property. RP 70-72.

Eventually Jordan complied with the officers' demand that he go inside the house. RP 72. Once inside his home Jordan shut and locked a wrought iron screen door, and continued to question and critique the officers and their conduct. RP 72-73. An officer directed Jordan to shut the main wooden front door of his home so that he could not see the officers' interaction with his sister. RP 51-56. Jordan refused. *Id.* The officer threatened to arrest Jordan if he did not shut the front door and end his ability to observe the police. RP 96. Jordan refused. RP 79-80. The officer came to the screen door and attempted to open the door. Clerk's Papers ("CP") at 16. However, Geraldine came to the screen door, unlocked it, and allowed the officer to come in. CP 16. The officer then arrested Jordan in his own home for obstructing the officers' ability to get Ruby to leave the family's property. CP 16.

During this interaction the officers did not arrest Ruby, RP at 25, instead the officers' goal was simply to get Ruby to voluntarily leave the property. At no time were the officers engaged in an elaborate investigation nor were they in the middle of an arrest. RP 27. Further, the officers testified that Jordan "made no threatening movements ... and

there's no evidence of any threats made by [Jordan,]" nor by Ruby. RP 95; CP 14.

The Juvenile Division of the King County Superior Court convicted Jordan of obstruction. RP 99. The court indicated that it relied upon the officers' testimony that they wanted Jordan inside with the front door closed for "safety reasons so that [Jordan] wouldn't be a threat to the officers" and because they wanted to sever eye-contact between Jordan and the officers and Ruby. RP 96. The court found that although the officers had to tell Jordan "several times that he needed to step away" that "he finally did so, and if this case had ended at that point perhaps there would be no obstruction charges[.]" RP 99. The court also stated that it agreed with Jordan that no obstruction charge would have been upheld based on Jordan's asserting his right to observe law enforcement from his home. RP 99. However, the court did find Jordan guilty of obstruction based on the fact that Jordan called the officers names and by "engag[ing] in a back-and-forth with the officers" Jordan's presence was problematic. RP 100. In the end, the court held that it was Jordan's contemptuous speech that was the basis of his conviction and opined that if Jordan had simply stood in the doorway silently observing then "we might not be here today." RP 99.

III. ARGUMENT

The Court should overturn Jordan's conviction for three reasons. First, he was convicted based on engaging in constitutionally protected speech. Second, individuals have a constitutional right to observe official police conduct. Third, given the sobering data about racially disproportionate enforcement of the obstruction statute, and the Justice Department's findings about the Seattle Police Department, the Court ought to be especially vigilant about protecting citizens from the criminal sanctions of the obstruction statute when they act upon the right to witness and criticize police officers' actions. For all three reasons, the Court should not allow a broad interpretation of the obstruction statute.

A. Jordan's Conviction for Obstruction Unconstitutionally Penalized Protected Speech in Violation of State and Federal Constitutions.

On the facts presented in this case, convicting Jordan under the obstruction statute was unconstitutional. Jordan had the right to criticize the police officers and to use strong language to do so. The obstruction statute cannot be used to make the exercise of this right a crime.

1. Obstruction Conviction Must Be Overturned Where It Is Predicated On Pure Speech.

Washington courts have consistently held that the constitution requires "some conduct" in addition to speech, or the refusal to speak, to sustain an obstruction charge. *State v. Williams*, 171 Wn.2d 474, 486,

251 P.3d 877 (2001) (overturning obstruction conviction where defendant falsely identified himself but did not engage in obstructive conduct). Indeed, in *Williams* the Supreme Court directed Washington courts, when reviewing obstruction convictions, to "hew to our jurisprudential history of requiring conduct in addition to pure speech in order to establish obstruction of an officer." *Id.* at 485. Since *Williams* the Supreme Court has again reaffirmed that the obstruction statute requires some conduct in addition to speech. *State v. Budik*, 173 Wn.2d 727, 735, 272 P.3d 816 (2012).

Under clear state law precedent, Jordan's conviction for obstruction cannot stand. The trial court found Jordan guilty of obstruction based solely on his speech and his mere presence at the front door of his house. RP 99-100. The court in its findings of fact, and the State in its argument, did not identify any conduct that could be construed as obstructive. Instead, the evidence demonstrated that Jordan's actions did not interfere with or obstruct the officers' ability to engage in their policing activities. Indeed, the officers testified that: (1) Jordan did not make any physical movements that could be construed as interfering with their duties, CP 14; (2) Jordan eventually obeyed officer directives and returned to the inside of his house and shut and locked the screen door,

CP 15-16; and (3) the policing activity occurred outside of Jordan's home at some distance from Jordan, CP 30.

The trial court convicted Jordan of obstruction based solely on his speech and his presence in his home behind a locked door. RP 100. This is a departure from the Supreme Court's holdings. Jordan's exercise of his right to continue observing the law enforcement activities from his house, by not shutting the main front door (both of which are protected activities), cannot constitutionally be deemed conduct that hindered police activity which occurred outside of Jordan's home. To uphold an obstruction conviction, the courts require conduct that actually hinders or impedes the policing activity. *See State v. Steen*, 164 Wn. App. 789, 800-01, 265 P.3d 901 (2011) (finding sufficient conduct, beyond pure speech, to sustain a conviction for obstruction where defendant refused to open the door of a trailer that was a necessary starting point for an investigation). In contrast, Jordan was locked away from the scene where the police action occurred and he took no physical action that interfered with the officers' duties. However disrespectful Jordan's words were, those words constituted pure speech and neither the court, nor the officers, identified any conduct (aside from Jordan's mere presence) that this court can rely upon to sustain his conviction for obstruction.

2. A Criminal Conviction Runs Afoul of the First Amendment if the Conviction is Predicated on Speech that Does Not Constitute Fighting Words or Incitement to Riot.

Not only does Washington State law demand that Jordan's obstruction conviction be reversed, the First Amendment does also. Indeed, the Supreme Court has long held that the First Amendment protects verbal criticism directed at police officers—even criticism that is distasteful. *City of Houston v. Hill*, 482 U.S. 451, 461-63, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987); *see also Lewis v. City of New Orleans*, 415 U.S. 130, 132-34, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974).

The facts in *Hill* are particularly relevant to this case. In *Hill*, the appellee shouted at police officers, who had approached his friend, challenging them to "pick on someone your own size." 482 U.S. at 454. The officers arrested Hill under a city ordinance that prohibited "oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty." *Id.* at 455. The Supreme Court concluded that the ordinance was facially unconstitutional because "[t]he Constitution does not allow such speech to be made a crime," *id.* at 462, and "[t]he 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. *See also Lewis v. City of New Orleans*, 415 U.S. at 132-33 (invalidating a similar

obstruction ordinance because it was not limited in scope to "fighting words" that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"); *Gulliford v. Pierce Cnty.*, 136 F.3d 1345, 1350 (9th Cir. 1998) (finding defendant's obscenity-laden criticism of officer to be protected speech); *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (noting that "criticism of the police is not a crime," and reasoning that officers "may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful but protected by the First Amendment").

Under the *Hill* line of cases, to justify arresting and convicting Jordan based on his speech, the State must demonstrate that Jordan's statements constituted either a threat or fighting words. "[T]he area of speech unprotected as fighting words is at its narrowest, if indeed it exists at all, with respect to criminal prosecution for speech directed at public officials." *United States v. Poocha*, 259 F.3d 1077, 1081(9th Cir. 2001). Further, when considering whether speech constitutes "fighting words" courts must remember that "a properly trained office may reasonably be expected to exercise a higher degree of restraint" and that this heightened restraint "is compelled by the constitutional shield that protects criticism of official conduct." *Poocha*, 259 F.3d at 1081.

Here, under a broad or narrow construction of "fighting words," Jordan's speech cannot be construed to be "fighting words" that would justify criminal prosecution.[2] The facts in this case are indistinguishable from those in *Hill* and its progeny. Jordan's language was no more provocative than Hill's challenge to the police officers, Lewis's insults, Gulliford's obscenities, or Duran's gestures. Like the individuals in those cases, Jordan expressed his dissatisfaction with the officers' conduct, but his speech was not "stripped of its constitutional protection" simply because he raised his voice or called the police names to express his views. *Hill*, 482 U.S. at 462-63.

Similarly, Jordan's statements were neither intended nor likely to incite anyone at the scene to "riot," including his sister. *See Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). For speech to lose its protection under the First Amendment as an "incitement to riot," that speech must be "intended to produce, and likely to produce, imminent disorder . . . [and] violence." *Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (holding that the words "[w]e'll take the fucking street later (or again)," directed at a large protesting crowd while the police were trying to clear the street, was not

[2] *See also Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003) (calling police officer a "son of a bitch" does not constitute fighting words); *Posr v. Court Officer Shield #207*, 180 F.3d 409, 415 (2d Cir. 1999) (warning officer that "one day you're gonna get yours," spoken while in retreat, does not constitute fighting words).

an incitement to riot). But as the officers conceded during trial, there is no evidence or suggestion that Ruby or Jordan posed any threat whatsoever—much less a *violent* threat—prior to or after Jordan's statements. RP 95, CP 14. Neither Ruby nor Jordan were physically aggressive, the officers had "no reason" to suspect either had a weapon, and no reason to suspect the house contained any weapons. RP 42, 53, 56. Thus, there is no evidence to support a finding that his words were an incitement to riot. Like the speech in *Poocha*, "the question [about whether the statements constituted an incitement to riot] is not even a close one." 259 F.3d at 1082.

B. Individuals Have the Right to Observe Police Conduct, and the Obstruction Statute Cannot be Used to Frustrate This Right

As explained in the cases cited below, courts have repeatedly affirmed that individuals have the right to observe police officers performing their duties in public. In each case where the court addresses this issue, the court acknowledges an important interest in protecting citizens' right to observe government officials in their official capacities—particularly police officers—because society ensures governmental accountability through the watchful eye of citizens, and the press. This is especially important in the law enforcement context because officers "are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik v. Cunniffe* , 655 F.3d 78, 82 (1st Cir. 2011).

1. The First Amendment Protects The Right to Observe Police Activity.

Jordan intuitively understood the importance of the right to observe police officers. RP 73 ("Well, I felt like as a citizen in this United States . . . everybody should have the right to observe the [police] scene."). And, indeed, courts have agreed with him.

The Seventh Circuit has recently held that the right to observe, and even to record, a police encounter is necessarily included within the First Amendment's guarantee of freedom of speech. *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012), *cert. denied*, 2012 WL 4050487 (Nov. 26, 2012). The question in *Alvarez* was whether an Illinois statute could forbid individuals from making audiovisual recordings of police officers. The court held that the statute infringed upon First Amendment interests because gathering information, especially about government actors, is as a corollary of the right to disseminate communications . *Id.* at 596-97. *See also Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (concluding that individuals have "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"); *Fordyce v. City of Seattle*, 55 F.3d 436, 437-39 (9th Cir. 1995) (concluding that appellant, who had been arrested for filming the police

interact with a large protest in Seattle had a "First Amendment right to film matters of public interest").

The First Circuit agrees. Like Jordan, the claimant in *Glik v. Cunniffe*, *supra*, insisted on recording an arrest in which he believed police were using excessive force. The question on appeal was whether "there [is] a constitutionally protected right to videotape police carrying out their duties in public." *Id.* at 82. The First Circuit held that "basic First Amendment principles... answer that question unambiguously in the affirmative." *Id.* The court reasoned that observing and recording "government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles," because these observations and recordings "serve a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Id.* (*quoting Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966)). *See also Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (concluding that recording a video of "a warrantless and potentially unlawful search of a private residence" was entitled to First Amendment protection).

These cases demonstrate that the right to observe police conducting their official duties is firmly rooted in the First Amendment.[3] It violates this right if the obstruction statute can be used to arrest and convict those who insist on observing police conduct. Jordan's conviction for obstruction, based on his continuing to observe the police interact with his sister from inside his house behind a locked screen door, violates the First Amendment and should be reversed.

2. Washington State Law Allows Police Officers to be Observed and Filmed While Acting in Their Official Capacities in Public.

State courts have also made clear that an individual cannot be convicted of a crime for exercising the right to observe or record police officers conducting their duties in public. In *State v. Flora*, the defendant appealed his conviction for recording police officers during his arrest. 68 Wn. App. 802, 803, 845 P.2d 1355 (1992). The Court of Appeals reversed, reasoning that individuals have an interest in observing and recording police officers performing their official duties. *Id.* at 807 (citing cases). While *Flora* challenged a conviction for violation of the state ban against "intercepting, recording, or divulging private communication," the

[3] *See also,* Letter re: *Christopher Sharp v. Baltimore City Police Department, et. al,* Dep't of Justice (May 14, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf (noting that it is the United States' position that protecting the constitutional right to observe police conduct "engender[s] public confidence in our police departments, promote[s] public access to information necessary to hold our governmental officers accountable, and ensure[s] public and officer safety) (last visited: Dec. 5, 2012).

Court's reasoning supports the right to observe law enforcement activities occurring in public. *Flora,* 68 Wn. App. at 805-08. It also supports the proposition that police officers cannot arrest individuals for exercising this right. Thus, Jordan's conviction cannot stand.

C. The Obstruction Statute Is Disproportionately Enforced Against People of Color

Not only has the obstruction statute, RCW 9A.76.020, been applied in a manner that infringes upon protected speech, it is well documented that the obstruction statute is often disproportionately enforced against racial minorities in Seattle. A report from the Auditor of the Office of Professional Accountability ("OPA") for the City of Seattle found that 51% of the obstruction charges filed in Seattle during a two-year period were filed against African Americans. This is true even though African Americans constitute less than 8% of Seattle's population. Office of Professional Accountability, "Auditor's Report on Obstruction Arrests, January 2006 – July 2008," at 7 (2008). Further, a recent *Seattle Post-Intelligencer* investigation, which studied arrests over a six-year period, found that SPD officers arrest African Americans "for the sole crime of obstruction—when it is not accompanied by an underlying charge—at a rate more than eight times as often as whites." Eric Nalder, et. al, "Anti-Crime Team Has a Tough Reputation – Maybe Too Tough: Unit Racks Up Most 'Obstructing' Arrests," *Seattle Post-Intelligencer*

(Feb. 28, 2008). Moreover, charges brought under RCW 9A.76.020 are notoriously problematic because, for all races, half the charges are thrown out before trial. *Id.*; *see also Auditor's Report on Obstruction Arrests*, *supra* at 7 (noting that 53% of obstruction charges were dismissed before trial).

In fact, the same *Post-Intelligencer* investigation found that obstruction charges often are improperly used as leverage against individuals who the police deem to be uncooperative. Lewis Kamb, "Cops at Times Use 'Obstruct' Charge as Leverage," *Seattle Post-Intelligencer* (Feb. 27, 2008). Collectively, these numbers suggest that the obstruction statute is overused (half the charges are thrown out), misused (to target free speech and the right to witness police conduct), and disproportionately used (against African Americans). Given this context, there is an urgent need for the Court to narrowly construe the obstruction statute so that it cannot be used to punish protected speech that is critical of the police (colloquially referred to as a "contempt of cop" charge), or to punish protected activities (*e.g.* observing police conduct).

The import of ensuring that the obstruction statute is not abused is especially important in our technological age where arrests, charges, and convictions are readily and easily available to potential employers, landlords, and the general public. Convictions for engaging in protected

activities can limit a person's opportunities for a substantial period of time. *See* Eric Nalder, "Dubious Bust Leaves 'Unseen Injury' for Life," *Seattle Post-Intelligencer* (Feb. 27, 2008).

In this instance, the obstruction statute was used to arrest, charge, and convict a young African-American teenager who exercised his right to observe police conduct and criticize police officers for the way the officers interacted with his sister while they were on his family's property. Because of this arrest and conviction, Jordan faces the prospect that, from this point forward, on every job and college application, on every law school or medical school application, he will have to answer "yes, I have been convicted." He faces these consequences for having exercised his constitutional rights. The harm resulting from this "unseen injury" demonstrates the importance of narrowly confining the obstruction statute to its constitutional limits.

D. The Justice Department's Investigation of the Seattle Police Department Highlights the Importance of Safeguarding the Right to Witness Police Actions.

Context matters. The Justice Department's findings explain why an individual like Jordan would invoke his right to witness his sister's arrest. First, the facts in this case exhibit nearly all the red flags for excessive force listed in the Justice Department's report. Specifically, the Justice Department found that when force is used, it is excessive 20% of

the time; 50% of the cases involving excessive force involve a racial minority; 57% of the time a baton is used the force is excessive; and 61% of excessive force cases involve multiple officers against one subject. Taken together, these numbers support that Jordan had a rational basis to fear for the safety of his sister and for asserting his right to observe the police: his sister is a person of color; multiple officers were engaged in convincing her to leave the property; and one of the officers unsheathed his baton. Furthermore, after the Department of Justice Report was issued it became common knowledge that without third-party witnesses, and some third-party witnesses with cameras, many instances of excessive use of force would have gone unnoticed by the public. *See* Investigation of the Seattle Police Department, http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf at 3 (last visited December 14, 2012). As discussed above, the right to observe police officers acting in their official capacity is an important right that is essential to maintaining police accountability and ensuring equitable treatment for all. Given this context, the obstruction statute should not and cannot be used to restrict the right to witness police action.

IV. CONCLUSION

For the above stated reasons the Court should narrowly confine RCW 9A.76.020(1) to its constitutional limits, affirm the fundamental right to free expression in criticizing the police and the right to observe police engaged in their official duties in public, and reverse Jordan's conviction.

DATED: December 18, 2012

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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CERTIFICATE OF SERVICE

I, David A. Perez, attorney for Amicus Curiae American Civil Liberties Union of Washington, certify that on December 18, 2012, I personally served to each of the following persons a copy of the document on which this certification appears:

Lila Silverstein (via email and messenger)	Counsel for Petitioner/Appellant
Dennis J. McCurdy and Daniel T. Satterberg (via email and messenger)	Counsel for Respondent

Signed at Seattle, Washington, this 18th day of December, 2012.

/s/ David A. Perez
David A. Perez