

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

March 12, 2012

The Honorable Ariadne J. Symons
Superior Court of California
County of Santa Cruz
Santa Cruz Courthouse
701 Ocean Street
Santa Cruz, CA 95060

Re.: *The People of the State of California v. Becky Ann Johnson et al.*
Case No. F22194

Dear Judge Symons:

The Reporters Committee for Freedom of the Press (“Reporters Committee”) and National Press Photographers Association (“NPPA”) respectfully request that the Court consider the following letter brief in its deliberation of the above-captioned case, specifically as to the charges against defendant Bradley Stuart Allen. Mr. Allen is a photojournalist and NPPA member whose involvement in alleged criminal activity amounted to no more than coverage of a newsworthy event, namely police response to a demonstration. Because the submission of an *amici curiae* brief at the non-appellate level is procedurally unusual, the Reporters Committee and NPPA are providing this Court with relevant information in a less formal format. A copy of this correspondence was provided to counsel for the government and the criminal division of the clerk’s office so that this document may be made part of the official docket.

The Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. NPPA is a nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Since 1946, NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to visual journalism.

As advocates for the rights of the news media and others who gather and disseminate information about issues that affect the public, the Reporters Committee and NPPA request that we be permitted to provide the Court with information about a journalist’s right to collect news, and express our concern about the severe penalties imposed against Mr. Allen in his exercise of that right. Given the U.S. Supreme Court’s recognition that newsgathering is constitutionally protected, we respectfully urge the Court to grant Mr. Allen leniency in adjudicating the harsh criminal offenses he

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for purposes of identification.*

faces as a result of those activities. Specifically, we ask, in the interest of justice, that the charges against him, or at a minimum the felony charges, be dismissed.

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Newsgathering is constitutionally protected.

It is important to begin by noting that the First Amendment's guarantee of press freedom is meaningless if journalists do not possess a concomitant right to gather the news. In *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), the U.S. Supreme Court recognized that the First Amendment's protection of a free press carries with it protection for essential newsgathering. There can be no doubt that newsgathering, as well as the dissemination of news, deserves protection under the umbrella of the First Amendment. "News must not be unnecessarily cut off at its source," Justice Stewart wrote in 1972, "for without freedom to acquire information the right to publish would be impermissibly compromised." *Id.* at 728 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting); *see also Zemel v. Rusk*, 381 U.S. 1 (1965) (recognizing that a right to gather news must exist in some form). Moreover, newsgathering is essential to preserving a free press and the free flow of information, as "freedom of the press can be no broader than the freedom of reporters to investigate and report the news." *See* Department of Justice Policy with Regard to the Issuance of Subpoenas to Members of the News Media, 28 C.F.R. § 50.10 (1998).

Although the statutes the defendants in this case are accused of violating are intended to serve important government interests, they cannot be exempt from First Amendment protection. No statute exists outside the parameters of the Constitution. *See Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) (holding that no state is "free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."). Application of these laws in the prosecution of a journalist engaged in the constitutionally protected act of newsgathering demands careful balancing of competing interests because constitutional freedoms "are delicate and vulnerable, as well as supremely precious in our society." *See Branzburg*, 408 U.S. at 738 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" and must take care not to apply statutory provisions in a manner that violates constitutional rights. *Button*, 371 U.S. at 433 (citation omitted). As such, courts considering punishments for exercise of the right to gather news should weigh the public interest in obtaining information against competing interests.

Applying this balancing test to this case, it is important to keep in mind that nowhere is the right of journalists to gather news more compelling than when they are covering the actions of governmental officers, including the police in the public performance of their duties. It is within this realm that members of the news media fulfill their constitutionally protected watchdog role of examining the official actions of public servants. As a federal appellate court relying on Supreme Court jurisprudence recently stated:

Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs. Moreover . . . freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

Glik v. Cunniffe, 655 F.3d 78, 82–83 (1st Cir. 2011) (citations and internal quotation marks omitted) (affirming denial of qualified immunity to officers on arrestee's First and Fourth Amendment claims); *see also* U.S. Department of Justice, Statement of Interest, *Sharp v. Baltimore City Police Department*, No. 1:11-cv-02888 (D. Md. filed Oct. 11, 2011) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). The reach of the First Amendment's protection extends beyond the right to gather such information — it also prohibits government officials from "punish[ing] the dissemination of information relating to alleged governmental misconduct." *Id.* at 1035; *see Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (speech relating to alleged governmental misconduct "has traditionally been recognized as lying at the core of the First Amendment").

In this case, the manner in which the protestors demonstrated their opposition to the country's economic structure and the manner in which law enforcement responded to this demonstration and negotiated with the protestors in an unsuccessful attempt to effectuate their removal are critically important and newsworthy events. The protest and government response could only be meaningfully covered by the presence of journalists at the event.

It is difficult to find that Mr. Allen's presence as an additional person on the property, there merely to cover the government's response to the demonstrators' acts of protest, increased any damages caused by the trespass or other unlawful conduct of the protestors. One of the hallmarks of journalism is independence — the freedom from obligation to any interest other than the public's right to know — and there is nothing to indicate that Mr. Allen aided, abetted, encouraged or incited the protestors; nor did he in any other way participate as a protestor. Moreover, as an outside observer reporting on the event, he did not "occupy" the premises in the same sense as those who remained on the property for several days did. Rather, he was engaging in constitutionally protected newsgathering — an activity that ensures that the free flow of information to the public so vital to democracy remains uninhibited. As Justice Sutherland wrote in *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936):

The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Justice Sutherland recognized that “an informed and enlightened public opinion was the thing at stake” when statutes interfere with First Amendment freedoms. *Id.* at 247. And if the First Amendment freedom of the press means anything, surely it encompasses a journalist’s right to be free from the threat of serious criminal charges for simply reporting on the activities of those who did engage in the alleged unlawful conduct.

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Technical violations of criminal statutes do not negate the need to balance First Amendment interests.

At times, journalists may, as a last resort, find it necessary to employ newsgathering techniques that technically violate statutory provisions in order to obtain information of compelling public interest. Strict application of these statutory provisions to newsgathering, even if they are otherwise valid, can unconstitutionally burden the right of journalists to gather the news. *See Lee v. The Columbian*, 16 Media L. Rep. (BNA) 1261, 1264 (Wash. Super. Ct. Clark County 1989) (rejecting accusation that a journalist violated telephone harassment law because journalist’s calls were protected as “routine newsgathering” and liability based on newsgathering “would constitute an unwarranted interference in the newsgathering process in violation of the First Amendment to the United States Constitution”).

At least one court has held that when the interests protected by tort laws were not adversely affected by a journalist’s newsgathering actions, which themselves might be construed as tortious, the journalist would not be liable for the violation. *Desnick v. American Broadcasting Cos., Inc.*, 44 F.3d 1345 (7th Cir. 1995). The same principle should apply when newsgathering implicates criminal laws, as one dissenting judge found in an Oklahoma case where nine journalists were charged with trespassing while covering a protest. The judge noted that the journalists posed no threat to public order or to the private property rights that the criminal trespass statute aimed to protect and concluded that prosecuting the journalists was unconstitutional: “I would not permit our criminal trespass statute to be used illegitimately and in this manner in order to prevent the public from knowing what their government is doing on quasi-public property. It is inconceivable to me that a contrary conclusion could be sanctioned in our democratic society.” *Stahl v. Oklahoma*, 665 P.2d 839, 849 (Okla. Crim. App. 1983) (Brett, J., dissenting), *cert. denied*, 464 U.S. 1069 (1984).

Judge Brett did not conclude that journalists could claim an absolute right to cross any property lines they chose in pursuit of a news story. Rather, he recognized that the public

interest demands that the constitutionally protected act of newsgathering — essential to a free press — be taken into account when statutory prohibitions are applied to members of the news media. He recognized that a statute criminalizing certain behavior “cannot be used arbitrarily and unreasonably to exclude the press from their constitutionally protected news gathering role” when the government “does not present a legitimate or important countervailing interest.” *Id.* He further recognized that in this case, the journalists had not interfered with a landowner’s right to the use and enjoyment of private property. *Id.* at 848.

Under certain circumstances, the only available means to test law enforcement is to directly challenge the barriers imposed by criminal statutes. The reporters in *Stahl* trespassed because, otherwise, their reports on a public controversy would have been limited to statements by the opposing parties to the controversy. Similarly, the following examples illustrate how journalists seeking information about matters of significant public interest and concern may have to resort to technical violations of a law in order to gather that information first-hand:

- In December 2005, two freelance photojournalists were arrested while covering the police’s response to protestors at a Nazi rally in Toledo, Ohio. One of the journalists was taking photographs from an enclosure set up specifically for members of the news media located more than 200 feet from the rally and 100 feet from demonstrators congregated to protest the rally. But police said the journalist did not have the temporary press credentials issued by the department to local media to cover the event and arrested and charged him with criminal trespass. The other photojournalist was arrested and charged with failure to disperse after he photographed police officers riding horses through the crowd of protestors more than an hour before the rally began. Both men stood trial, during which one of the journalist’s attorney alleged that the police targeted them because their photos captured an overly aggressive response to the anti-Nazi protestors. The jury acquitted the photojournalist charged with failure to disperse but convicted the other of criminal trespass. *Toledo v. Sauger*, CRB-05-24002 (Toledo Mun. Ct. Sept. 28, 2007); *Toledo v. West*, CRB-05-24018 (Toledo Mun. Ct. Sept. 28, 2007). An Ohio appellate court, however, overturned the latter’s conviction after it concluded that the journalist’s right to a speedy trial had been violated. As such, the court, on mootness grounds, declined to consider his additional argument that violation of his constitutional right as a newsgatherer likewise warranted reversal of the conviction. *Toledo v. Sauger*, 901 N.E.2d 826 (Ohio Ct. App. 2008).
- Recognizing that simply approaching election officials for information about voting fraud would not tell the whole story, a journalist in Idaho successfully registered and voted five times in the same school district trustee election — casting blank ballots all but one time — and then wrote an article about the voting abuse. As a result of the journalist’s allegedly unlawful activity, the infirmities of an electoral process were exposed both to the public and to the government itself.

But the article also alerted authorities to the journalist's activities, and he was charged with registering to vote illegally. His editor also was charged with inducing him to break the law. Shortly before trial in October 1983, the judge dismissed the complaints. *Idaho v. Hail*, No. 16075 (Idaho Dist. Ct. Shoshone County complaint dismissed Oct. 12, 1983); *see also* The Reporters Committee for Freedom of the Press, *Ballot Box Scheme Nets Charges Against Reporters and Editors*, *The News Media & The Law*, January–February 1984, at 48.

- In 1977, the news director at WFMY-TV in Greensboro, N.C., noticed that a local toy store openly displayed fireworks on a sales counter. After verifying with law enforcement officials that it was illegal to use or sell fireworks in North Carolina, except at public fairs or carnivals, the news director sent a reporter and a cameraman to the store to prepare a news report about the availability of the illegal fireworks. The journalists purchased fireworks, which they then took to sheriff's deputies, who arrested the toy store's owner for illegally possessing and selling fireworks. The journalists filmed the arrest, and WFMY featured the footage on its evening news broadcast. The journalists subsequently were charged with illegally purchasing and possessing fireworks. Their attorney asserted that they had not intended to violate the law, but rather had intended to expose possible violations of the law. *See* The Reporters Committee for Freedom of the Press, *Newsmen Arrested for Fireworks Sales Probe*, *The News Media & The Law*, April 1978, at 44. A jury agreed in March 1978 and found the journalists not guilty. *State v. Garner*, No. 77 CR 15107 (N.C. Super. Ct. Crim. Div. Davidson County Mar. 15, 1978); *State v. Smithwick*, No. 77 CR 15106 (N.C. Super. Ct. Crim. Div. Davidson County Mar. 15, 1978).
- Shortly after the bombing of Pan American Flight 103 in 1988, two journalists working for a French television network attempted to evaluate the safety of international flights by testing airlines' security measures. The journalists tried to ship packages containing fake bombs made of modeling clay, wires and an alarm clock from New York to Europe via flights on Pan Am, Trans World Airlines and Air France airplanes departing from John F. Kennedy International Airport. *See* The Reporters Committee for Freedom of the Press, *Air Security 'Tests' Net Arrests*, *The News Media & The Law*, Winter 1989, at 45. A TWA guard who discovered one of the fake bombs notified the Port Authority Police Department, which seized that box, as well as another checked at the Pan Am ticket counter. The package intended for the Air France flight was not found. *Id.* The journalists were charged under 18 U.S.C. § 371 with conspiring to lie to airport personnel about the contents of the packages, but the journalists asserted through their lawyer that they never intended to violate the law. *United States v. Chaillou*, No. 89-11M-2 (E.D.N.Y. complaint dismissed Aug. 16, 1994); *United States v. Frankel*, No. 89-11M-1 (E.D.N.Y. complaint dismissed Aug. 16, 1994).
- Also shortly after the Pan Am Flight 103 bombing, an ABC reporter and cameraman researching a similar story on airport security were arrested for

trespassing after they entered a restricted area on the tarmac at Kennedy Airport. The charges against both journalists ultimately were dropped. *New York v. Santana*, No. 9-Q-064698 (N.Y. Sup. Ct. complaint dismissed Feb. 1, 1989); *New York v. Wallace*, No. 9-Q-064699 (N.Y. Sup. Ct. complaint dismissed Feb. 1, 1989).

- More recently, a student photojournalist covering an “Occupy” demonstration in Rochester, N.Y., was arrested for trespassing and violation of a municipal code that prohibits being in the public park after hours after the journalist refused to leave the park, which, according to police officers, was closed at the time. The judge dismissed the charges under a state criminal procedure law that authorizes dismissal “in the interest of justice . . . when, even though there may be no basis for dismissal as a matter of law upon any ground . . . such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice.” *The People of the State of New York v. Acuff et al.*, No. CR011-343597 (Rochester City Ct. Monroe County Jan. 12, 2012).

In all of these situations, journalists undertook activities that technically violated the law. However, their acts did not cause, increase or contribute to the harm the relevant statutes intended to prevent. Instead, the reports revealed information of vital interest to the public that could not have been obtained any other way. Without making that initial decision to step beyond statutory bounds in pursuit of stories of significant public concern, these journalists would have failed in their roles as watchdogs over official government action.

As this case demonstrates, events of significant public interest often occur on private property. And journalists, including Mr. Allen, who technically violate laws designed to protect property interests in order to exercise their constitutionally protected newsgathering right provide an enormous public service to the citizens of their communities, who have a right to know what is happening there. We believe it more than disingenuous for prosecutors to use the photographs Mr. Allen took during his coverage of these newsworthy events as proof that he committed the alleged crimes and participated in a conspiracy, particularly given that other journalists present on the premises were not similarly charged. The government’s assertion that he failed to cooperate with police by not informing them in advance of the intentions of the protestors runs diametrically opposite to the purposes and obligations of a journalist. Indeed, it appears the prosecution wishes to punish Mr. Allen for not acting as an arm of the government, which also runs counter to the very purpose and protections provided to journalists under the California Evidence Code Section 1070.

Rather, Mr. Allen’s meaningful coverage of the Santa Cruz Police Department’s response to public opposition to the country’s economic structure, possible only through his presence at the event, guaranteed that the free flow of information to the public vital to

our system of self-government remained uninhibited. A free, unrestrained news media are essential to informing the enlightened public opinion that is the hallmark of democracy.

For the foregoing reasons, we respectfully urge the Court, in the interest of justice, to grant Mr. Allen leniency. Specifically, we ask the Court to dismiss the charges, or at the very least the felony charges, against him.

Sincerely,

Lucy A. Dalglish
Executive Director
The Reporters Committee for Freedom of the Press

On behalf of:

Mickey H. Osterreicher, Counsel for National Press Photographers Association

cc: Clerk, Criminal Division, Superior Court of California, County of Santa Cruz
Assistant District Attorney Rebekah W. Young
Ben Rice, Counsel for Defendant Bradley Stuart Allen