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.: 03 GA 33315 Div.: Ctrm:

MOTION TO RECONSIDER DENIAL OF HEARING AND DENIAL OF MOTION TO DISMISS

COMES NOW, Daniel Lewis, by and through counsel, Daniel N. Recht of Recht & Kornfeld, P.C. and the Law Office of Jonathan D. Rosen, P.C., hereby respectfully requests this honorable Court reconsider its previous ruling denying the Defendant's request for a hearing and denial of the Defendant's Motion to Dismiss: The Constitutionality of "Fucking Pig". As grounds herein states:

1. The defense previously filed a Motion to Dismiss: The Constitutionality of "Fucking Pig". (Hereinafter referred to as "Motion to Dismiss").

2. The defense also previously filed a motion requesting a hearing so both sides would have a full and fair opportunity to litigate the Motion to Dismiss.

3. This Court recently issued a written Order denying these motions.

4. This Court's written Order is devoid of any factual findings and conclusions of law. This case concerns significant First Amendment issues and puts squarely before this Court the constitutionality of the Castle Rock ordinance of Disturbing the Peace as it is applied to Mr. Lewis.

5. This Court must hold a hearing and make factual findings on a challenge to the application of an ordinance in a given circumstance. A facial challenge to an ordinance can be resolved through legal argument and analysis without resolving factual matters of a given case. However, Mr. Lewis' previously filed Motion to Dismiss was a challenge to the applicability of the Castle Rock ordinance to the facts of his case and should be resolved only after the Court makes factual findings and then applies the law to the facts of this case.

6. Assuming the facts in the police report as the evidence the prosecution will present at trial, this charge is based on either:

a) Mr. Lewis' "yell[ing] into the microphone while raising his left arm, 'This is for all you Castle Rock Police Cops. I hate you all. Fuck the pigs.'" (Narative of Officer Ty C. Petersen, page 3 of the Castle Rock Police Department – IR Case Report); or

b) Mr. Lewis starting a song with "fuck". (Hand written statement of Coleen Swanson, Program Specialist for the Town of Castle Rock); or

c) Mr. Lewis starting a song with "Fuck those Castle Rock Cop & Park & Rec staff we ha[te] [sic] those fucking pigs." (Hand written statement of Robert Hanna, Director of Parks & Rec. for the Town of Castle Rock, listed complainant); or

d) Mr. Lewis stating "Castle Rock Police are fucking pigs". (Narative of Officer Elizabeth Micale, page 1, Supplemental #1); or

e) Mr. Lewis stating "This song is dedicated to the Castle Rock Police Department, I hate you fucking pigs." (Narrative of Officer W. Harris, page 1, Supplemental #2).

7. Although the factual distinctions between the various statements are not vast, the distinctions are not without a difference. The decisional body of case law is different for circumstances were a statement is directed at an individual officer as compared to a general statement about the police department as a government entity.

8. This Court will also need to determine whether Mr. Lewis was arrested for allegedly uttering "tumultuous" language or "offensive" language or both "tumultuous" and "offensive" language. Was his arrest solely based on the content of his utterance or was it based partially on the tenor and tone of his language. Was Mr. Lewis arrested based on facts outside of his utterance? These are just a few examples of the factual matters and legal determinations left unresolved by this Court's prior ruling that will hamper further judicial review.

9. If Mr. Lewis prevails at this level, the prosecution will assumedly seek further review. If the prosecution prevails, Mr. Lewis will most assuredly seek further review. In fact it is not uncommon for our Supreme Court to ultimately resolve the issue of whether a municipal ordinance is constitutional on its face and as applied to a given circumstance.

10. An adequate record is essential to further review. This includes both an adequate opportunity for the parties to develop on the record the facts, arguments and legal authority on the application of the law to those facts and the opportunity for the Court to make findings of fact and conclusions of law sufficient for further review. If this Court does not make sufficient findings of fact and conclusions of law, the appellate court will ultimately need to remand the case back to this Court for this purpose in a post trial proceeding. Appellate courts cannot make factual findings and it is the legal conclusions of the trial court that are subject to review on appeal.

11. Mr. Lewis is filing a Motion For Bill of Particulars simultaneously with this Motion to Reconsider. Mr. Lewis hopes that the government can help narrow the factual and legal basis for this prosecution by preparing a bill of particulars thereby resolving some of the factual and legal issues left unresolved at this time.

12. However, a full evidentiary hearing will be essential for the proper resolution of Mr. Lewis' Motion challenging the application of the Castle Rock ordinance to the facts of his case. This is a matter that should be resolved before trial pursuant to C.M.C.R. 212(f).

13. If this Court persists in its denial of a hearing, the Court should nevertheless reconsider its decision on the merits of the Motion to Dismiss.

14. Assuming the facts in the police report as the evidence the prosecution will present at trial, this charge is based on an allegation that Mr. Lewis uttered a profanity concerning the Castle Rock Police Department as the lead singer of the group "Dysarranged" during the grand opening of the Castle Rock Skate Park. The prosecution is based on the content of his speech in a public venue.

15. A prosecution under this general set of facts violates Mr. Lewis' First Amendment rights. Colo. Const. Art. II, Sec. 10, U.S. Const. Amends. I, XIV. Recognition of the delicate and vulnerable nature of these First Amendment freedoms and the fact that they "need breathing space to survive" (NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963)), mandates the courts give the closest scrutiny to state action which has the effect of curtailing or "chilling" free expression. NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Not only must a statute infringing upon expression be justified by an overriding state interest but such a statute may be applied only where there is a clear and present danger to such interest. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); West Virginia State Board of Education v. Barnette, supra.

16. In Ware v. City and County of Denver, 511P.2d 475, 182 Colo. 177 (1973), our Supreme Court held that a prosecution in similar circumstances (Mr. Ware yelled "fuck you!") was unconstitutional. The facts set forth in the Ware decision are as follows:

> The defendant, a non-student, was among an audience of over 200 persons at a meeting held on the University of Denver campus to hear representatives of the United States Department of Justice. It was known in advance that the subjects to be discussed would be controversial and that dissent might be expressed by the audience.
>
> The meeting began with short speeches by the Justice Department representatives. The meeting was then opened for questions from the audience. Members of the audience inquired as to the policies of the national administration. Answers given were unsatisfactory to a number of those in the audience, and some members of the audience became angry. There were numerous outbursts by the audience including laughter, shouting, and utterances of the quoted words and other unseemly expressions. These outbursts were in response to statements by the Justice Department representatives. There was no evidence that the defendant's comment -- or any of the comments -- provoked anyone into any form of physical response, except that two persons near the defendant left, stating that they did not like the language.
>
> It is apparent from the record that the outbursts of the defendant and others were responses to political opinions and the voicing of contrary opinions. There was no breach of the peace and there is nothing in the record to indicate that the defendant "calculated to provoke a breach of the peace" by the utterance here in question.
> Ware v. City and County of Denver, 511 P.2d at 475.

17. Much like in Ware, the record is devoid of any evidence that Mr. Lewis' alleged utterance provoked anyone into any form of physical response. Likewise, the Ware Court noted that two people "did not like the language" and left the meeting. In this case, it is likely that one or more persons "did not like" Mr. Lewis' alleged statement. But without more, such displeasure is not illegal.

18. And in both Ware and this case, there is no indication that Mr. Lewis intended to provoke a breach of the peace, or incite a riot or other violent reaction. See also, Feiner v. New York, 340 U.S. 315, 321, 95 L. Ed. 295, 71 S. Ct. 303 (1951) (Court upheld conviction where defendant's statements likely to incite a riot). There is no evidence in the record to indicate Mr. Lewis's alleged statement was likely to produce a clear and present danger of a serious substantive evil that rises above public annoyance or unrest. The First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is" `shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.' " City of Houston v. Hill, 482 U.S. 451, 461-63 (1987) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)); see also Lewis v. City of New Orleans, 415 U.S. 130, 132-134 (1974).

19. In Hill, the appellee shouted at police officers who had approached his friend to "pick on somebody your own size." Id. at 454. Hill was arrested 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. Although Hill was acquitted, he brought an action seeking to strike the ordinance as unconstitutional on its face. Id. The Supreme Court agreed, emphasizing that "[t]he

Constitution does not allow such speech to be made a crime," and that "[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.

20. The facts in this case are even more compelling because the prosecution is based on the content of Mr. Lewis' speech in a public venue. Mr. Lewis' alleged utterance was in a public forum, much like the public speaker on a soapbox in a public park. It is these public venues that the government's ability to curtail the freedom of speech is most limited.

21. For example, in Cannon v. City and County of Denver, 998 F.2d 867 (10th Cir. 1993) an anti-abortion protester brought an action under 42 U.S.C. 1983 against the City and County of Denver and individual police officers who arrested and incarcerated him for approximately eight hours for disturbing the peace when they were carrying signs reading "The Killing Place" outside a Denver abortion clinic. The Court stated:

> Public places, such as the sidewalk involved here, and streets and parks, historically associated with the free exercise of expressive activities, are considered without more to be "public forums"; in such places, the government's ability to permissibly restrict expressive conduct is very limited. United States v. Grace, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983). But cf. Brown v. Palmer, 944 F.2d 732, 739 (10th Cir. 1991) (en banc)
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> The record before us shows that the activity which the police found objectionable was not the picketing itself but the specific content of the protestors' signs which read "The Killing Place". . . .
>
> Thus the officers' actions here raise a serious question whether they violated the paramount principle that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); see also Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980). "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Cannon v. City and County of Denver, 998 F.2d at 871-72.

22. The only compelling state interest our courts have recognized as justifying this type of infringement on First Amendment rights is the avoidance of violence and breach of the peace which may be threatened by the use of provocative "fighting words." "It is clear that 'fighting words' -- those that provoke immediate violence -- are not protected by the First Amendment." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982).

23. The alleged statements by Lewis simply do not constitute "fighting words". (See discussion on Ware v. City and County of Denver above). Also illustrative is Cohen v.

California, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), where the Supreme Court reversed the conviction of a man who had entered a courthouse wearing a jacket that read "Fuck the Draft". The Court held that the words on the jacket did not constitute fighting words. Rather fighting words were "those personally abusive epithets which, when addressed to the ordinary citizen, are as, a matter of common knowledge, inherently likely to provoke violent reaction." Id. at 20. The Court said that while the obscenity displayed in relation to the draft was not uncommonly "employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'" Id. (quoting Cantwell, 310 U.S. at 309). The Court noted that "words 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." Id. at 26.

24. The alleged statements of Mr. Lewis are not fighting words. Even if the words aroused violent feelings or aroused some people to anger, that is simply not enough to amount to fighting words in the constitutional sense. "[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). It is only where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot" that the police may intervene to prevent a breach of the peace. Feiner v. New York, 340 U.S. 315, 321, 95 L. Ed. 295, 71 S. Ct. 303 (1951).

25. Mr. Lewis' alleged statements are not stripped of their constitutional protections simply because the words used may be considered vulgar, profane, juvenile or inartful. For example, in People v. Vaughan, 183 Colo. 40, 514 P.2d 1318, the Court was analyzing a flag anti-desecration statute where the defendant wore a pair of blue jeans on the seat of which a portion of the American flag had been sewn. The Court stated:

> The ideas expressed by defendant's conduct may seem to some to be juvenile and inarticulate, and perhaps his actions are subject to interpretations other than we have given, but this does not strip his "speech" of constitutional protection. 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.

26. "[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).

27. As the Supreme Court said in Cohen:

> We cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much

> for their emotive as their cognitive force. . . . Indeed, 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.]

28. It is equally important for this Court to understand that Mr. Lewis' alleged statements were not directed at any particular police officer as a personal verbal assault. Rather, the statements are a classic expression of displeasure with a government entity. There is no difference between criticizing "the draft" and criticizing "the police department". Both are governmental entities that many citizens object to on some level. Many persons value the draft as a welcome component of our citizen's duty to protect our country. However, not all citizens share that point of view and our constitution, if it stands for anything, stands for the proposition that a view point, even a minority view point may be freely expressed in a public forum. Likewise, many persons value the services provided by our police officers. However, not all citizens share that point of view. Those who do not share the majority point of view should not, in a free society, fear prosecution because they express their opinion.

29. Even if this court believes Mr. Lewis was criticizing a particular police officer, the United States Supreme Court has recognized that the First Amendment protects a significant amount of verbal criticism and challenges directed at police officers. Houston v. Hill, 482 U.S. at 461. The freedom of individuals to oppose or challenge police action verbally without thereby risking arrest is one important characteristic by which we distinguish ourselves from a police state. Id. at 462-63. Thus, while police, no less than anyone else, may resent having obscene words and gestures directed at them, they 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.

30. No less well established is the principle that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows - or should know - that much. See, Houston v. Hill, 482 U.S. at 462.

31. As distasteful as this Court may find Lewis' alleged utterance to have been, it was not illegal; criticism of the police is simply not a crime. Houston v. Hill, 482 U.S. 451, 461-63, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987).

WHEREFORE, Daniel Lewis, hereby respectfully requests this honorable Court reconsider its previous ruling denying the Defendant's request for a hearing and denial of the defendant's Motion to Dismiss: The Constitutionality of "Fucking Pig" and set this matter for a full evidentiary hearing or in the alternative grant the Defendant's Motion to Dismiss.

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 **Motion to Reconsider Denial of Hearing and Denial of Motion to Dismiss** 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

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