Municipal Court, City of Castle Rock, State of Colorado 100 N. Perry Street Castle Rock, CO 80104 (303) 663-6133 PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. DANIEL A. LEWIS Defendant.	
Attorneys for Defendant: Daniel N. Recht, #11569 Recht & Kornfeld, P.C. 1600 Stout Street, Suite 1350 Denver, CO 80202 (303) 573-1900 Fax: (303) 446-9400 admin@rechtkornfeld.com Jonathan D. Rosen, #23372 The Law Office of Jonathan D. Rosen, P.C. 1525 Josephine Street Denver, CO 80206 (303) 322-4922 Fax: (303) 322-6459 JDRLawyer@aol.com In cooperation with the ACLU Foundation of Colorado	Case No.: 2003 GA 33315 Div.: Ctrm:

BRIEF IN SUPPORT OF MOTION TO DECLARE CASTLE ROCK MUNICIPAL CODE SECTION 9.04.020, DISTURBING THE PEACE, UNCONSTITUTIONAL

INTRODUCTION

Mr. Lewis has been charged with a single count of Disturbing the Peace pursuant to Castle Rock Municipal code Section 9.04.020. This ordinance states:

> It shall be unlawful for any person or group of persons to maliciously or willfully disturb the peace and quiet of any neighborhood or family, or public building or public street or sidewalk, or business establishment by loud or unusual noises, or by tumultuous or offensive language, threatening, traducing, quarreling, challenging to a fight or fighting within the town.

Mr. Lewis has submitted a Motion to declare this ordinance facially unconstitutional.

SUMMARY OF THE ARGUMENT

The federal and Colorado constitutions protect freedom of speech. In order to ensure that penal statutes do not invade that right, the courts have developed the concepts of void for vagueness and over breadth to strike down statutes that are unconstitutional on their face.

The void for vagueness doctrine requires that a statute sufficiently describe the conduct that is unlawful so that people of ordinary intelligence can be given fair warning of the prohibited conduct. It also protects against arbitrary and discriminatory enforcement of the statute. When the statute touches on freedom of speech, the void for vagueness doctrine protects against the chilling impact the statute would have by virtue of its failure to only prohibit unprotected speech.

The over breadth doctrine prohibits statutes that criminalize speech that is otherwise protected. The courts have recognized certain areas of protected speech that are not constitutionally protected, including "fighting words" and obscenity.

The ordinance in this case prohibits "loud or unusual noises, or tumultuous or offensive language, or threatening, or traducing, or quarreling, or challenging to a fight or fighting within the town" that disturbs the peace and quiet of any neighborhood or family, or public building or public street or sidewalk or business establishment. This language is unconstitutionally vague and overbroad.

FREEDOM OF SPEECH LAW

Both the United States and Colorado Constitutions clearly provide that no law shall impair or abridge freedom of speech. United States Constitution, Amendment 1; Colorado Constitution Art. II, sec. 10. First Amendment freedoms are the cornerstone of our democracy and the source of the strength and vitality of our society. It is the unfettered and public discussion of ideas of every sort that keeps the institutions of government responsive to the people. See, Whitney v. California, 274 U.S. 357, 372, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), (Brandeis, J., concurring). Only a limited number of exceptions have been carved out by the courts in recognition of the fact that the government has a compelling or overriding interest in prohibiting certain types of speech. Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Bolles v. People, 541 P.2d 80 (Colo. 1975); People v. Vaughan, 183 Colo. 40, 514 P.2d 1318 (1973). For example, the courts have upheld the constitutionality of statutes prohibiting obscenity, libel, incitement, invasion of substantial privacy interests of the home, and "fighting words." See, Hansen v. People, 190 Colo. 457, 548 P.2d 1278 (1976) and cases cited therein.

The Colorado Constitution extends broader protection to freedom of expression than does the First Amendment to the United States Constitution. People v. Ford, 773 P.2d 1059, 1066 (Colo. 1989) citing People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).

OVERBREADTH ANALYSIS

Prohibitory legislation must be precisely and narrowly drawn to proscribe only unprotected speech. Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). A statute is facially overbroad in the free speech context if it substantially infringes upon or impairs constitutionally protected speech while proscribing speech that is not constitutionally protected. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Bolles v. People, 189 Colo. 394, 541 P.2d 80 (1975). The doctrine has been consistently applied in the free speech context because courts recognize the preferred status bestowed upon the right to free speech by our constitutions. People v. Vaughan, 183 Colo. 40, 514 P.2d 1318 (1973).

The judicially recognized exceptions where the government can punish speech include obscenity, libel, incitement, invasion of substantial privacy interests in the home and fighting words. See, Hansen v. People, 548 P.2d 1278, 1281 (Colo. 1976). "Fighting words" are those which by their very utterance tend to incite others to unlawful conduct or provoke retaliatory actions amounting to a breach of the peace. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Chaplinsky v. New Hampshire supra; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); Bolles v. People, supra; People v. Vaughan, supra; Ware v. Denver, 182 Colo. 177, 511 P.2d 475 (1973).

This Court is not without guidance on this issue. The United States Supreme Court has previously struck down a municipal ordinance that was not narrowly limited to “fighting words”. For example, in Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), the appellant was convicted on two counts of using "opprobrious words or abusive language tending to cause a breach of the peace" contrary to a Georgia statute. The words spoken to police officers were "White son of a bitch, I'll kill you," "you son of a bitch, I'll choke you to death," and "you son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." Without considering the constitutionality of punishing Gooding's words under a narrowly drawn statute, the Court found the statute as construed by the state courts void on its face because it was not limited to words having "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." 405 U.S. at 524. See also, Lewis v. New Orleans, 415 U.S. 130, 134, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974) (a municipal ordinance which "punishes only spoken words... can therefore withstand appellant's attack upon its facial constitutionality only if... it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments.").

The Colorado Supreme Court has previously struck down similarly worded provisions. In Hansen, the defendants were charged under a disorderly conduct statute that provided a person commits an offense if they make “a course and obviously offensive utterance, gesture or display in a public place.” Hansen v. People, 548 P.2d 1278, 1281 (Colo. 1976). In finding the subsection facially overbroad, the Court held the challenged subsection made no attempt to limit its application to "fighting words" and found it “abundantly clear” that the subsection on its face sweeps within its coverage protected as well as unprotected speech. Id.

In People v. Smith, 862 P.2d 939 (Colo.1993) the Court considered the validity of subsection 1(g) of Colorado's harassment statute. 18-9-111, 8B C.R.S. (1986). This section stated:

> 18-9-111 Harassment. (1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he: (g) Makes repeated communications at inconvenient hours or in offensively coarse language; . . .

The Court in finding this section facially overbroad stated:

> We find that section 18-9-111(1)(g), 8B C.R.S. (1986) is anything but narrowly drawn. Like the disorderly conduct statute declared unconstitutional in Hansen, the scope of subsection (1)(g) of the harassment statute is not limited to speech, such as obscenity or "fighting words," which the state may constitutionally prohibit. Rather, the challenged subsection prohibits all repeated communications containing "offensively coarse language" if made with the intent to annoy, harass, or alarm. Moreover, the statute does not distinguish between communications made in public places and communications that intrude into areas in which the individual has a significant privacy interest, such as the home. Because the statute substantially sweeps within its coverage protected as well as unprotected speech, it is facially overbroad. People v. Smith, 862 P.2d at 942.

Likewise, in Aguilar v. People, 886 P.2d 725 (Colo. 1994) the Court found subsection (1)(b) of the disorderly conduct statute unconstitutionally overbroad. The applicable section of the statute stated:

> 18-9-106. Disorderly conduct. (1) A person commits disorderly conduct if he intentionally, knowingly, or recklessly: . . . . (b) Abuses or threatens a person in a public place in an obviously offensive manner; . . . § 18-9-106(1)(b).

In finding the statute is unconstitutionally and facially overbroad the Court stated:

> The language of the present disorderly conduct statute is not narrowly tailored to limit its application to fighting words. The statute lacks the limiting language that preserved the constitutionality of the statutes challenged in Janousek and Batchelor. Because constitutionally protected speech may be threatening, [footnote omitted] the provision sweeps too broadly in its prohibition of unprotected speech and includes protected speech as well. Even though Aguilar's remarks were offensive, the statute could inhibit open, albeit abusive, debate concerning government officials or any other topic subject to public debate. The statute is therefore overbroad on its face. Aguilar v. People, 886 P.2d at 728.

In Bolles v. People, 541 P.2d 80, 189 Colo. 394 (Colo. 1975) the Court found subsection (1)(e) of Section 18-9-11,C.R.S. 1973, unconstitutionally overbroad. The subsection, in pertinent part, provides:

> "(1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he: "(e) communicates with a person, anonymously or otherwise

> by telephone, telegraph mail, or any other form of communication, in a manner likely to harass or cause alarm; . . . ."

The court stated:

> We find that one is guilty of the crime of harassment if he intends to "alarm" another person -- arouse to a sense of danger -- and communicates to that other person in a manner likely to cause alarm. It would therefore be criminal in Colorado to forecast a storm, predict political trends, warn against illnesses, or discuss anything that is of any significance.
>
> So, also, if one has the intent to annoy -- to irritate with a nettling or exasperating effect -- and he communicates with another in a manner that is likely to cause alarm -- to put on the alert -- he too is guilty of harassment. The absurdity of this is patently obvious to anyone who envisions our society in anything but a state of languid repose. The First Amendment is made of sterner stuff. Bolles v. People, 541 P.2d at 83, 189 Colo. 398.

The Bolles Court went on to state:

> The statute before us in this case is anything but narrowly drawn. It could, of course, be relied upon to punish for obscene, libelous, riotous communication which is probably constitutionally permissible. Yet the crucial factor is that this statute could also be used to prosecute for communications that cannot be constitutionally proscribed.
>
> It is therefore axiomatic that as citizens, living under the beneficent protection of the First Amendment, we are entitled to robust debate in a free marketplace of ideas. As such, it must be a fundamental truism that a function of free speech under our system of government is to invite dispute. "It may indeed serve its high purpose when it *induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger*. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131. [Emphasis supplied.] In effect, if unsettling, disturbing, arousing, or annoying communications could be proscribed, or if they could only be conveyed in a manner that would not alarm, the protection of the First Amendment would be a mere shadow indeed. Id.

These cases should be carefully compared to the analysis in cases where the Court has rejected an overbreadth challenge.

In People ex. Rel. Van Meveren v. County Court, 551 P.2d 716 (Colo. 1976), our Supreme Court had the opportunity to review the constitutionality of subsection (1)(h) of the harassment statute. This subsection provides:

> "(1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he: "(h) Repeatedly insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response." Section 18-9-111(1)(h), C.R.S. 1973.

The Court noted that it had recently struck down subsection (1)(e) of this same statute as unconstitutionally overbroad in Bolles v. People, supra. However, the Court found subsection (1)(h) was not overbroad because it was limited to "fighting words" by the use of the phrase "in a manner likely to provoke a violent and disorderly response." The Court stated:

> The statute, as we read it, proscribes only those words which have a direct tendency to cause acts of violence by the persons to whom, individually, the words are addressed. The test is what men of common intelligence would understand to be words likely to cause an average addressee to fight. The limited scope of the statute brings it within permissible limitations on free expression. Chaplinsky v. New Hampshire, supra. [191 Colo Page 205]

What is readily apparent from this decisional body of law is that an ordinance is overbroad where it does not limit its application to "fighting words".

APPLICATION OF THE LAW TO THE STATUTE IN QUESTION

The Castle Rock Municipal code Section 9.04.020, Disturbing the Peace, states:

> It shall be unlawful for any person or group of persons to maliciously or willfully disturb the peace and quiet of any neighborhood or family, or public building or public street or sidewalk, or business establishment by loud or unusual noises, or by tumultuous or offensive language, threatening, traducing, quarreling, challenging to a fight or fighting within the town.

This ordinance is not narrowly drawn so as to only regulate the hours of speech in public places. See, Saia v. New York, 334 U.S. 558, 562, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948) (stating "the hours and place of public Discussion can be controlled"). The ordinance is overbroad because there is no "time" limitation and applies equally to language during the morning, noon, afternoon evening and night.

The ordinance is overbroad because it does not limit its application to prohibiting unwanted or offensive communications from invading the privacy of individual citizens in their homes. Cohen v. California, 403 U.S. 15, 21, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971); Rowan v. United States Post Office Dept., 397 U.S. 728, 736-37, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970); Martin v. City of Struthers, 319 U.S. 141, 148, 87 L. Ed. 1313, 63 S. Ct. 862 (1943); Bolles v. People, 189 Colo. at 399, 541 P.2d at 83.

Most importantly, the ordinance is overbroad because of the types of language it criminalizes. This ordinance criminalizes language that is either: a) tumultuous; b) offensive; c) threatening; d) traducing; e) quarreling; or f) a challenge to fight that disturbs the peace and quiet of any neighborhood or family.

The criminalization of all "offensive" language without limiting its application to "fighting words" makes this provision unconstitutionally overbroad. Webster's Third International Dictionary tells us that "offensive" means, causing "displeasure or resentment, insulting, affronting". The limitless number of statements that might be "offensive" to someone clearly sweeps within its purview a substantial amount of constitutionally protected speech.

The Colorado Supreme Court has already ruled an attempt to criminalize "offensive" language renders a provision unconstitutionally overbroad. In Hansen, the disorderly conduct statute provided a person commits an offense if they make "a course and obviously offensive utterance, gesture or display in a public place". This language was unconstitutionally overbroad because the provision did not attempt to limit its application to "fighting words". Hansen v. People, 548 P.2d 1278, 1281 (Colo. 1976). The statute in Hansen is actually more narrowly tailored than the Castle Rock provision because the statute in Hansen criminalized obviously offensive utterance in a public place.

Likewise, the criminalization of "offensively coarse language" made with the intent to annoy, harass, or alarm that was found to be overbroad in People v. Smith, 862 P.2d 939 (Colo.1993). Again, the language of the statute in Smith was more narrowly tailored than the Castle Rock provision because it required the *specific intent* to annoy, harass or alarm. And, in Aguilar v. People, 886 P.2d 725 (Colo. 1994) the Court found a statute making it a crime to abuse or threaten a person in a public place in an obviously offensive manner to be overbroad. Whereas, in Bolles v. People, 541 P.2d 80, 189 Colo. 394 (Colo. 1975), the Court found subsection (1)(h) of the harassment statute was not overbroad because the provision specifically criminalized only those words or acts that were" likely to provoke a violent or disorderly response" and was thus limited to criminalizing "fighting words". Again, there is no such limiting language in the Castle Rock provision.

As was pointed out by the Smith Court in footnote 7 (862 P.2d at 943), the drafters of the Model Penal Code, in their comment to the harassment section stated "the constitutional limits on regulation of expression may bar any attempt to punish speech in a public place merely because it is offensive to the audience." Model Penal Code section 250.4(3) (1980) comment at 365 n. 22.

The Castle Rock provision criminalizes all "offensive" language without limitation. Our Supreme Court has already found three other provisions that criminalized "offensive" language without limitation to "fighting words" were unconstitutionally overbroad. This part of the provision broadly sweeps within its prohibitions too much protected speech and as such should be declared facially unconstitutional.

In addition, the ordinance criminalizes language that is "threatening". However, threats can be constitutionally protected speech. People v. Hickman, 988 P.2d 628, 639 (Colo. 1999) citing, Aguilar v. People, 886 P.2d 725, 728 (Colo. 1994); Brandenburg v. Ohio, 395 U.S. 4444, 447-49, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (finding that advocating violence as moral propriety or moral necessity is "not the same as preparing a group for violent action and steeling it to such action"); Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (overturning conviction because the Court found the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was protected under the First Amendment as "political hyperbole" but upheld the statute that reaches protected speech because of the

overwhelming interest in protecting the president); State v. Robertson, 293 Or. 402, 649 P.2d 569, 580-81 (1982) (reasoning that some threats to commit minor or insubstantial crimes may be legitimate speech); United States v. Hutson, 843 F.2d 1232, 1235 (9th Cir. 1988)(noting that some threats to engage in unlawful conduct may nevertheless be protected speech); Landry v. Daley, 280 F. Supp. 938 964 (N.D.Ill. 1968) (holding that threats to commit minor crimes against public order or "insubstantial evil" cannot be prohibited), *rev'd on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971).

For example, in Whimbush v. People, 869 P.2d 1245 (Colo. 1994) the court found the following statute overbroad:

> Whoever without legal authority threatens to confine, restrain, or cause economic or bodily injury to the threatened person of another or to damage the property, economic well-being, or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an act or refrain from doing a lawful act commits criminal extortion which is a class 4 felony. Id. At 1247.

The Whimbush Court found the statute facially overbroad because it was not limited to threats of "imminent bodily harm" and other types of non-protected speech. Instead, the statute covered threats of collective action in support of group demands protected by cases such as NAACP and Keefe. Id. At 1248.

The Castle Rock provision criminalizes all "threatening" language without limitation. This part of the provision broadly sweeps within its prohibitions too much protected speech and as such should be declared facially unconstitutional.

Likewise, the Castle Rock provision criminalizes "quarreling" without limitation. As such, a disagreement, well below what would be considered "fighting words" can lead to criminal charges. And the word "tumultuous" could indicate any words spoken in a loud or excited manner, whether or not constitutionally protected.

The Castle Rock legislature could have chosen to incorporate a "fighting words" exception that applies to the entire provision. Instead, they chose to criminalize "fighting words" separately in the part of the Castle Rock provision that criminalizes "challenging to fight". Likewise, the provision separately criminalizes "traducing" (libel, slander or defamation). These specific parts of the Castle Rock provision appear to fit within the judicially recognized exceptions of obscenity, libel, incitement, invasion of substantial privacy interests in the home and fighting words. Hansen v. People, 548 P.2d 1278, 1281 (Colo. 1976).

The Castle Rock provision is not saved from its' unconstitutional overbreadth because it makes this language criminal when the person "maliciously or willfully disturb[s] the peace and quiet of any neighborhood or family, or public building or public street or sidewalk, or business establishment". The mens rea requirement is written in the disjunctive and allows for prosecution for willful or malicious acts or language. Even a specific intent requirement will "fail to eliminate overbreadth concerns wherever the effect (e.g., to harass, to annoy, to alarm, etc.) associated with the intent provision is broad enough to encompass a substantial amount of protected activity. [citation]". People v. Smith, 862 P.2d at 942.

CONCLUSION TO THE OVERBREADTH ANALYIS

The breadth of this ordinance reaches substantial areas of previously recognized protected speech. This ordinance violates both the Colorado and United States Constitutions because it is "overbroad". Colo. Const. Art. II, Sec. 10, U.S. Const. Amends. I, XIV. "Given the preferred status accorded to free speech by the federal and state constitutions, a statute which restricts speech must be narrowly drawn to avoid criminalizing an intolerable range of constitutionally protected conduct. [Citations] If a statute substantially infringes upon constitutionally protected speech while proscribing speech which is not constitutionally protected, it will be struck down as facially overbroad. [Citations]." People v. Smith, 862 P.2d 939, 941 (Colo. 1993) (citations omitted).

VAGUENESS ANALYSIS

The Ordinance also violates the Colorado and United States Constitutions because it is "vague". The due process requirement of reasonable specificity serves three valuable societal interests: fair warning of what conduct is illegal; protection against arbitrary and discriminatory enforcement; and where freedom of expression is at issue, protection from the chilling effect of ill-defined restrictions on speech. See, People ex. Rel. Van Meveren v. County Court, 551 P.2d 716 (Colo. 1976).

In People ex. Rel. Van Meveren v. County Court, our Supreme Court adopted the reasoning of the United States Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), describing these three values that are protected by the void for vagueness doctrine:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute; abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wide of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (Footnotes omitted.) People ex. Rel. Van Meveren v. County Court, 551 P.2d at 719.

Our Supreme Court has had several opportunities to decide whether similar provisions were unconstitutionally "vague". For example, in People ex rel. Van Meveren v. County Court, 191 Colo. 201, 551 P.2d 716 (1976), the Court considered and rejected a vagueness challenge to a telephone harassment statute. The challenged statute in that case provided: "A person commits harassment if, with intent to harass, annoy, or alarm another person, he: (h) Repeatedly insults,

taunts, or challenges another in a manner likely to provoke a violent or disorderly response." § 18-9-111(1)(h), 8 C.R.S. (1973). The defendant challenged the statute on the ground that it was unconstitutionally vague because the speaker was required to know the emotional impact his words would have on the recipient. The Court rejected this argument, holding that subsection (1)(h) requires an objective determination: whether the words when directed to an average person would tend to induce an immediate breach of the peace. People ex rel. Van Meveren, 191 Colo. at 206, 551 P.2d at 720.

In People v. Norman, 703 P.2d 1261 (Colo. 1985), the Court declared a provision of another harassment statute unconstitutionally vague. The statute at issue provided that a person commits the crime of harassment if, "with intent to harass, annoy, or alarm another person," such person "engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose . . . ." §18-9-111(1)(d), 8 C.R.S. (1978). The Court held that the statutory language contained "no limiting standards to assist citizens, courts, Judges or police personnel to define what conduct is prohibited and, conversely, what conduct is permitted." People v. Norman, 703 P.2d at 1267.

In People v. Randall, 711 P.2d 689 (Colo. 1985), the Court upheld an indecent exposure statute against a void for vagueness challenge. The statute at issue provided: "A person commits indecent exposure if he knowingly exposes his genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person." § 18-7-302(1), 8 C.R.S. (1978).

Because it was immaterial whether a particular victim was in fact affronted or alarmed by the prohibited conduct, the Court concluded that the statute set forth a readily identifiable objective standard for measuring the proscribed conduct. In contrast to the statute found unconstitutional in Norman, the Court noted that the indecent exposure statute contained particularized standards setting forth the conduct sought to be proscribed -- exposure of one's genitals -- without reference to the effect of the conduct. People v. Randall, 711 P.2d at 693.

In People v. McBurney, 750 P.2d 916 (Colo. 1988), the Court rejected a void for vagueness challenge to an amended telephone harassment statute. The statute provided: "A person commits harassment if, with intent to harass, annoy, or alarm another person, he: (e) Initiates communication with a person, anonymously or otherwise by telephone, in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone which is obscene . . . ." § 18-9-111(1)(e), 8B C.R.S. (1986). That statutory provision limited the scope of the offense to harassing or obscene telephone calls, thus avoiding potential for arbitrary and discriminatory enforcement. People v. McBurney, 750 P.2d at 920.

In People v. Gonzales, 188 Colo. 272, 534 P.2d 626 (1975), the Court rejected a void for vagueness challenge to a criminal impersonation statute that provided: "A person commits criminal impersonation if he assumes a false or fictitious identity or capacity, and in such identity or capacity he: (e) Does any other act with intent to unlawfully gain a benefit for himself or another or to injure or defraud another." 1963 C.R.S. § 40-5-113(1)(e) (1971 Perm. Supp.). The Court found the statutory language sufficiently limited to permit a person of average intelligence to understand what conduct was forbidden. People v. Gonzales, 188 Colo. at 275,

534 P.2d at 628. The statute related only to conduct committed after the perpetrator assumed a false or fictitious identity.

In People by and through Longmont v. Gomez, the Supreme Court struck down as unconstitutionally vague, a part of the Longmont ordinance that contained the following provision:

> A person commits harassment if, with intent to harass, threaten or abuse another person he: (5) [e]ngages in any other conduct that in fact harasses, threatens or abuses another person. People by and through Longmont v. Gomez, 843 P.2d 1321, 1326 (Colo. 1993).

Our Supreme Court found this provision violated the notion of fundamental fairness embodied in the due process clause of the Colorado Constitution because a "person of ordinary intelligence cannot determine in advance whether particular conduct would result in criminal prosecution under [this subsection]". People by and through the City of Longmont v. Gomez, 843 P.2d at 1326. The Court found particularly offense the phrase "any other conduct" as inviting "unbridled executive discretion". Id. At 1325. The Court further found that the limiting phrase "that in fact harasses, threatens or abuses another" did not save the ordinance form being unduly vague. Id. At 1325. While the phrase does require application of an objective test, its focus on the result of conduct does not provide any advance indication of what particular conduct is in fact prohibited. Likewise, the fact that the ordinance requires that the act be done with the specific intent to harass, threaten or abuse another person did not sufficiently limit the broad sweep of the subsection. Id. At 1325- 1326.

The case law makes clear that to escape a "vagueness" challenge the statute must set forth a readily identifiable objective standard for measuring the proscribed conduct in advance. Even if a specific intent to commit the proscribed act is included in the provision, the provision must still provide adequate notice that the proscribed act is illegal.

The Castle Rock ordinance in question is even more pernicious than the one in Longmont v. Gomez, because in the Longmont case, the ordinance did not give fair notice of what "actions" were in violation of the law. Whereas, in this matter, the ordinance does not give fair notice of what language is in violation of the law.

The term "offensive language" is so vague that the speaker cannot know whether the particular language they use violates the statute or not. Webster's Third International Dictionary tells us that "offensive" means, causing "displeasure or resentment, insulting, affronting". Language that is "offensive" is illimitable in its potential interpretations according to personal or even social dictates. The ordinance does not provide fair warning of what conduct is illegal because it is virtually impossible to determine when the "offensive" line has been crossed.

The term "offensive language" is so vague that it creates the real risk (as evidenced by this case) of arbitrary and discriminatory enforcement by government personnel. For example, if Mr. Lewis had said "I hate the Castle Rock police department" would he have been arrested and subject to this prosecution? Or, if he had chosen the words, "I hate you stupid pigs"? Or, "I dislike you jerks." Would the "displeasure" created by his remark be sufficiently "offensive" to result in his prosecution. The fact that we are left to speculate as to the answer to this very

question evidences the vagueness of the ordinance. There are no objective criteria that can answer that question and we are left with the answer "maybe" or "maybe not".

This ordinance is especially dangerous because of the chilling effect the vagueness has on our freedom of expression. Because we can not tell in advance what language might "offend" our public officials or neighbors in the street, we are constantly forced to risk our liberty by speaking in public. It is the unfettered expression of ideas that supports the greatness of our democracy. It is the constant fear of prosecution for speaking unpopular ideas that might or might not "offend" others that cripples the unfettered expression of ideas.

Mr. Lewis' words may have been vulgar and inartful in the expression of his beliefs concerning the Castle Rock police department. However, speech that is "juvenile and inarticulate" is not "stripped" of its constitutional protection. People v. Vaughan, 183 Colo. 40, 514 P.2d 1318 (1973). As Justice Kelly opined in People v. Vaughan:

> The First Amendment is not the exclusive property of the educated and politically sophisticated segment of our population; it is not limited to ideas capable of precise explication. In the words of Mr. Justice Harlan:
>
> "[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." Cohen v. California, 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).
>
> The State can no more censor ideas on the basis of their intellectual or artistic merit than on the basis of their political content. Id. at 1322.

CONCLUSION FOR THE VAGUENESS SECTION

This ordinance violates the notion of fundamental fairness embodied in the due process clause of the Colorado Constitution and United States Constitutions. The ordinance does not set forth a readily identifiable objective standard allowing us to measure in advance what may run afoul of the law. Such uncertainty invites arbitrary and discriminatory enforcement and impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. The uncertainty of this ordinance also chills basic First Amendment freedoms by creating the fear of prosecution if we speak unpopular ideas that might "offend" our public officials or neighbors in the street.

As Mr. Justice Frankfurter has said "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures -- and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." Baumgartner v. United States, 322 U.S. 665, 673-674, 64 S.Ct. 1240, 1245, 88 L.Ed. 1525 (1944). [Id. at 25-26.]

"[A] function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

CONCLUSION

Based on the aforementioned arguments and authorities, Mr. Lewis submits that the ordinance in this case is both is unconstitutionally vague and overbroad. It is not suggested that this decision should come lightly or easily to this Court. Rather, this answer is compelled by the recognition of the importance of the Constitution in the role of our society.

As stated so eloquently by Justice Kennedy, in his concurring opinion in Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342, (1989) where the Court ruled the State of Texas could not punish a person for burning an American flag:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.
>
> Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.
>
> With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.
>
> For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the

offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Respectfully submitted,

RECHT & KORNFELD, P.C.

_____
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In cooperation with the ACLU Foundation of Colorado

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2003, a true and correct copy of the foregoing **Brief in Support of Motion to Declare Castle Rock Municipal Code Section 9.04.020, Disturbing the Peace, Unconstitutional** was placed in the United States Mail, correct postage prepaid, and addressed to the following:

Office of the City Attorney
City of Castle Rock
100 Wilcox Street
Castle Rock, CO 80104

Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____