

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 07, 2014, 3:01 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL *ljs*

No. 88694-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN J.,

Juvenile Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES ACCEPTED FOR REVIEW 2

C. STATEMENT OF THE CASE 2

D. ARGUMENT 7

The application of the obstruction statute to this case violates the
First Amendment, requiring reversal of the conviction and
dismissal of the charge with prejudice. 7

1. The standard of review is *de novo*. 7

2. The obstruction statute may not be used to criminalize the
exercise of the First Amendment right to criticize police
officers who are performing their official duties. 8

3. Jordan was improperly convicted of obstruction for
exercising his constitutional right to criticize the police
officers' use of force against his sister. 13

4. Reversal is required. 16

E. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009)..... 7

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004)..... 12, 14

State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011)..... 5, 8, 12

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 14

Washington Court of Appeals Decisions

In re T.L., 165 Wn. App. 268, 268 P.3d 963 (2011)..... 7

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005) 7

State v. Sweany, 162 Wn. App. 223, 256 P.3d 1230 (2011) *aff'd*, 174 Wn.
2d 909, 281 P.3d 305 (2012)..... 8

State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000) 12

United States Supreme Court Decisions

Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)
..... 13

Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).... 8

Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987)
..... passim

Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)
..... 15

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) 17

Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) 12

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945)..... 17

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) 17

Decisions of Other Jurisdictions

American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012) 14

Bell v. Keating, 697 F.2d 445 (7th Cir. 2012)..... 11

Buffkins v. Omaha, 922 F.2d 465 (8th Cir. 1990)..... 12

Milwaukee v. Wroten, 160 Wis.2d 207, 466 N.W.2d 861 (Wis. 1991) 11

People v. Rapp, 492 Mich. 67, 281 N.W.2d 452 (Mich. 2012)..... 11

Constitutional Provisions

U.S. Const. amend XIV 8

U.S. Const. amend. I 8

Statutes

RCW 9A.76.020..... 8, 12

Other Authorities

Dominic Holden, *Hostile Policing*, *The Stranger*, August 7, 2013 14

Seattle Police Department Directive, New DP&P Manual Section, Title 17.070 (June 5, 2008) 14

A. INTRODUCTION

Jordan J.¹ was convicted of obstruction of justice for standing in the doorway of his own home and yelling at three police officers who were detaining his little sister 10-15 feet away in the driveway. The conviction violates the First Amendment.

States may criminalize *physical* interference with police without running afoul of the Constitution. They may also prohibit a few narrow categories of pure speech, like “true threats.” But they may not prohibit criticism of police, even if such criticism annoys or delays the officers. Indeed, “[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.” *Houston v. Hill*, 482 U.S. 451, 462-63, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

This Court should reverse Jordan’s conviction and clarify that Washington’s obstruction statute does not apply to observing and criticizing police in the exercise of their duties.

¹The petitioner’s first name is Eristus but he goes by his middle name, Jordan. RP 68.

B. ISSUES ACCEPTED FOR REVIEW

1. The First Amendment protects the rights to observe and criticize police activity. Jordan was convicted of obstruction of justice for standing on his own property, insisting on remaining in view of three policemen who were detaining his little sister, and criticizing their use of force. Does the conviction violate the First Amendment?

2. Statutes must be interpreted so as to preserve their constitutionality and this Court has narrowly construed the obstruction statute in light of the First Amendment. In applying the obstruction statute to this case, did the lower courts impermissibly broaden the scope of the statute?

C. STATEMENT OF THE CASE

Jordan J. is a high school student who lives with his mother, Geraldine, and sister, Ruby, in Seattle. One day Geraldine called the police because Ruby, who was underage, had gotten drunk and was arguing with her mother. Three armed policemen went to the home.² CP 13-14; RP 31, 47-48, 67-69.

² The State is wrong in stating that one of the officers was a woman. A different officer, apparently a woman, had *earlier* responded to the home with Officer Barreto, but they left because Ruby was gone when they arrived. A short time later, Officers German Barreto, Sean Jenkins, and Mark Mullins – all men – responded to the home. RP 13, 16, 36, 38, 41, 48, 95.

Two officers escorted Ruby out of the house and detained her in the driveway, and they asked Jordan to step outside while one officer spoke to his mother. When the third policeman re-joined the others in the driveway, Ruby was acting hostile and belligerent because she did not want to leave. One of the officers grabbed her and held her down. Jordan advised his sister to calm down and comply with the officers' directives. RP 17-18, 20, 27-28, 31, 35.

However, when one of the officers unsheathed his baton and raised it against Ruby, Jordan became alarmed. RP 69-71, 78-79, 96-97. He swore at the officer and yelled, "that's my sister, that's my sister." RP 44-45. An officer directed Jordan to go back inside the house and close the door. RP 40. Jordan did not immediately comply, because he was concerned for his sister. As he later explained, "I was questioning why I had to go inside, you know, I lived there and I should be able to observe this just to make sure my sister was safe." RP 71. Jordan had witnessed police violence in the past, and did not want Ruby to meet a similar fate. RP 71.³

³ The State claims it is not clear that an officer raised his nightstick against Ruby. The dispute is irrelevant, because criticism of police need not be "correct" to be protected speech. However, it is worth noting that the State did not dispute Jordan's claim on cross-examination and did not call any witnesses on rebuttal. The trial court did not make a specific factual finding either way, but appeared to accept Jordan's account: "Mr.

Eventually, Officer Jenkins escorted Jordan back inside. CP 15; RP 41. Jordan did not resist; indeed, the officer did not even have to touch him. *State v. E.J.J.*, 173 Wn. App. 1033 at *2. Jordan never attempted to return to the front yard. Rather, he stood behind the wrought iron door, and continued to monitor the interaction between Ruby and the other two policemen which was occurring 10-15 feet away. RP 30.

Officer Jenkins ordered Jordan to close the solid door so he would not be able to see what was happening outside. CP 15; RP 52. Jordan refused. He later said, "I felt like as a citizen in this United States I felt like that everybody should have the right to observe the scene ... just to make sure that everybody is safe. ... I should be able to make sure that my sister is all right...." RP 73.

Jordan continued to observe and criticize the police officers from behind the wrought iron door. While Jordan was yelling at the officers, Officer Jenkins was yelling back at him, repeatedly ordering him to close the solid door and warning him that he would be arrested for obstruction of justice if he did not close the solid door. Jordan stayed inside behind the security door, but did not close the solid door. Officer Jenkins

[J.] testified that the reason he went outside was because he saw one of the officers raise his baton against his sister, and so his purpose in his words was to supervise the scene. Mr. [J.] was quite candid in his testimony." RP 96-97 (oral ruling); CP 17 (written findings incorporate oral ruling).

subsequently arrested him for obstructing a law enforcement officer. CP 15-16; RP 30, 43, 49, 75, 97, 99, 100.

At trial, the State argued Jordan was guilty of obstruction because his presence in the home, yelling at the officers, and refusal to close the solid door hindered the officers' detention of Ruby. Jordan argued he did not commit obstruction under this Court's decision in *State v. Williams*, 171 Wn.2d 474, 478, 251 P.3d 877 (2011), which narrowly construed the obstruction statute in light of the First Amendment. RP 86-87.

The Juvenile Court recognized that Jordan never threatened the officers. CP 14; RP 42, 53, 63, 95. Nor did he touch them or even move in between them and Ruby. CP 13-17. The court nevertheless found Jordan guilty of obstructing a law enforcement officer. CP 17.

The judge said that if Jordan had simply stood behind the wrought iron door and observed the situation without speaking there would probably not be sufficient evidence of obstruction. RP 99. However, because he did not stand quietly behind the door and instead yelled at the police officers, he was guilty of the crime:

[T]he fact that [Jordan] refused to close the door made the situation worse because it wasn't as if at that point he was simply standing in his house observing, which he would have every right to do, but [Jordan] was engaged in a [verbal] back-and-forth with the officers. The word "taunting" came up. I don't know whether that accurately describes what went on here, but it's very clear to the court

that by raising his voice and calling the officers names, he was making his presence known to his sister, and the testimony was that through his presence, it made it more difficult for the officers to do their job. So I am finding [Jordan] guilty beyond a reasonable doubt of obstructing these law enforcement officers.

RP 100; CP 17 (oral ruling incorporated into written findings and conclusions).

The Court of Appeals affirmed over Jordan's objections that the conviction was unconstitutional because it punished him for protected speech. The court expressed bewilderment at the proposition that yelling is protected by the First Amendment. It stated that the conviction was proper because: (1) "[Jordan's] presence escalated the situation with [Ruby];" (2) "[Jordan] was irate, calling the officers names, yelling, and using profanity;" and (3) "[Jordan] refused the officers' repeated requests to leave the scene." *E.J.J.* at *7.

D. ARGUMENT

The application of the obstruction statute to this case violates the First Amendment, requiring reversal of the conviction and dismissal of the charge with prejudice.

Jordan was convicted of obstruction of justice for exercising his constitutional rights to be present in his own home, to monitor the scene while police detained his sister, and to criticize the officers. This Court should clarify that the obstruction statute does not apply to this protected activity, and should reverse Jordan's conviction.

1. The standard of review is *de novo*.

The question in this case is whether Jordan's conviction for obstruction is invalid under a constitutional construction of the statute. Issues of statutory construction are reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Questions of constitutionality are also reviewed *de novo*. *In re T.L.*, 165 Wn. App. 268, 280, 268 P.3d 963 (2011). In evaluating a conviction following a bench trial, this court reviews challenged findings of fact for substantial evidence, then determines *de novo* whether the surviving findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).⁴

⁴ The State in its Answer makes the odd claim that the issue was not preserved below. Trial counsel argued that there was insufficient evidence to support a conviction under *Williams*. RP 86-87. And even if she hadn't, "a criminal defendant may always challenge the sufficiency of

2. The obstruction statute may not be used to criminalize the exercise of the First Amendment right to criticize police officers who are performing their official duties.

The obstruction statute provides, “A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” RCW 9A.76.020(1). The statute is in tension with the First Amendment, which “protects a significant amount of verbal criticism and challenge directed at police officers.” *Houston v. Hill*, 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); U.S. Const. amend. I.⁵ Thus, “courts have long limited the application of obstruction statutes based upon speech” in order to comply with the Constitution. *State v. Williams*, 171 Wn.2d 474, 478, 251 P.3d 877 (2011).

In *Hill*, the U.S. Supreme Court struck down an ordinance whose prohibitions were similar to those of our obstruction statute. The provision in question made it unlawful to “oppose, molest, abuse or

the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) *aff’d*, 174 Wn. 2d 909, 281 P.3d 305 (2012).

⁵ The First Amendment provides, in relevant part, “Congress shall make no law ... abridging the freedom of speech, or ... the right of the people ... to petition the Government for a redress of grievances.” U.S. Const. amend. I. Its protections apply to the states through the Fourteenth Amendment. U.S. Const. amend XIV; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

interrupt any policeman in the execution of his duty.” *Hill*, 482 U.S. at 455 (quoting Code of Ordinances, City of Houston Texas, § 34-11(a) (1984)). The plain language of the ordinance was not limited to conduct; it also punished speech that interrupts an officer in the exercise of his duties. *Id.* The Court held, “The Constitution does not allow such speech to be made a crime.” *Id.* at 462.

The Court explained, “[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. This principle, enshrined in the First Amendment, arose from the common law. *Id.* at 463 n.12. For example, an old English case held that where a bystander yelled, “you have no right to handcuff the boy,” after a constable broke up a fight between two boys and arrested one of them, the bystander had “done no wrong and may not be arrested.” *Id.* (citing *Levy v. Edwards*, 1 Car. & P. 40, 171 Eng.Rep. 1094 (Nisi Prius 1823)).

Only a few narrow categories of speech may be criminalized. These include child pornography and obscenity, “true threats,” incitements to imminent lawless action, and “fighting words” - words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *See United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2537, 2544,

183 L.Ed.2d 574 (2012); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Yelling at police is *not* one of the categories of speech that may be criminalized; it is instead protected expression. *Hill, supra*, at 461.

Indeed, the “fighting words” exception to the First Amendment is more limited when the words are addressed to police officers, because “a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to ‘fighting words’.” *Hill*, 482 U.S. at 462 (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 135, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (Powell, J., concurring)).

Furthermore, verbally challenging police officers constitutes protected speech *even if* it delays, offends, or otherwise inconveniences the officers. *Hill*, 482 U.S. at 463 n.12 (The First Amendment “demands some sacrifice of efficiency”). The framers of the Constitution recognized “that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.” *Id.* at 472. Accordingly, although governments may criminalize *physical obstruction* of police action, they may not punish verbal criticism of law enforcement officers. *Hill*, 482 U.S. at 462-63.

Following *Hill*, courts across the country limited or invalidated laws criminalizing obstruction and disorderly conduct in light of the First Amendment. For example, the Wisconsin Supreme Court struck down an ordinance as overbroad in *Milwaukee v. Wroten*, 160 Wis.2d 207, 466 N.W.2d 861 (Wis. 1991). The ordinance prohibited a person from “resisting or in any way interfering with any police officer or hindering or preventing him from the discharge of his duty.” *Id.* at 229-30. The Court held:

If these words refer exclusively to conduct, they are constitutionally acceptable. If, however, they can also apply to verbal expressions which are not “fighting words,” the ordinance is on its face ... overbroad and constitutes an infringement upon protected speech.

Id. at 230. The court endorsed a lower court’s explanation that the ordinance was invalid because it “could apply to a substantial amount of constitutionally protected conduct.” *Id.* at 232. For example, “[o]ne who complained of the amount of force used by an officer in effecting the arrest of a third party could be deemed to be interfering with that officer’s arrest.” *Id.*

Other courts are in accord. *See, e.g., People v. Rapp*, 492 Mich. 67, 76, 281 N.W.2d 452 (Mich. 2012) (invalidating Michigan State University ordinance that made it a crime to “disrupt” a person carrying out a service for the university); *Bell v. Keating*, 697 F.2d 445, 458 (7th Cir. 2012)

(Chicago ordinance unconstitutional to extent it criminalizes individual's refusal to leave a scene when so instructed by a police officer to prevent "serious inconvenience, annoyance or alarm" as opposed to "substantial harm"); *Buffkins v. Omaha*, 922 F.2d 465 (8th Cir. 1990) (holding it was unlawful to arrest a person for disorderly conduct for calling a police officer "asshole").

Washington's obstruction statute is similar to the ordinance struck down in *Hill*, but this Court has saved it by construing it narrowly. In *Williams*, this Court reaffirmed that RCW 9A.76.020 is "intended to prohibit *conduct*." *Williams*, 171 Wn.2d at 482 (emphasis added). It was properly applied, where, for example, a defendant "not only refused to give his name, he *threatened the officer and lunged at him*." *Id.* at 484 n.10 (citing *State v. Turner*, 103 Wn. App. 515, 525, 13 P.3d 234 (2000)). This Court requires a showing of "conduct in addition to pure speech in order to establish obstruction of an officer." *Id.* at 485. And the only "pure speech" that can be criminalized is speech that falls within the unprotected categories like true threats or speech that is otherwise "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience." *Hill*, 482 U.S. at 461 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)); see also *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)

(harassment statute, which criminalizes pure speech, must be limited to “true threats”). Criticism of police officers is pure speech which may *not* be criminalized. *Hill*, 482 U.S. at 461-62.

3. Jordan was improperly convicted of obstruction for exercising his constitutional right to criticize the police officers’ use of force against his sister.

The lower courts’ expansion of the statute to apply to Jordan’s case violates the First Amendment under *Hill* and *Williams*. The trial court and Court of Appeals relied on the fact that when Jordan began “speaking in a loud and excited voice” Ruby became “agitated.” CP 14; *E.J.J.* at *6. But Jordan had a First Amendment right to “speak in a loud and excited voice” in response to police use of force, and the fact that his criticism may have agitated Ruby is of no moment. *Hill*, 482 U.S. at 461. Only if Jordan’s speech had incited Ruby to such violence that there was a clear and present danger of imminent substantial harm would his “speaking in a loud and excited voice” not be protected. *Id.*; *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

The State brazenly claimed that Jordan’s speech “has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all.” Resp. Br. at 14-15. “True threats,” like those of the hypothetical robber, indeed fall outside the scope of First Amendment protection. *See Kilburn*, 151 Wn.2d

at 43. But here, the officers testified and the trial court explicitly found that Jordan *never* threatened the police. CP 14; RP 95.

Nor can Jordan's conviction be supported by his refusal to "leave the scene" or close the solid door instead of just the wrought iron door. Jordan has a Fourth Amendment and article I, section 7 right to be at his own home, and a First Amendment right to observe and criticize the police. *Hill*, 482 U.S. at 461; *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) (utmost protection of privacy is in the home); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (First Amendment protects right to observe and record police in exercise of their duties). Jordan understood he had this right and responsibility: "I felt like as a citizen in this United States I felt like that everybody should have the right to observe the scene ... just to make sure that everybody is safe." RP 73.⁶

The trial court accepted the State's claim that some speculative potential for danger justified ordering Jordan to close the solid door. But

⁶ Indeed, local law enforcement offices have officially recognized this right. The Seattle Police Department issued a Directive in 2008 stating that citizens were permitted "to remain as onlookers and/or photograph officers in the field performing their duties." Seattle Police Department Directive, New DP&P Manual Section, Title 17.070 (June 5, 2008). King County Sheriff's spokeswoman Sergeant Cindi West has stated, "In general, a person cannot be ordered to stop photographing or to leave property if they have a legal right to be there." Dominic Holden, *Hostile Policing*, *The Stranger*, August 7, 2013.

the officers testified that they had not frisked Jordan or swept the house because they did not have any individualized suspicion of danger. CP 15; RP 42, 56. If they *had* been worried about Jordan retrieving a weapon, it would have been better to keep him in their sights behind the wrought iron door, rather than allowing him to hide his actions behind a solid door and then ambush them. RP 51, 55-56 (“With the [solid] door open, we could clearly see him”); *cf. Maryland v. Buie*, 494 U.S. 325, 333, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (when protective sweep is justified, its purpose is to find dangerous persons who are hiding and could unexpectedly launch an attack). The real reason Officer Jenkins ordered Jordan to close the solid door is that he did not want Jordan to watch the other policemen deal with Ruby. RP 52.⁷ But as Jordan recognized, he had a constitutional right to observe the scene. RP 73.

In the end, the trial court recognized this as well, telling Jordan “we might not be here” if he had simply stood behind the wrought iron door and watched quietly. RP 99. The court convicted Jordan because he did not simply observe, but engaged in a verbal “back-and-forth” with police, “raising his voice and calling the officers names.” RP 100. But this verbal challenge is protected under the First Amendment, and cannot

⁷ “Q: And so you wanted him to shut the inside door – the more solid door that you could not see out of, so that he would not be able to see what was going on, correct? A: Yes, correct, yes.”

be punished as a crime. *Hill*, 482 U.S. at 461. Jordan had a constitutional right to be present at his own home, to observe police in the exercise of their duties, and to criticize the officers' use of force against his sister. The application of the obstruction statute here is unconstitutional.

4. Reversal is required.

The State may argue that even though the trial court improperly convicted Jordan of obstruction for yelling at the officers from behind the wrought iron door, the conviction may be affirmed because Jordan initially failed to go inside after being ordered to do so. This would be incorrect for several reasons.

First, the officers never claimed Jordan was physically in their way, and they never asked him to back up. They ordered him to go inside *and close the door* so he couldn't see them or criticize them. CP 14; RP 40, 42, 43. As explained above, Jordan had the right to remain in view and criticize the officers. *Hill*, 482 U.S. at 461.

Second, even if they had ordered him to back up a little and he initially refused, the conviction could not be affirmed because the trial court did not find Jordan guilty of obstruction on this basis. The court made clear that it was finding Jordan guilty of obstruction for engaging in the protected activity of "raising his voice and calling the officers names" and engaging in a verbal "back-and-forth" with Officer Jenkins. RP 100.

Finally, even in cases where there is only a general verdict and it is not clear on what basis the judge or jury decided a case, reversal is required where the conviction *could* have been based, in part, on protected speech. *Street v. New York*, 394 U.S. 576, 590-91, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground would be to countenance a procedure which would cause a serious impairment of constitutional rights.

Id. at 586 (citing *Williams v. North Carolina*, 317 U.S. 287, 292, 63 S.Ct. 207, 87 L.Ed. 279 (1942)). In *Street*, the Court held that the defendant's conviction had to be reversed if it could have been based solely on his words. *Id.* "Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based solely on his words, we are still bound to reverse if the conviction could have been based upon both his words and his act." *Id.* at 587; accord *Thomas v. Collins*, 323 U.S. 516, 528-29, 541, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

Here, the record shows that Jordan was convicted based solely on his words. RP 100; CP 13-17. But even if his conviction might have been based both upon his words and on some unprotected act, reversal is required. *Street*, 394 U.S. at 587; see also *id.* at 589-90; accord *Zant v. Stephens*, 462 U.S. 862, 881-83, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)

(reaffirming rule of *Street* and *Collins*). This Court should reverse and remand with instructions to vacate the conviction and dismiss the charge with prejudice.

E. CONCLUSION

This Court should reverse Jordan's conviction and hold that the obstruction statute may not be applied to a person who is merely standing on his own property observing and criticizing nearby police activity.

Respectfully submitted this 7th day of January, 2014.

/s/ Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 88694-6
 v.)
)
 ERISTUS JORDAN J.,)
)
 Juvenile Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY, DPA () U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE () HAND DELIVERY
APPELLATE UNIT (X) E-MAIL
516 THIRD AVENUE, W-554
SEATTLE, WA 98104
[paoappellateunitmail@kingcounty.gov]

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JANUARY, 2014.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Thrd Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

OFFICE RECEPTIONIST, CLERK

From: Maria Riley <maria@washapp.org>
Sent: Tuesday, January 07, 2014 3:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: PAOAppellateUnitMail@kingcounty.gov; Lila Silverstein
Subject: 889946-JOHNSON-SUPPLEMENTAL BRIEF
Attachments: Johnson Jordan SUPP FINAL.pdf

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

Lila J. Silverstein- WSBA #38394
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: lila@washapp.org

By

Maria Arranza Riley

Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.