INDEX OF CONFERENCE MATERIALS INCLUDED IN PDF

THE PEOPLE'S LAW PROJECT - MASS DEFENSE IN A SMALL MARKET
2009 NLG Conference Workshop
Friday, October 16, 2009, 8:30-9:45 AM
Seattle, Washington

AGENDA

THE PEOPLE'S LAW PROJECT - MASS DEFENSE IN A SMALL MARKET

2009 NLG Conference Workshop
Friday, October 16, 2009, 8:30-9:45 AM
Seattle, Washington

Moderator: Josh Norkin

I. Shannon Carson
- Mass defense committee
- Legal observer committee
- Logistics committee
- Know Your Rights trainings

II. Taylor Pendergrass
- FOIA litigation
- Pre-convention efforts
  - Open records requests
  - Negotiations with the city
  - KYR booklet
- Post-convention civil litigation

III. Dan Spalding
- PLP's organizational structure
- Comparison of recent mass defense projects

IV. Brian Vicente
- Media strategy

V. Jes Jones
- Legal support of arrestees
- Attorney recruiting and support

VI. Charlie Nadler
- Criminal Litigation

VII. Josh Norkin
- Closing comments
- Q&A

Biographies of 2009 NLG Conference Panel Members

Shannon Carson is a third year law student at the University of Denver. She graduated from New York University with a BA in Journalism, after which she moved to Denver to go to law school at Denver University. She was recently elected to the Colorado NLG's Steering Committee. She spent the past summer defending misdemeanor clients as a student intern with the Colorado State Public Defender's office.

Jes Jones graduated from Northeastern University in 2007. She moved to Colorado and joined the Colorado Public Defender's Office in August of 2007. She has been a member of the NLG since her first year of law school and was recently elected President of the Colorado NLG Chapter.

Charles Nadler was born, raised and educated in New York City. He first became a member of the NLG when he entered law school in 1982. Before law school he was a philosophy professor in Ellensburg, Washington, and union organizer of professors in Iowa, where he led the first strike at a theological seminary since the University of Paris in the Middle Ages. After law school, he and his wife started their own firm representing juveniles and criminal defendants in Iowa. He was a cooperating attorney for the ACLU, and President of the Iowa Affiliate for three years. During this time, he practiced bankruptcy, social security, labor law (union side only) and employment law. At the time he moved to Colorado in 2005, over 75% of his practice was federal criminal defense. He is a member of the Colorado NLG's Steering Committee.

Joshua Norkin recently graduated from Denver University's Sturm College of Law and currently practices criminal defense in Denver, Colorado. He is a member of the Colorado NLG's Steering Committee. He has worked as a congressional staffer in Washington, done outreach with migrant farm workers in rural Colorado, worked for the non-profit Rocky Mountain Immigrant Advocacy Network, and has studied and traveled abroad in Australia, Spain, Costa Rica and Cuba.

Taylor Pendergrass graduated from the Univ. of Colorado School of Law in 2004. He is currently a staff attorney for the ACLU of Colorado. He joined the NLG during law school and served as National Vice President of the NLG from 2003-2007. Prior to joining the ACLU, he worked as a farm labor advocate and organizer in Oregon and North Carolina after his first and second years of law school. He also worked as a volunteer attorney with the Rocky Mountain Immigrant Advocacy Network and as a contract attorney with Boulder County Legal Services.

Dan Spalding is a co-founder of the Midnight Special Law Collective, an Oakland-based non-profit that facilitates legal trainings for activists and community groups, and provides legal support for mass actions. In that capacity, Dan has helped coordinate legal support for such protests as the A16 World Bank/IMF demonstrations in DC in 2000; the Bay

Area anti-war protests in 2003; and the DNC and RNC protests in 2008. A former Legal Worker Vice President, he works as an ESL teacher to adults in Oakland.

Brian Vicente is an active defense attorney in Colorado and serves as executive director of Sensible Colorado, a non-profit working for effective and humane drug policy in Colorado. He currently serves as the chairman of the Denver Mayor's Marijuana Policy Review Panel, coordinates the Colorado Bar Association's Drug Policy Project, and serves as director of the People's Law Project, a legal collective defending First Amendment rights at the 2008 Democratic National Convention.

The following article was published in the Spring 2009 edition of *Guild Notes

DNC TRIALS IN DENVER A SUCCESS

By Joshua Norkin

On the first night of the Democratic National Convention, August 25, 2008, the Denver Police Department arrested over one hundred people, including innocent photographers, members of the press, legal observers and bystanders. Each was uniformly charged with three municipal ordinances: Obstruction of Streets, Interference, and Failure to Obey a lawful order.

That same night, the Colorado Chapter of the National Lawyers Guild, under the banner of the People's Law Project (PLP), had attorneys working round the clock to advise those being held in a makeshift police detention facility in downtown Denver. These attorneys were successful in advising nearly all one hundred arrestees, and approximately sixty of those individuals would later ask for jury trials. It was an amazing feat, and in the following months the People's Law Project worked hard to make sure that every individual who wanted free legal representation would have it.

The ensuing trials were a striking achievement. Over the course of six months the legal community in Denver came together under the PLP banner and succeeded in having forty of the sixty cases set for trial result in acquittals or dismissals. Defense counsel also managed to have two of the three charges dropped in every case. Despite the instance of the police in probable cause videos, nobody was every given a lawful order to disperse.

These victories can be attributed to a sound organizational structure of dedicated individuals and a carefully thought out "mass defense" strategy. Involved attorneys met at least once weekly during the trials and the PLP organized informational sessions and attorney round tables. Organizers also managed a fully functioning list-serve and website. Such a high level of involvement allowed attorneys to build on mistakes, fine tune strategies, share cross-examination techniques and perfect motions. Because each case was essentially the same fact pattern, with slight variation, attorneys were able to work together to perfect a winning trial strategy; the results were overwhelming.

The trials themselves were inconceivable to the casual onlooker as well as many clients. Those in the courtroom found it hard to believe that prosecutors were willing to try so many individuals with so little evidence. Prosecutors worked hard to convict individuals based on a theory of guilt by association. Everyone was painted as an "anarchist" who was determined to raze downtown Denver. Defendants were accused of throwing missiles, vandalism and even filling bags full of urine and feces to throw at the police. However, no defendant was ever charged with those crimes and no evidence was ever introduced to suggest that those activities had even occurred.

Defense attorneys worked hard to counter the false perceptions that were being fed to the jury. For many, the theory of defense was to insist that the defendants were

being tried as individuals, and not as a group. This was supported by the lack of any individualized evidence. Many defendants faced a trial in which prosecutors had a admittedly circumstantial case.

Critical testimony was given by Scott Humphreys and Cecil Bethea. A student at University of Colorado Boulder, and a trained NLG legal observer, Humphreys provided a critical thirty minute video tape that one Judge called "the smoking gun". Unlike the several police videos that were turned over in discovery, Humphreys' video had a time stamp and ran continuously from before the arrest until the very end. Humphreys' was able to testify to the fact that police had surrounded people, blocking egress, within just two minutes. The video directly contradicted police testimony that protesters were violent and threatening toward the police and free to come and go for up to an hour.

Bethea's story was perhaps the incidents most compelling. Bethea, in his mid-eighties, was on his way home from the library when he encountered a crowd that he described as a "Butch Cassidy look-alike contest". By the time he reached the end of the block the police, dressed like "armadillo man" had already shut-down the entire street in both directions. Bethea had nowhere to go. So he waited and then eventually sat down when commanded to do so by officers. He was then approached by two officers from behind; they lifted him up off the ground by forcefully pulling his arms behind his back. Bethea was in pain. But it got worse. Bethea was then brought to the mass arrest area where he was searched. Eventually, one of the officers realized Bethea must not have been part of the protest. Bethea later commented that "I didn't know the Constitution had any age limits".

The Colorado Guild is currently working to build its membership base following the success of the PLP. Colorado hopes to establish another working project in the areas of immigration or police brutality over the course of the next year.

People's Law Project – DNC Documents

The following pages contain a sample of the Arrestee Intake Form used during the DNC along with a model phone script that was used by the volunteers who answered the phones.

Other forms that were used during the DNC include:

- Evidence Intake Form
- Jail Support Form
- Out-take Form
- Police Misconduct Report Form
- Witness Statement Form

Current versions of these forms can be found at:

www.midnightspecial.net/materials/actionlegal.html

Date: Time: Your name:

ARRESTEE INTAKE FORM

One form per arrestee ***(*) is important*** Possible duplicate? Y

Personal

* First name	
* Exact last name	
Nickname	
* Date of birth	
Gender ID	
Phone	
Email	
Address	
City, state, zip	

Medical

* Med conditions	
Medications and dosage/instruct.	
Doctor name	
Doctor phone	
Notes	

Outside Support

*Affinity group (AG)	
(AG) support person	
Phone	

Arrest

* Do you want to see a lawyer?	Y / N
* Do you want to bond out?	Y / N
Arrest date	
Time of arrest	
Location	
Charge(s)	
Arresting officer	
Badge #	
Incident ID#	
Citation #	
Witness name	
Witness phone	

Jail

Facility	
Booking #	
Exact location	

Court Dates

Location		date
Location		date

Lawyer

Name	
Agency	
Phone	

Notes

Calls from the street

Answer the phone by saying “People’s Law Project, this call may be monitored.”

Write all this information into the notebook at your call station:

- Date and time
- Name of caller
- Exact location of caller
- Call back number (email & landline #, too, if it's an extreme situation)
- The message
    - If they're taking too long, let them know we need to keep the phone lines open

For calls regarding **police brutality** or **harassment**:

- Briefly, what’s happening?
- Where exactly are you? How close are you to the incident?
- Are any Legal Observers or media seeing it? How many? If not, can you direct their attention to it?
- Are there any medics? Do you need the number for the Medical Team?
- Is the victim(s) detained or arrested? (Held down, behind police lines, handcuffed?)
- How many police are present? (Estimates are ok)
- Can you see the names or badge numbers of police? Have you recorded or can you record this information?
- Can you get the names and contact info of Legal Observers, media, medics, and other witnesses? If you can’t write them down, can you dictate them to me over the phone?
- You can get a Police Misconduct Report from a Legal Observer, or download one from our website and mail it in.
- ***[Tell a core person as soon as you hang up]***

Make a note as to your perceptions of the witness — did they sound upset? scared? angry?

Highlight all entries in your notebook regarding police misconduct or brutality in blue.

When police are arresting people

Answer the phone by saying “People’s Law Project, this call may be monitored.”

- How many people are being arrested? Count or estimate numbers.
- Are any Legal Observers or media seeing it? How many? If not, can you direct their attention to it?
- Are the police using any force? (shoving, tackling, pain compliance holds)
- Can you find out if the arrestees know the legal hotline number? Do you see it written on their arms or legs? Can you get close enough to tell them the number?
- Can you hear if they're saying, "I am going to remain silent, I want to see a lawyer"? Can you get close enough to suggest that they do this?
- Are any arrestees using non-compliance (going limp, etc)?
- Are there any medics? Do you need the number for the medics?
- Are there buses, vans, or other police vehicles nearby?
- Is the situation escalating?
- *[Fill out Arrestee Intake Forms for **each** individual who gets arrested – even if we only have partial identifying info for them (like just first name)]*
- ***[Tell a core person as soon as you hang up]***

Highlight reports of arrests in your notebook in yellow.

Calls from jail

All information received from people calling from jail for the first time should be recorded on the Arrestee Intake Form. Ask the questions with stars (*) next to them first. Put this form in the Arrestee Intake Form box. This is extremely important for keeping track of arrestees.

Answer the phone by saying “People’s Law Project, this call may be monitored.”

- What's your name?
- Are there any medical or other emergencies? ***[If yes, tell a core person as soon as you hang up and highlight in pink.]***
- Is this your first call to the legal hotline?
  1. If yes, then continue down this script.
  2. If no, ask if they have any updates on their situation. If they do, then find their arrestee form (if you have time) and take updates on it. If you can't find it, or if the phones are ringing off the hook, write down their updated information on another arrestee intake form. **Check the box for “Possible duplicate?” and write in big letters at the top of the form, “UPDATED INFORMATION FROM JAIL [date and time]”)**
  3. If they've called before and have no updates, skip to the "Emotional support" section below.
- Were you arrested with others or by yourself? Does anyone need immediate attention? Has anyone been separated from the group?
- How many people are with you? What are their names and booking numbers?
- Do you or anyone else there have a designated legal support person? Who are they and have they been contacted? (Write the name and contact information under “(AG) Support Person” in the Personal section)
- Have you asked to see a lawyer? Who have you asked? What did they say? Do you know the name(s) and badge number(s) of the person(s) you asked?
- Have the cops tried to question anyone? Has everyone invoked their rights by saying the Magic Words — "I am going to remain silent. I want a lawyer."?
- Have you discussed with others what you want to do? (Bond out, stay in jail until arraignments, etc.)
- Do you feel you have been mistreated in any way?
- Do you feel like you are in special circumstances and need to cite out right away?

All calls from jail are recorded. Certain things **should not** be discussed over the phone:

— Immigration status of a particular person
— Individual involvement in event that led to arrest

— Any admission of crime or intent to commit a crime

If someone begins to talk to you about these things, remind them again that the call is probably recorded. Suggest they wait until they see a lawyer to try to explain what's going on or certain problems they may have. Tell them that we will make extra effort to get lawyers in to see people who have special circumstances that may cause them to be targeted.

Don't promise that we can get them a lawyer right away, only that we're doing everything we can.

Answer questions, but don't spread rumors.

Again, if anyone needs emergency help, tell a core person as soon as you hang up and highlight in pink.

When people call from jail for **emotional support:**

- Listen.
- Let them know generally we are doing what we can — sending lawyers to the jails, talking to the prosecutor's office, etc.
- Let them know about other support — people calling the jails, court, mayor, etc. to demand the arrestees' release; jail vigil outside (or jail vigil being organized); press conferences and high media interest.

When people call about **mistreatment in jail:**

- Ask if they need or if they have requested medical attention.
- Ask about identification/badge numbers, names, physical descriptions of police or guards; ask them to pay close attention to these things in the future.
- Take detailed notes on what they're telling you in your log. Make a note next to the person's name on the list of arrestees of time, date and your name.
- Tell them that we will have Police Misconduct Reports available when they get out and that they should fill one out then.
- *[Highlight police brutality in blue.]*

If they are calling from jail with **specific legal questions:**

- Remind them that you are not a lawyer, but that the People's Law Project is working with lawyers.
- If the office isn't too busy, ask a core person to talk on the phone with them.
- If they really need the answer and the core people in the office are too busy, write down the questions and tell them you will get the answer(s) as soon as possible or try to get a lawyer to come and answer the question directly.

If they are calling from jail with **messages for lawyers:**

- If they have **sensitive information** or messages that can only be given to or through lawyers:
    - Ask them what the message is regarding in general and how they would rank its urgency on a scale of 1-5, 5 being extremely urgent.
    - Write down the request for a lawyer, the request, and the urgency number.
- *[Relay information to core members they call the lawyers.]*

Calls from family and friends

Early in the action:

- The caller wants to know what the legal hotline is or who you are.
    - *The legal hotline is staffed by volunteers for the People's Law Project, whose mission is to provide emotional and legal support to activists participating in the demonstrations. Our priority right now is taking calls from people reporting brutality and arrests happening on the streets and for people calling from jail who have been arrested.*

- **The person wants to know if their friend/relative has been arrested.**
    - *If you believe your (friend/relative) has been arrested, you might want to call back later when we've heard from more arrestees and have better information. It takes a while for police to process people, and arrested activists are sometimes denied their right to a phone call, and we expect the police will continue to make arrests, so no matter when you call, there is a good chance that our list will not be complete. However, you are welcome to call back, and if we aren't too busy, we would be happy to try to answer your questions.*

Middle or Later in the Action

(after you have some arrestee information compiled, and if the phones aren't ringing off the hook with calls from jail)

The caller wants to know if their friend/relative has been arrested.

- *What is the name of the person you are looking for?*
    - If the office is not busy and you have time then proceed.
        - Otherwise, say "*Sorry, we can't look this information up right now because we have to keep the phone lines open for people calling from jail. Try calling back later, and in the meantime try to stay by a phone that they can call you from.*"
    - Check the list of confirmed arrestees for the name
    - If you find the name: *Yes, _____ is in jail. The legal team is working on getting lawyers into the jail as soon as possible.* Reassure the caller that the person is ok, that they are with other activists, and that they are taking care of each other (if you know this to be true).
    - If you do not find the name: "*We don't have this person on our list, but that doesn't mean that s/he wasn't arrested. Our list is incomplete - it takes a while for police to process people, arrested activists are sometimes denied their right to a phone call, and not everyone knows the legal hotline number. You can call the jail and see if _____ has been booked. The number for the jail is: (xxx)XXX-XXXX.*
    - If you have time, and/or the person is dissatisfied, angry, or upset:
        - *I hear your concern(s), and we are doing all we can to help those who have been/are being arrested. There is something else you can do – you can call the mayor, the sheriff, the police chief/commissioner, the jails and the media and tell them you are outraged at their disregard for and repression of constitutional rights and the unlawful arrests of people expressing their First Amendment rights.*
        - *You can find their numbers on our website – www.dnc-plp.org*
        - *I know this is a stressful time for all of us. We're doing all we can to help those being persecuted for their political activity. Stay strong.*

Rehan Hasan, Chair • Mark Silverstein, Legal Director

Avenues for Human and Civil Rights Advocacy and Litigation at Mass Events

Case Study: 2008 Democratic National Convention, Denver, Colorado

All of the advocacy letters, education materials, and legal pleadings discussed in this outline are available online at: <http://www.aclu-co.org/dnc/dnc.htm>

Before and after the Democratic National Convention in Denver in 2008, the ACLU of Colorado worked in four broad areas: 1) free speech and Fourth Amendment rights; 2) conditions of confinement and due process for arrestees; 3) local and federal surveillance of activists and protestors; 4) accountability. For each of these above broad categories, we made strategic choices about employing one or more of the following: a) non-public advocacy, or public advocacy combined with media strategies; b) public education and outreach; c) litigation.

Regardless of your event or community, many or all of the above issues might be considered by organizers, activists, legal workers, lawyers and others protecting human and civil rights during the event. Depending on your local politics, resources, strategies and goals, some of the ACLU's experiences might be useful touchstones or references for your mass event.

1. Free Speech and Fourth Amendment Rights

In 2008 in Denver, the ACLU's focused its efforts on ensuring that Denver's legal and policy framework accommodated the broadest range of First Amendment activity, with the goal of maximizing free speech opportunities and decreasing grounds on which officers could validly make stops, searches or arrests. Some examples of these efforts included:

- Non-public and public advocacy that resulted in sweeping changes to the City's ordinances related to parades and use of public parks. As a result, the City made changes that included: abandoning a proposal that a government permit applicant would "win" over a private permit applicant in the event of two competing permit applications for a public forum; formally recognizing in the ordinance that "spontaneous" marches and events required no permit; reducing and eliminating certain permitting fees and indemnity/insurance requirements; creating a clear appeals procedure for permit denials with clear timeframes; restricting discretion for officials charged with approving or denying permits; striking virtually discretionless arrest authority for certain permit violations. The advocacy was not successful in lobbying for an end to a ban on overnight camping in City parks.

- Public advocacy letter that resulted in City abandoning their position that its officers would make full custodial arrests in all circumstances during the DNC, even for minor violations.

- Litigation against Denver and the United States Secret Service challenging their refusal to commit to a timetable for announcing security restrictions around the convention center, and challenging the location and size of the "public viewing area," i.e., "free speech zone." The litigation was successful in forcing the disclosure of all security plans and timetables for permit processing well in advance of the DNC, and in convincing Denver to abandon plans for suspicionless searching of bags within the "free speech zone." The court refused to alter the location or size of the "free speech zone" or designated parade route.

- Drafted a Colorado-specific "Know Your Rights" booklet and, in conjunction with the People's Law Project, distributed thousands before and during the DNC at numerous KYR trainings held by PLP.

- Filed an open records act request seeking records of how Denver was spending $50 million dollars in federal money for "security" purposes, with emphasis on the purchase of so-called "less lethal" weaponry. Filed successful open records act lawsuit when Denver refused to divulge the requested records.

- Demanded information from Denver on what policies, procedures and accountability mechanism would apply to thousands of officers coming to DNC from outside jurisdictions across the state.

- Sent public advocacy letter during the DNC regarding lack of badge numbers on officers patrolling the streets, and lodged immediate public critique regarding mass arrest of August 25, 2008.

2. Conditions of Confinement and Due Process for Arrestees

While the above efforts were aimed, in part, at decreasing the possibility that law enforcement officers would make arrests, the ACLU also focused on trying to insure that if and when arrests occurred, that arrestees were accorded safe, sanitary and constitutional conditions of confinement and due process.

- Numerous public advocacy letters requesting information on Denver's detention plans and demanding that Denver commit to ensuring particular constitutional and statutory rights, and have proper contingency plans for health and overcrowding emergencies.

- Filed successful open records act lawsuit when Denver refused to divulge detention policy manual in response to open records act request.

- Demanded that Denver commit to affording all arrestees the right to meet immediately with an attorney at the DNC detention facility, as guaranteed by Colorado law. Drafted

flyers informing protestors of this particular Colorado right and how to exercise it, distributed by PLP. Advocacy paved way for class action claims after the DNC.

3. Local and Federal Surveillance of Activists and Protestors

Leading up to and during the DNC, the ACLU attempted to keep the issue of government surveillance in the public eye through the use of open records act/FOIA requests and media strategies.

- FOIA requests related to surveillance at past National Special Security Events (NSSE's).

- Colorado open records act requests related to plans for video surveillance and local law enforcement officers' involvement in surveillance.

- Held press conference on FBI "Special Bulletin" sent to all Denver law enforcement agents that listed innocuous objects such as bikes and maps as tools of "violent demonstrators"; press conference featured homeowner who had been repairing her chimney and was interrogated by officers for having a "stockpile" of bricks.

- Publicly filed complaint with Denver's police monitor regarding law enforcement deputy discovered posing as a protestor and accidentally doused with OC spray by other law enforcement officers.

4. Accountability

- Filed a series of public complaints with Denver's police monitor during and after the DNC regarding use of force, mass arrests, and Denver's failure to perform an adequate internal investigation. Complaints helped make Denver commit to version of events, generated internal interviews and paper later useful in litigation, and added momentum to long term struggle for overhaul of Denver's police monitoring structure.

- Filed post-convention FOIA request to federal agencies regarding surveillance of protestors.

- Filed civil litigation regarding mass arrests on August 25, 2008, including class action claims on behalf of all arrestees denied the right to meet with an attorney; and First and Fourth Amendment claims on behalf of those wrongfully arrested.

Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

August 27, 2008

Mr. William Lovingier
Director of Corrections and Undersheriff
Denver Sheriff Department
1437 Bannock Street, Room 405
Denver, CO 80202
VIA EMAIL to Alvin.lacabe@denvergov.org

David Fine
Office of the City Attorney
1437 Bannock St., Room 353
Denver, CO 80202
VIA EMAIL to david.fine@denvergov.org

Re: Problems resulting from mass arrests

Dear Director Lovingier and Mr. Fine:

In the aftermath of the mass arrests made by the City and County of Denver on August 25th, 2008, I write to address issues arising from those arrests and connected to the City's refusal to permit attorney from the People's Law Project and the American Civil Liberties Union of Colorado access to arrestees held at the Temporary Arrestee Processing Site (TAPS).

As you know, prior to the DNC the ACLU of Colorado expressed concerns about the conditions of confinement at TAPS. Some of these concerns were communicated in an August 6, 2008 letter sent to Director Lovingier and Manager of Safety Al LaCabe, and copied to Mr. Fine[1], and included ensuring confidential visits with attorneys at any place of custody pursuant to C.R.S. §§ 16-3-403 & 404, providing access to adequate food and water, prompt processing, and the health and safety of the detainees.

The City assured the ACLU that it had considered and addressed many of the ACLU's other concerns. The City ultimately refused, however, to permit attorney access at TAPS.

Unfortunately, when these assurances were tested by the mass influx of arrestees to TAPS during of Monday evening, August 25th, and Tuesday morning, August 26th, several problems quickly emerged.

[1] http://www.aclu-co.org/dnc/Lovingier.LaCabe.ACLU.detentionfacility.08-06-08.pdf

Although we are still gathering information and interviewing persons detained at TAPS, the initial information we have gathered raises serious questions regarding whether there were systemic and pervasive violations of the constitutional and statutory rights of those detainees, and their rights under international law. The combination of the conditions at TAPS and the lack of any confidential consultation with attorneys may have put undue pressure on those arrested on the evening of August 25th to plead guilty to charges simply to escape confinement.

I write now to address these concerns and request that the City remedy these problems to correct any problems before any future mass arrests occur.

1. Mass Arrests on the Evening of August 25th, 2008

Although the legality of the mass arrests of persons on the evening of August 25, 2008 is not the subject of this letter, the health and safety of the persons held in custody by Denver at TAPS cannot be fully addressed without understanding the events that lead to their confinement.

We are still investigating the events that lead to the corralling of hundreds of citizens on 15th Street between Court and Cleveland. What we do know is that at after some interactions between law enforcement and civilians in and around Civic Center park, a large group of persons walked down Colfax Avenue and onto 15th Street, where any further progress was stopped by an array of law enforcement officers blockading 15th Street at Court.

The group that proceeded to 15th Street appear to include 1) protestors who had been standing in the public streets around Bannock, 2) protestors who were obeying all laws by standing only on the sidewalks, 3) interested onlookers and bystanders from Civic Center Park, the 16th Street Mall and the downtown area who followed the crowd to see what was occurring or otherwise found themselves blocked in with the crowd, 4) members of the media, and 5) Legal Observers from the People's Law Project ("PLP") of the National Lawyers Guild.

As this group came down 15th Street and saw that any further progress was impeded, another group of law enforcement officers closed off 15th Street from the southeast side on Cleveland, completely blocking several hundred people in that small section of 15th Street between Cleveland and Court, and not permitting anyone to leave the area.

It is not clear whether any order to disperse was ever given. No Legal Observer, witness or arrestee on the scene we've debriefed heard any order to disperse. If one was given, it was not audible to many of the persons trapped inside of 15th Street between Cleveland and Court, nor was it audible to me at the corner of 15th and Court or to our Legal Observers inside the cordon.

Even if an order to disperse was given and could have been heard, however, it may have made little difference as officers who had cordoned off 15th Street were initially refusing to allow anyone to leave. Numerous persons, including attorneys serving as Legal Observers, asked to be able to leave the blockaded area and were refused. At some point, additional lines of law enforcement officers began to subdivide the area between the street and the sidewalks, forcing more persons off the sidewalk and onto the street. During the time that people were trapped on 15th Street, law enforcement officers deployed chemical agents, including pepperball rounds, and used other physical force on the persons trapped inside of the cordon.

Eventually, law enforcement officers began releasing some persons and making full custodial arrests of others. It is not yet clear what the methodology or criteria were for determining whether a person would be released or arrested.

2. Time in custody at the arrest site

By approximately 7:00 p.m., if not earlier, it was clear that persons trapped inside the police cordon on 15th Street were not free to leave and were being held in the custody of the City's law enforcement officers. The persons who were ultimately arrested that night spent the next several hours in the custody of the City while officers determined who they were going to arrest. For those arrested, after hours in custody waiting sitting on the road or sidewalk, they then spent more time during a videotaped probable cause statement and other arrest processing at the site. Eventually, they were placed on a bus and transported to TAPS. Thus, by the time they had reached TAPS, arrestees had already been detained and in the custody of the City for hours.

3. Denial of attorney access at TAPS

After the arrests, attorneys from the People's Law Project and the ACLU arrived at TAPS to conduct confidential attorney-client consultations with persons in custody detained there, as guaranteed by Colorado law. The PLP and ALCU attorneys had specific names of clients who wished to meet with them. Although these persons had now been in the custody of the City for hours, the City refused to provide any access to allow these persons to meet with attorneys.

4. Time in Custody at TAPS

The City had assured the ACLU and the public that processing times would be as fast as 60 persons per hour.[2] Early reports indicated that 84 arrestees were sent to TAPS within a short time frame on the night of August 25th. Later reports we received from court personnel indicated that this number may have been as high as 139.

[2] No Razor Wire At Denver's Convention Holding Cells, P. Solomon Banda, CBS 4 News (available at http://cbs4denver.com/local/denver.convention.holding.2.799498.html).

Arrestees spent hours in custody at TAPS. The last group of arrestees was still arriving at the City and County building late into the morning of August 26th, after spending hours at TAPS. It is unclear whether this delay was because the processing times at TAPS were far longer than the City had publicly estimated (139 arrestees arriving *en masse* would have taken about 2 ½ hours to process by the City's estimates; if they arrived in groups that never exceeded 60, presumably they all should have been processed within one hour), or because the persons were processed in one hour as anticipated but then had to wait for space at the City and County building before transport. In any event, however, it is clear that TAPS was and is a detention facility, as some arrestees who did not make their own bond spent 6, 7, 8 or more hours waiting at TAPS before being transferred to court.

5. Conditions of confinement at TAPS

Reports of the conditions of confinement at TAPS are disturbing. The allegations reported by arrestees held at TAPS includes, but is not limited to:

- Numerous arrestees report being denied the right to make any phone call at TAPS despite requests to do so;

- A larger number of arrestees was permitted to make a short phone call, but only *after* they had been forced to make a decision regarding whether or not to post their own bond;[3]

- Arrestees who were exposed directly or indirectly to pepper spray report not being decontaminated at the arrest site nor at TAPS;

- Arrestees who were vegetarian or vegan, which was a large portion of the arrestees, were not given any food at all, not even non-animal portions of the standard brown bag meals;

- Universally, arrestees report that TAPS was kept incredibly cold. Many arrestees, who were arrested outside on a hot and sunny August day, were dressed in tank tops and shorts, or other light clothing. Some were shirtless when arrested. Arrestees who reported requesting blankets were not given any. Many arrestees were kept in holding pens where tubes running from the air conditioning trucks outside were venting directly and forcefully into their cells from across an open floor;

- Arrestees were kept barefoot at TAPS. I personally saw one such arrestee later at the City and County Building. I saw her marched from the

[3] Had the phone call been permitted earlier, arrestees could have been counseled on their bond options, and the positive and negative consequences of posting their own bond.

elevator to the courtroom in bare feet and leg shackles. I saw her appear in front of the judge in bare feet. At least one other arrestee I personally saw in court was missing one shoe and was sock-footed.

6. Misinformation provided to arrestees at TAPS

During an August 14th, 2008, meeting between myself, Manager LaCabe, Director Lovingier, Mr. Fine and ACLU of Colorado Legal Director Mark Silverstein, we discussed the ACLU's position that attorney access had to be provided at TAPS. Manager LaCabe questioned the purpose of such attorney access. The night of August 25th and 26th drew into sharp relief just how critical that access would have been, and how the City's decision to deny arrestees that access fundamentally prejudiced their most basic rights.

The City provided arrestees with pre-printed forms, or "trip tickets," that purported to contain all the charges that were being lodged against the arrestee. The forms almost universally contained charges such as obstructing streets and interference with police authority. In addition, however, the forms included additional other charges that included begging, loitering, and throwing stones and missiles. Arrestees looking at the forms thought that they were facing 6, 7 or 8 different charges.

It was not until later that an assistant city attorney explained, for the first time, that the charges for arrestees were "pre-printed" on the forms, and that the protocol was supposed to have been to "cross-out" the charges that arrestees were not facing, with the remaining charges being the ones actually brought against arrestees. The assistant attorney explained that that it had been an error that the charges were not "crossed-out."

In addition, the summons and complaint form filled out by officers reflected precisely the same error—on the face of the summons there were typed charges that made it erroneously appear that the arrestee was facing numerous charges which, according to the City's questionable protocol, should have been "crossed out." In addition, on some summons forms officers had mistakenly written-in or checked off charges by hand in addition to the pre-printed charges. Thus, one arrestee's summons and complaint form that I reviewed appeared to have 6 charges, but upon further inspection it revealed that 2 pairs of the charges were duplicates—the arrestee was actually only charged with 2 ordinance violations, not 6.

In addition, it was evident that the arrestees were laboring under a myriad of misunderstandings and misinformation that was predictably highly coercive in convincing an arrestee to plead guilty, and could have been remedied if they were provided a confidential visit with legal counsel, including, but not limited to:

- If they plead not guilty they could not post bond;

- If they plead not guilty would result in a "double-sentence" if they were convicted;

- If they plead "not guilty" they could not later change their plea;

- They were facing "years" in jail for a conviction of a single particular charge;[4]

- That third parties could not post their bond;

- A number of other basic and common misunderstandings about the complicated criminal justice process including, but not limited to, lack of information for out-of-town arrestees about the possibility of moving or continuing future court dates.

7. Conditions of confinement at the City and County Building

After being moved from TAPS, arrestees were brought to the fourth floor of the City and County building. Nearly all were flexi-cuffed on the right wrist to another person on the right wrist, which was a painful and uncomfortable position especially when seated in rows of seats in the jury box, as one person had to constantly have his or her arm draped over her body at all times. The arrestees were also put in leg shackles. Arrestees remained flexi-cuffed to other arrestees even when they were inside the holding cells. Even more shocking, however, was that deputies refused to release persons from flexi-cuffs for the purpose of using the bathroom. Thus, arrestees that had to use the restroom were forced to do so while be flexi-cuffed to another person.[5]

8. Attorney-client visits denied at City and County Building

It was our understanding from Director Lovingier that although the City refused to allow attorneys access to TAPS, arrestees would be permitted to have confidential meetings in private rooms with attorneys at the City and County Building. During the night of August 25th and 26th, however, we learned for the first time that no confidential meetings with arrestees would be provided at all.

Attorneys from the PLP and ACLU were not permitted a single confidential attorney visit with any arrestee at the City and County building. The only meetings that the sheriff's department permitted prior to court appearance was to allow PLP and ACLU attorneys to speak to arrestees in the holding cells, or "cages," on the fourth floor of the City and County Building, in the presence of

[4] In fact, all the charges were municipal court violations that do not carry such penalties.
[5] In addition, although deputies clipped the middle of the flexi-cuffs apart upon release from jail, they sometimes left the actual cuffs on like bracelets. One arrestee came to the PLP office and had to use wire cutters to remove his flexi-cuffs.

sheriff's deputies and other arrestees, and only for a few minutes. ACLU and PLP attorneys were never permitted to meet one-on-one with a single client at the City and County Building. Later, the sheriff's office changed course and prohibited even these limited non-confidential visits on the 4th floor.

Even when arrestees were brought down to court, ACLU and PLP attorneys and arrestees were not provided with any opportunity for a confidential visit. The only access we were given to these clients was to whisper with them while the clients were in the jury gallery, in open court in front of the judge, court staff, assistant city attorneys, a reporter from the Rocky Mountain News in the gallery, and sheriff deputies. In addition, because of the fact that each arrestee was flexi-cuffed to another arrestee in the same awkward fashion, it was not even possible to whisper to a client without another arrestees' ear being literally inches away from the conversation. Even these limited, non-confidential conversations were incredibly brief, as they could be conducted only in open court while the court was waiting for pleas to be entered.

9. <u>The City did not tell ACLU and PLP attorneys about arrestees at PADF</u>

We had long understood that every person arrested during the DNC on municipal charges would be processed at the TAPS and brought to the City and County building for a hearing. We also understood that because things would be moving relatively quickly, it would be nearly impossible for the sheriff or the court to inform attorneys in advance of who would be appearing in court. Thus, the only way an attorney could make sure he or she was present to appear with his client in court would be to "camp out" in the courtrooms and wait for the client to appear. In fact, several private attorneys were in the courtroom doing just that, along with PLP and ACLU attorneys, in the wee morning hours of August 26, 2008.

The City was well aware that PLP and ACLU attorneys were ready, willing and able to meet with any person arrested during the DNC, and more specifically, that PLP and ACLU attorneys were at the court from 11 p.m. on the night of August 25th, 2008 and were staying until each and every arrestee came to the City and County Building. I personally spoke with DSD sergeants each time I was permitted into the cages, and requested and received updates on when the next buses were coming from TAPS and how many arrestees were left at TAPS.

In the early morning of August 26, 2008, we were told that that there were only approximately 50 arrestees left at TAPS who were coming shortly in two buses, a bus of 22 and a bus of 30. Later that morning, however, after only seeing perhaps an additional two-dozen arrestees, ACLU and PLP attorneys were abruptly told that all the arrestees had been brought over, although clearly 50 additional arrestees had not come through court by that time.

It wasn't until later that the ACLU and PLP learned from the friends and relatives of other arrestees that a significant number of arrestees had been taken to Denver's Pre-Arraignment Detention Facility ("PADF"), not the City and County building. Although City officials knew that ACLU and PLP attorneys were ready and able to meet with arrestees, we were lead to believe that all the arrestees had come from TAPS and had their court hearings. In fact, a substantial number of arrestees were transported to the PADF, contrary to the process that was communicated to us prior to the DNC. Had we been informed that people were being detained at PADF, we would have had confidential visits with those arrestees.[6]

Arrestees at PADF reported that they believed they were separated from other arrestees because the City had identified them as "organizers" or "ringleaders," although it is unclear what criteria or evidence the City could have relied upon to make any such alleged designation. We look forward to getting more information from the City on why this last group of arrestees was sent to PADF instead of through the announced protocol, and why ACLU and PLP attorneys were not notified that arrestees were at custody in PADF, but rather lead to believe that all arrestees had come to court.

10. Arrestees may have entered unknowing and involuntary guilty pleas

It cannot be underestimated how gravely and seriously the misinformation provided by the City, the denial of telephone access, the denial of confidential attorney visits at TAPS, the denial of confidential attorney visits at the City and County building, and the conditions of confinement and general fatigue prejudiced the rights of these arrestees and their ability to rationally and knowingly make informed decisions about the charges brought against them.

Most critically, of course, arrestees at TAPS never had the chance to be counseled by attorneys who could have asked them questions about the facts of the events of that evening, and discussed whether there were serious questions regarding the existence of probable cause for their arrest and whether the government would be able to prove the elements of the crime beyond a reasonable doubt. Of course, a citizen's access to information about the nature of the charges, the elements the government must prove to convince a jury to convict them of those charges, and possible defenses is a fundamental part of legal counsel in our criminal justice system.

In addition, the other circumstances described in this letter, individually and in their totality, call into question whether any guilty plea could have possibly been knowing or voluntary. After spending hours sitting on the road, arrestees were transported to TAPS were they sat in ice-cold pens for hours without blankets, unable to sleep, unable to use the bathroom except with another person, some unable to make any phone calls. Arrestees had a number of misunderstandings

[6] Unlike TAPS, the City does allow confidential attorney visits at PADF.

about their rights and the criminal process, not the least of which was misinformation provided by the City to many arrestees that falsely showed the arrestees facing a half dozen or more criminal charges when they were only actually facing 1, 2 or 3 charges. It is not surprising that when arrestees heard that a plea deal included pleading guilty to only one charge, this misinformation was highly coercive in convincing some to take the plea. Out-of-town arrestees mistakenly believed that they had no ability to work with the court system to set court dates around already scheduled flights, and often times believed they were facing much stiffer jail penalties that the ordinances actually permitted. For the entire time in TAPS, not a single arrestee was permitted to speak confidentially with a PLP or ACLU, or any other, attorney.

Not only did arrestees not have the opportunity to discuss with legal counsel the charges, or their possible defenses, or their rights and the procedures of the criminal process, they were also denied any confidential attorney client visits at the City and County Building. Some arrestees got limited access to PLP and ACLU attorneys who were permitted for to talk to them in groups through thick wire screens for a few minutes (until the City subsequently revoked that access). The only other counsel they received was in rushed, whispered conversations in the jury gallery box surrounded by other arrestees, the judge and court staff, and sheriff deputies.

When arrestees were forced to make a decision that could possibly result in a conviction that would forever remain on their record, many had already made up their minds after hours of detention, able to rely only upon misinformation and rumor, and completely isolated from any legal advice. Even those attempting to come to a rational decision were having to do so at 4, 5 or 6 a.m. in the morning, after hours of confinement, without being fed, without sleep, bound uncomfortably by flexi-cuffs to another arrestee, trying to understand complex legal terms and concepts and accurately and rationally relate the facts of their arrest to an attorney in a non-confidential setting in front of a court eager to move through the docket. Certainly, many would agree that such conditions did not permit a knowing and voluntarily plea.

11. <u>The City must correct these problems immediately</u>

With two days remaining in the convention, the City must permit attorney access at TAPS. We know at one time that the City was considering housing a functioning county court at TAPS. Surely if the facility had the physical capacity to house a court, several pairs of chairs and office cubicle dividers could be accommodated against a wall for confidential attorney client visits.

In addition, the City should remedy other problems including, but not limited to, informing detainees that even if they are vegetarian there are items in the lunches they can eat, providing blankets at TAPS, providing shoes or slippers to arrestees without footwear, allowing phone calls and allowing the calls

immediately upon entering TAPS if the arrestee so wishes, permitting confidential attorney consultation on the 4th floor of the City and County building, and flexi-cuffing arrestees individually, and permitting them to use the restroom individually and in private.[7]

I look forward to hearing from you at your earliest convenience. When you respond, please also copy Legal Director Mark Silverstein.

Sincerely,

Taylor Pendergrass
Staff Attorney, ACLU of Colorado

cc. Manager of Safety Al LaCabe (sent via email).

[7] All videotape or digital footage from TAPS should be preserved.

The World is Flat: The structure of the legal office during the DNC 2008 protests

Dan Spalding, Midnight Special Law Collective

Here's the background of the DNC protests:

There's three kinds of mass demonstrations

1. Mass protests that are huge (Seattle 1999, RNC 2004)
2. Mass protests that are small (DNC 2004, G20 2009)
3. Mass protests that barely happen at all (BioJustice 2001 aka "BioJust Us")

The DNC 2008 was a solid, smaller mass demonstration

- There were several thousand protesters.
- There was a huge police presence, including riot cops & plainclothes officers.
- They had one large march (IVAW) and one (totally unrelated) mass arrest.

Legal Office Structure

We operated with a fairly flat hierarchy, composed of just two levels:

The Core Collective (CC)

- This was Denver folks who committed to the project early, all lawyers & law students
- ...as well as Megan Books and Dan Spalding, who helped with prep and execution.
- CC made decisions by consensus in meetings and by informal consensus in the office.
- There was always at least one Core Collective person in the office, usually more.

Volunteers

This was the attorneys, legal workers, law students and everyday folks – including Brian Vicente's dad! – who helped during the protests.

- We didn't need many volunteers from the streets. This was convenient for us, but we also got less feedback from the protesters we were supporting

Core Collective folks did the same tasks as volunteers

CC people answered phones, did filing, data entry, etc.
CC people also did "higher order" tasks which required more responsibility and/or a big picture perspective:

- Talking to attorneys
- Dispatching LOs
- Handling evidence

Exceptions

- Brian handled media calls.
- Lawyers handled specific lawyerly tasks: Court appearances, talking to callers who

were in the process of getting questioned by the police, etc.

The Importance of a Flat Hierarchy

Having a flat hierarchy is crucial in a high stress, round-the-clock operation.

CC folks were able to make decisions on the spot – usually in collaboration with any other CCs present, but without having to get approval from someone off-site.

This was possible because most decisions weren't strictly legal

Most decisions were logistical or tactical:

- Changing filing systems and other office procedures as needed
- Assigning different tasks to volunteers when things were really busy
- And generally handling crises

A top-down hierarchy wouldn't have worked

Tasks were too varied and constantly changing for one (or a few) people to stay on top of everything.

- A flat hierarchy lets the people actually doing the work to make the decisions.
- It also distributes experience, preparing more people to be in leadership positions during and after the protests.
- We used collective meetings to check in about the decisions we made.
    - The CC was able to meet fairly often because the office was in a central location in a (relatively) small city.

The 24-hour office also makes a top-down structure impossible

The labor and trauma of a mass-protest inevitably makes the people working in it go a little crazy.

- A flat hierarchy distributes the stress to more people so it's (more) manageable.
- When I've been in an office where one or two people were in charge of making all the judgment calls, those people had nervous breakdowns a couple days into the protest.
    - This creates a terrible bottleneck. The bottomliners can't make good decisions, and those who still can are frozen out of the decision making process.

The flat hierarchy was a big part of why we won

It's not just that we're smarter than the system, or that we worked harder – although we are and we did.

We also had a better organizational model:

- We were flexible, switching tasks when needed.
- We made better decisions, by a mix of people with different experiences.
- We were more robust, complementing each other's strengths and shoring up each others' weaknesses.

This isn't just a means to an ends – this is an end in and of itself

- For me personally, this is a big reason why I do the work I do – and believe in it.
- We prove that a small group of dedicated people working democratically can be more effective than a bigger institution based on domination and rigid hierarchy.
- We're basically learning how to run our utopian society, one mass protest at a time.

Challenges? Bail.

Action legal offices usually don't handle bail.

Bail is problematic because:

- It involves handling money.
- You have to subjectively triage in the moment – who needs bail more, the veteran activist with a broken nose or the random student who's having a panic attack?
- We felt like we had enough to do already. (Me in particular)
- Often, the person paying bail is legally responsible if the arrestee fails to appear.

But people wanted to donate bail money to us

- We were the logical place for people to call.
- We passed them off to an activist coordinating bail.
- This worked poorly.

We should have figured out bail ahead of time

- As it was, we just declared “We're not doing bail!” and left it at that.
- However, in Pittsburgh, people were able to self-organize bail for G20 defendants with serious charges and high bails.
- Organizing bail is something we have to learn to do better. (Although there's some disagreement about this within the collective.)

FOR IMMEDIATE RELEASE
Friday, August 22, 2008

Contacts:

Thomas Cincotta, Esq. Southwest Regional Vice-President, NLG (720) 234-8517
Miriam Stohs, Esq., Colorado Chapter liaison, NLG (303) 929-5501

NATIONAL LAWYERS GUILD OF COLORADO CALLS ON DENVER POLICE TO EXERCISE RESTRAINT, NOT PUNISH PROTEST

Denver-- The National Lawyers Guild of Colorado (NLG) calls on local authorities and law enforcement to exercise restraint, rather than punish freedom of speech at the 2008 DNC. Recent inflammatory rhetoric coming from local officials appears calculated to frighten the public from participating in marches and rallies – activities that are fundamental to democracy and lay at the core of the First Amendment.

1. Last year, the Denver City Council refused to adopt a resolution supporting free speech at the DNC, although a nearly identical resolution was passed in St. Paul for the RNC. Instead, the City Council recently passed an ordinance that makes it illegal to carry certain items, such as chains, padlocks, and noxious substances like urine or feces with the intent to use them against police officers. The NLG is not aware of a single documented instance of activists using excrement or urine for nefarious purposes in the United States. State statute and local law already prohibit spitting or throwing anything at law enforcement, with heavy mandatory minimum sentences in the event of injury.

2. Denver has erected a temporary detention center north of downtown to hold and book individuals who are arrested during the DNC. The funds used for this processing center represent a theft from the students, the sick, and the poor of our community. It is also symptomatic of the City's disparate treatment of individuals who speak out. The need for this facility springs from Denver's decision to arrest any persons who are accused of breaking the law while engaging in "protest" activity. The City punishes Free Speech-related activities by mandating arrest that is not required for other non-violent municipal and state offenses. We join the call of the ACLU of Colorado for the City to issue citations to appear in court, rather than arrest individuals accused of non-violent offenses. In addition, no provisions have been made for detainees to meet with counsel at the temporary detention center. We call on the City to provide for detainees' access to counsel as guaranteed by Colorado statute and international law.

3. The Denver Police Department issued a bulletin to all uniformed officers and other agencies to be on the lookout for materials that "could be used by violent protesters" at the upcoming DNC. The NLG fears that this bulletin will be used as pretext for illegal invasions of privacy, harassment of peaceful activists, and the unlawful shutdown of activists' convergence centers.

4. The NLG opposes the use by the Denver police of pressure-point pain compliance holds, chemical agents, batons, rubber bullets, and horses against peaceful activists whose only crime

is blocking traffic. We call on the police to exercise restraint and follow proper chain of command.

The chilling effect of the City's rhetoric is already evident. Wherever you go, people express reservations about attending demonstrations because they fear "getting arrested." According to NLG Southwest Regional Vice President Thomas Cincotta, "The message from the City and County of Denver has been clear: 'Come to Denver if you have money to spend. If you live here, do not protest. If you protest, you risk arrest.' But anyone who wants to attend a rally in the United States should not fear arrest and the threat of criminal charges." The NLG encourages the residents of Colorado to come to Denver and make their voices heard next week. The demonstrations planned during the DNC can and should be large, effective expressions of speech.

The People's Law Project, a project of the Colorado Chapter of the National Lawyers Guild, was established in late 2007 to ensure that peoples' voices are heard at the DNC and their constitutional rights are protected. The PLP is coordinating Legal Observers for public events and arranging legal representation for individuals who are arrested. Anyone arrested while exercising their constitutional rights during the DNC should call our 24/7 hotline at (303) 830-0277.

Founded in 1937 as an alternative to the American Bar Association, which did not admit people of color, the National Lawyers Guild is the oldest and largest public interest/human rights bar organization in the United States. Its headquarters are in New York and it has chapters in every state.

FOR IMMEDIATE RELEASE
Thursday, August 28, 2008

Contacts:
Brian Vicente, Director, National Lawyers Guild DNC People's Law Project, (720) 280-4067
Miriam Stohs, Esq., Colorado Chapter liaison, NLG (303) 929-5501

NATIONAL LAWYERS GUILD DNC PEOPLE'S LAW PROJECT CRITICIZES DNC COURT PROCEDURES

Denver-- The National Lawyers Guild DNC People's Law Project (PLP) criticizes the procedures that created a high risk of accused persons waiving their rights without access to lawyers or an adequate understanding of their cases.

The PLP is particularly concerned with today's phone call from the Denver County Courts alerting defendants that they could appear in court on Friday, August 29 "for an opportunity to dispose of their case." The information provided by court clerks did not inform defendants that they could set their cases for jury trial. Earlier this week, eighty-two persons were taken into custody during a preemptive mass arrest. Upon release, most defendants were told they had to appear in court on September 2, 2008 even if they resided out of state. Although defendants were called throughout the day regarding the new court appearance, PLP attorneys were not notified of this hearing until late Thursday.

This development heightens PLP's concern that people are being unfairly pressured to plead guilty, rather than exercise their constitutional rights to trial. The PLP sees a pattern of unusual and potentially abusive practices implemented for the DNC, notably:

- attorneys refused entry to the detention center to consult with detainees who requested counsel;
- initial court appearances from Monday's arrests were scheduled for 1:00 AM, leaving activists and bystanders scrambling to obtain legal counsel in the dead of night;
- City Attorneys offered punitive plea bargains that ignored widespread absence of probable cause;
- the Court refused to release people on their recognizance regardless of an absence of criminal history and the presence of significant community ties; and
- the Sheriff failed to release individuals in a timely manner after they posted bond, transferring them to the county jail and slowly processing them out.

Together, these unusual practices raise PLP's concern that people have been and will be unfairly pressured to plead guilty. The PLP is organizing volunteer attorneys to be present at the special appearance set for Friday morning in Denver County Courtroom 100K.

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is coordinating Legal Observers for public events and arranging legal representation for individuals who are arrested.

Founded in 1937 as an alternative to the American Bar Association, which did not admit people of color, the National Lawyers Guild is the oldest and largest public interest/human rights bar organization in the United States. Its headquarters are in New York and it has chapters in every state.

www.nlg.org
www.dnc-plp.org

For Immediate Release
November 10, 2008

Contact
Brian Vicente, Director, People's Law Project, 720-280-4067

DNC Protester Defense Group Files Open Records Act Request for Information on Prosecution Costs

City continues losing streak; falls to 1-17 conviction rate after Friday's acquittals

DENVER – On Monday, November 10, the People's Law Project (PLP)-- the group responsible for the legal defense of those arrested at protests during the DNC-- made a formal request to Denver Mayor John Hickenlooper for an estimate of the costs that Denver taxpayers have incurred in prosecuting individuals arrested on August 25, 2008 during the Democratic National Convention. This request comes on the heels of the November 7 acquittal of three individuals caught in the August 25 mass arrest of 106 citizens during a demonstration at 15th and Court in Denver. With these three additional acquittals, the Denver City Attorney's Office has now failed to convict 17 of the first 18 people set for trial who were arrested at free speech events during the DNC.

"If the Denver Nuggets opened their season with a 1-17 record, people would raise serious questions about what changes needed to be made," said Brian Vicente, Denver lawyer and Director of the People's Law Project. "In this case, the mounting number of acquittals provides further proof of what the PLP has been saying all along--the manner in which police haphazardly arrested over a hundred people resulted in a number of journalists, students, peaceful demonstrators, bystanders, and curious onlookers being swept up in the arrests--persons guilty of no crime whatsoever who the City is now attempting, unsuccessfully, to prosecute."

The request for information on the costs of prosecution, filed under the Colorado Open Records Act ("CORA"), seeks an estimate of both the hours and dollars spent by the Denver Police Department and the Denver City Attorney's Office in prosecuting individuals arrested on August 25. So far, these DNC-related trials have averaged three days in length and each trial has required a full three-day commitment from six jurors, a judge and clerk, three prosecutors, defense lawyers, and the testimony of numerous police officers. As the request notes, every hour that officers spend preparing for and attending trials is an hour not spent on the street stopping crime or performing other police duties.

These prosecutions have recently come under increased scrutiny after information surfaced that Denver police may have acted inappropriately at the Monday event. Last week, the ACLU of Colorado filed a report calling for an investigation into this event questioning whether a staged violent confrontation by undercover police served to create a hostile and dangerous environment. For more details on this story see: http://www.denverpost.com/popular/ci_10920817

A copy of the People's Law Project's CORA request is attached. By law, the City is required to respond to this request within three business days.

The People's Law Project recruited and trained more than 40 attorneys to provide pro-bono representation for those arrested at free-speech events during the Convention. The People's Law Project is a nonprofit organization dedicated to protecting First Amendment rights. It is a project of the National Lawyers Guild. For more information on the People's Law Project please visit http://www.DNC-PLP.org<http://www.dnc-plp.org/>

People's Law Project

Denver Democratic National Convention 2008

A project of the Colorado National Lawyers Guild

November 9, 2008

Mayor John Hickenlooper
City and County of Denver
City and County Building
1437 Bannock St., Room 350
Denver, CO 80202
SENT VIA FACSIMILE: 720-865-8787

Re: Colorado Open Records Act Request regarding costs of prosecution of August 25, 2008 arrestees

Dear Mayor Hickenlooper:

I write seeking information regarding the costs of prosecution for persons arrested and charged on the night of August 25, 2008 during the Democratic National Convention. Please consider the following a request pursuant to the Colorado Open Records Act and the Colorado Criminal Justice Records Act. I believe that the Mayor's office has access to all the information requested below, however, if your office is not in custody of these records, I would appreciate you forwarding this request to the proper custodian or letting me know whom I should contact.

In cases where you believe that disclosure of this information is not mandated by, or is exempted under, the Colorado Open Records Act or the Colorado Criminal Justice Act, we request that the information nevertheless be disclosed in the interest of public transparency. If you have concerns you believe would weigh against disclosure of any of this information, I would be happy to discuss those concerns with you.

We request the following information:

1. An estimate of the total number of hours that Denver Police Department officers have spent preparing for or attending court (whether preparing with City Attorneys, traveling to court, waiting to testify, or actually testifying), instead of performing police duties, as a result of the prosecutions of persons arrested on the evening of August 25, 2008. This request includes, but is not limited to, the time that Commander Dilley, Commander Kroncke, Sergeant Foster, Sergeant Martinez, Officer Booten, Officer Ferrari, and Officer Campbell have spent preparing for or attending court instead of performing police duties.

2. An estimate of the total monetary amount paid or that will be due to Denver Police Department officers for their time spent preparing for or attending court in request No. 1 above, including any overtime pay.

3. An estimate of the total number of hours spent by employees of the City Attorney's office on the prosecutions of persons arrested on the evening of August 25, 2008.

4. An estimate of the total monetary amount paid or that will be due to any third parties contracted to assist with the prosecutions of persons arrested on the evening of August 25, 2008 including, monies paid or due to the law firm of Holland and Hart.

5. An estimate of the total monetary amount paid or that will be due to any court staff or court personnel contracted specifically to oversee or assist with prosecutions arising from the Democratic National Convention.

6. An estimate of the total hours spent by regular employees and staff of the County Court on prosecutions arising from the Democratic National Convention.

7. An estimate of the total monetary amount paid or that will be paid by the City for the legal representation of indigent defendants arrested on the evening of August 25, 2008.

If you deny this request for records in whole or in part, I ask that you provide forthwith a written statement of the reasons for the denial that cites the law or regulation that you rely on. C.R.S. § 24-72-305(6).

I look forward to your response at your earliest convenience, and no later than within three business days, as required by the Colorado Open Records Act.

Sincerely,

Brian Vicente
Executive Director

Lawyer wants to know what DNC protest trials are costing city

By John C. Ensslin, Rocky Mountain News (Contact)

Published November 10, 2008 at 7:19 p.m.

Text size
3 Comments
Email
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Lawyers for protesters arrested during the Democratic National Convention want to know how much Denver is spending to prosecute the cases, citing a 1-17 losing streak so far.

According to Brian Vincente, executive director of the People's Law Project, of the first 18 cases set for trial, only one has resulted in a conviction.

So far, the city attorney has dismissed eight defendants, juries acquitted six and judges acquitted two. One faces retrial after a jury deadlocked.

"If the Denver Nuggets opened their season with a 1-17 record, people would raise serious questions about what changes needed to be made," Vincente said.

He said the mounting number of acquittals suggested that many of the 106 people charged were "haphazardly" arrested during a demonstration at 15th and Court streets.

But City Attorney David Fine noted that about 50 of the protesters arrested have entered guilty pleas. He also said that a much larger group that took part in the protest was allowed to disperse.

Fine added that in two trials, the juries that acquitted the defendants insisted on making public statements to the effect of praising the behavior of the police and the prosecution.

Fine said those juries also admonished the defendants and said their acquittals should not be interpreted as condoning their behavior.

On Sunday, Vincente filed an open records request, asking Denver officials to estimate how much money and how many hours the police department has spent preparing for and testifying at the trials. He also asked for the amount spent on the prosecution.

He said each trial has lasted an average of three days and involved two to three lawyers from the city attorney's office.

"Is that a good use of time?" he asked. "There's domestic violence cases and rape cases and all sorts of other issues plaguing the city of Denver."

Published on *Face the State* (http://facethestate.com)

DNC trials could cost city more than $500,000

By *bradj*
Created *11/11/2008 - 10:13am*

Face The State Staff Report

Trials for protesters arrested in Denver during August's Democratic National Convention began last month and according to defense counsel, are likely to cost taxpayers hundreds of thousands of dollars. The exact tally, however, remains elusive as city officials decline to provide their own estimates.

FTS File Photo

The city's courts are expected to hear nearly 50 cases for arrests made Aug. 25, the first official night of the DNC. Denver Police detained approximately 300 protesters at the corner of 15th and Court that day. Around 100 of those arrested were charged with obstructing a public passageway, a misdemeanor criminal offense. Half pleaded guilty, opting for plea deals, while the remaining half went to trial.

Inquiries made by Face The State into just how much it will cost Denver to hear the cases have come up fruitless. **Brian Vicente**, director of the People's Law Project, the group responsible for the legal defense of those arrested, made a formal request Monday (PDF) to Denver Mayor **John Hickenlooper** seeking

information on costs associated with the arrest and prosecution of protesters. The PLP is a non-profit coalition that recruited more than 40 lawyers to provide pro-bono and low-pay representation to the accused.

In an attempt to tabulate the costs, a Face The State staff writer first contacted the Denver Court Administrator's office, where representatives said they were not responsible for maintaining the financial data of the courts and directed FTS to the criminal division clerk for further information. A staffer there directed FTS back to the court administrator's office.

And once back at that office, FTS was eventually referred to the city auditor. Inquiries to the city auditor's office were not returned.

Vicente made a request for the information under the Colorado Open Records Act. He says hopes the request will yield information, demonstrating how many hours and dollars the Denver Police Department and City Attorney’s office have collectively spent in prosecuting the individuals arrested.

Of the trials concluded thus far, the results have yielded few positive outcomes for prosecutors. Out of the approximately 50 cases being heard, 10 have already been dismissed, six have resulted in acquittals, there was one hung jury and only one conviction. Vicente questioned why, after the government's losing streak, it would continue to push so hard for more trials of such a low-level offense.

“If the Denver Nuggets opened their season with 1-17 record, people would raise questions about what changes needed to be made,” Vicente said.

Vince DeCroce, director of prosecution for the city attorney's office, says it is hard to quantify what the city will spend on an average DNC protest trial and added that such trials shouldn’t warrant extra attention. He pointed to the fact that city often sees event-related spikes in its caseload, such as when arrests have been made at anti-war protests and on Columbus Day, at DUI checkpoints on holiday weekends, or when the city conducts periodic outstanding warrant sweeps.

Vicente estimates that defense lawyers would normally spend around $5,000 per trial to defend an client in a misdemeanor case similar to the DNC trials. Sandy Mullins, executive director of the Colorado Criminal Defense Bar, said that this number is a “reasonable estimate for what a criminal defense attorney would ask for in fees.”

If that number were applied to the prosecution, then the city would pay about $250,000 to prosecute the DNC protesters. But that total doesn’t take into account the additional tab for judges, clerks, bailiffs, courtroom security, juries, and third parties contracted to work on cases.

Vicente said too many police officers have wasted time and money preparing and testifying in the cases, when their time would be better spent “fighting real crimes.”

Vicente's request for information comes on the heels of the American Civil Liberties Union's request for a formal investigation into claims that undercover police officers may have instigated the Aug. 25 confrontation.

“The real loser in all this is the Colorado taxpayer,” Vicente said.

- American Civil Liberties Union
- City and County of Denver
- Civil Rights
- Democratic National Convention
- Local Government

Rocky Mountain News

80-year-old 'protester' testifies at DNC trial

Rounded up by mistake with protesters, let go

By Sue Lindsay, Rocky Mountain News (Contact)

Published November 8, 2008 at 12:05 a.m.

Photo by George Kochaniec Jr. / The Rocky

George Kochaniec Jr. / The Rocky

Cecil Bethea sits outside a Denver County courtroom Friday. Bethea was called to be a witness in DNC protester trials.

Photo by Tim Hussin / The Rocky

Tim Hussin / The Rocky

Police remove Cecil Bethea in August from a circle of protesters after he got caught in the march while trying to catch a bus.

Silver-haired Cecil Bethea, in a red plaid jacket and tie, doesn't look much like the anarchists police officers have described during recent trials of Democratic National Convention protesters.

Friday, the 80-year-old sat outside a Denver County courtroom and read a library book.

He was waiting to testify at the trial of three people who by day's end would be acquitted of charges they blocked a street.

It was Bethea's passion for reading that nearly got him arrested Aug. 25.

Bethea, a Denver resident for 50 years, told the jury he had just left the Denver Public Library and was walking across Civic Center when he saw a large crowd on Bannock Street and decided he wanted to try to see a DNC protest, "not to participate, just to see what was going on."

Rocky Mountain News

All of a sudden, he said he saw the crowd moving toward him, some of them running.

"Well, I thought, the meeting is over! What was extraordinary is that half of them had handkerchiefs tied around their faces. It looked like a Butch Cassidy look-a-like contest," he said, as jurors laughed.

"Next morning, when I read the paper, I found out they were the anarchists!" he said, his voice revealing traces of his native Alabama.

Bethea said he was walking down 15th Street to catch the mall shuttle to his bus when he became caught up in the crowd. He said 15th was blocked by a line of police in riot gear at Court Place.

"They had all their regalia on," he said. "You know how they enjoy dressing up. They looked like Armadillo Man."

Bethea said he turned around to head to the mall via Cleveland Place but found himself blocked by another wall of police behind the crowd.

"They just had us corralled there," he said. "I just stood there with a curious look on my face when suddenly somebody yelled, 'Sit down!' "

"With my gimp leg, sitting down can be a bit of a production, so I sat on my briefcase," he said.

Bethea said he was pulled from the crowd, subjected to a pat-down search and handcuffed.

He said one of the officers told him, "Aren't you a bit old for protesting?" Bethea said he told the officer he was just walking to his bus from the library. Asked to prove it, Bethea directed the officer to the two books in his briefcase, along with his library check-out slip. Eventually, he said, he was allowed to leave.

"It was a very disappointing riot," Bethea concluded. "I thought of the riots in Chicago in '68, the Detroit riots, and it was nothing like that. There wasn't a sign, no chanting, singing or anything. We were just sitting there."

Nearly 60 people have been tried or are scheduled to be tried on DNC-protest-related charges.

Asked after he testified what he thought about the protester trials, Bethea said, "From what I understand, they've only convicted one out of how many trials? That's not a very good batting average."

Not long after Bethea testified, the jury began deliberations in the charges against Nathan Acks, Edward Lloyd and Stephanie Catlin.

The three were acquitted.

DNC Charge List

Code	Charge
3-1 (a)	Posting Unauthorized Posters
18-18-406 (1)	Possession of Marijuana under 1 OZ
18-18-428	Possession of Drug Paraphernalia
38-3	False Identification
38-31	Interference
38-31 (b)	Disobedience to Lawful Order
38-31 (c)	Refused Order of Officer
38-32	Resistance
38-36	Aiding or Rescuing Prisoners
38-40	False Information
38-71	Destruction of Private Property
38-86	Obstructing Passage
38-87	Disrupting Assembly
38-89	Disturbing the Peace
38-92 (a)	Threats to Person / Property
38-96	Irritants in Public
38-115	Trespass
38-125	Obstruction Equipment Prohibited
54-240	Seat Belt Required

The 2008 DNC Cases: A Summary

The Results So Far

The total number of individuals is 151, including 147 adults and 2 juveniles for whom there are results and 2 for whom there are none.

A. **TRIALS**

Total: 41

Acquittals: 28

Hung Jury: 1

Convictions: 12

Note: The numbers are of persons who had trials, not the actual number of trials, or the number of charges disposed of for each individual.

B. **DISMISSALS**

Total: 13

Dismissed: 12

Diverted: 1

Note: The numbers represent persons, not charges disposed of. The diversion was included here on the assumption that it was a deferred prosecution and so not a plea.

C. **PLEAS**, Part I

Total: 89

Deferred: 6

No Contest: 7

Straight: 74

Unknown: 2

Note: The pleas represent persons, not charges. Even with a plea, usually it was to one charge, and usually two were dismissed. The deferreds could shift to either a straight conviction or a dismissal. Only time will tell. As for the two unknowns, the docket sheets show that the Court was unclear, and this was my best estimate.

D. **PLEAS**, Part II

Total: 89

Pled In:

August: 66

September: 6

October: 8

November: 1

December: 3

January 2009: 4

February 2009: 1

Note: You can see that most of the pleas were before there were any trials in the initial rush of people to get out of jail and go home.

E. **IN LIMBO**

Total: 8

Failure To Appear: 3

Trial Reset: 2

Juveniles: 2

Status Hearing 1

Methodology

The summary numbers are based upon the attached charts. They in turn are primarily based on the list of arrestees provided by the City with the probable cause photos and videos. The list contained 151 names.

Of the 151, there were 1 Jane and 5 John Does These were actually named elsewhere on the list and so were duplicates. This leaves 145.

Of the 145, there were 4 duplicates with the same case number but a slight variation in name. This leaves 141.

Of the 141, 3 were juveniles. We have results for 1 of the 3. The other 2 are unknown as to results. This leaves 138 adults, 1 juvenile and 2 unknown juveniles.

One adult had a second trial, because the first was hung. This increases the adults to 139.

After comparing our emails and victory list with the City's list, I discovered another adult and another juvenile. These were confirmed with the attorneys who represented them. This results in 140 adults, 2 juveniles and 2 unknown juveniles.

I also found another adult in our Google Group, for 141 adults.

A comparison of the City's list with the court administration DNC-1 and DNC-2 lists revealed 6 more adults. This results in 147 adults, 2 juveniles and 2 unknown juveniles.

I may have included some who do not belong. You can make your own judgment from the charges. These may have had the misfortune of getting arrested during the DNC. I saw a couple, but do not recall their names. They would be on the plea list. There may be some I missed, but, if so, I do not know how to find them.

There is a category called "In Limbo", which covers those for which we have no results yet. The 2 unknown juveniles are in that category. They will be moved when there are results.

The total number of persons is 151.

Note: Juveniles are not named to protect their privacy. I know who they are. The numbers after last names coordinate with my lists.

DNC TIMELINE

Time	Event

(**B01D01** - DNC1-CAM5-Sheraton Disk)

19:10:23	Begin coming from Civic Center Park across Colfax
19:11:00	Move on to 15th
19:11:48	Police SUVs (3) plus a Police Car come right behind the crowd
19:12:00	Bus comes up the right lane

Can see people walking in the opposite direction to the crowd

(**B06D01**-Dispatch tapes)

19:06

+3:25 19:09:25	They are going north to Colfax
+3:50 19:09:50	They are crossing Colfax going North
+5:15 19:11:15	They are on 15th
+5:20 19:11:20	Get in front of them
+5:51 19:11:51	Stopped them at Court and 15th

19:12

+:15 19:12:15	Don't want them doubling back through the park
+:40 19:12:40	Front end closed / Close the back end
+1:03 1913:03	We got em stopped

☒ County and Municipal Court ❑ District Court The City and County of Denver, Colorado Court Address: 1437 Bannock Street Denver, CO 80202 **The City and County of Denver,** **Plaintiff,** **v** **Ellis, Richard Heath,** **Defendant.**	**COURT USE ONLY**
Attorney (Name and Address): Charles H Nadler 1625 Larimer Street, Unit 901 Denver, CO 80202-1529 Phone Number: (303) 825-0585 E-mail: charlesnadler2@gmail.com FAX Number: (303) 825-0585 Atty. Reg. CO#: 37698	Case Number: **08GS094354** Division: General Sessions Courtroom: 282
Motion to Dismiss **Due to the Unconstitutional Vagueness of Section 38-86 of the Denver Municipal Code as Applied**	

COMES NOW Richard Heath Ellis, Defendant in the above matter, by and through his attorney, Charles H Nadler, of Nadler and Weston, hereby makes his MOTION TO DISMISS DUE TO THE UNCONSTITUTIONAL VAGUENESS OF SECTION 38-86 OF THE DENVER MUNICIPAL CODE AS APPLIED, as follows:

Assuming, without conceding, that the ordinance is valid on its face, the ordinance is void as it is being applied to Mr. Ellis for vagueness.

In this specific situation, the charge of "obstruction of passage" is inexorably linked to the Denver Police Department's failure to give Mr. Ellis a lawful order to disperse and a reasonable opportunity to correct his alleged infractions. To charge Mr. Ellis with "obstruction of passage" in these circumstances, both the Colorado and United States Constitution require that a lawful order have been communicated to Mr. Ellis to apprise him of his unlawful conduct.

Because no order to disperse was given to Mr. Ellis on August 25, 2008, Section 38-86 is void for vagueness as applied to his.

I. FACTS

1. Mr. Ellis was present in the vicinity of 15th and Court in Denver, Colorado, at approximately 7:13 pm, the time that police cordoned off approximately 200-300 protestors. Mr. Ellis was detained and arrested along with approximately 100 other individuals.

2. At the time of his arrest, Mr. Ellis was exercising the First Amendment's guarantees of "freedom of speech", "freedom of assembly", "freedom to petition government", and more specifically, "travel", "observe demonstrations of a political nature", "educate himself to better participate in the political process", and "take pictures of the political activities for posterity" in a traditional public forum. *See* Colo. Const. Art II, Section 10. Defendant notes that the Colorado

Constitution provides broader freedoms of free speech than the First Amendment. *See People ex rel. Tooley v. Seven Thirty-Five E. Colfax*, 697 P.2d 348, 356 (Colo. App. 1985). Streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 59 S. Ct. 496, 516 (1939).

3. At the time of his arrest, Mr. Ellis was not loitering. His presence was purposeful. No lawful order or notice to disperse was ever communicated to Mr. Ellis before he was detained by police.

II. LAW

1. Denver Rev. Mun. Code Section 38-36 provides,

> (1) It shall be unlawful for any person to knowingly:
>
> > (a) Obstruct a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public has access or any other place used for the passage of persons, vehicles, or conveyances, whether the obstruction arises from the person's acts alone or from the person's acts and the acts of others; or
> >
> > (b) Disobey a reasonable request or order to move issued by an individual the person knows, or reasonably should know, to be a peace officer, a firefighter, or a person with authority to control the use of the premises, to prevent obstruction of a highway or passageway or to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.
>
> (2) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

2. The due process clauses of the Colorado and the United States Constitutions prohibit penal statutes which are vague. U.S. Const. Amend. V; Colorado Const. Art. II, Section. 25.

3. An ordinance is presumed constitutional. The burden is on the challenger to demonstrate that it is not. "Where statutes or ordinances are challenged on the ground of vagueness, a court must attempt to construe the law in a manner that will satisfy constitutional due process requirements, if a reasonable and practical construction of the statute will achieve such a result." *Robertson v. City and County of Denver*, 978 P.2d 156, 159 (Colo. 1999).

4. A party may challenge the constitutionality of a law on its face or as it is, or will be, applied to them. Mr. Ellis challenges the ordinance as it is being applied to him. *See e.g. New York v. Ferber,* 458 U.S. 747, 774 (1982).

   (1) According to the applicable law, in order to succeed on a facial vagueness challenge to an ordinance, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 499, 497 (1982).

(2) On the other hand, "A plaintiff bringing an 'as-applied' constitutional challenge to a statute contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act. If a statute is held unconstitutional "as applied," the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative." *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. 2006).

5. Vague laws offend two important societal values:

   (1) First, they may trap the innocent by not providing "fair warning" of what conduct is illegal." *VanMeveren v. County Court*, 551 P.2d 716, 719 (Colo. 1976).

   (2) Second, they "impermissibly delegate 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" *Grayned v. City of Rockford*, 408 U.S. 102 at 108-109 (1972); *see also Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1982). (stating that it would be "dangerous if the legislature could set a net large enough to catch all possible offenders" and then leave it to the courts "to step inside and say who could be rightfully detained, and who should be at large").

6. "It is a well-recognized requirement and consonant alike with ordinary notions of fair play and the settled rules of law that 'The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.'" *Connally v. General Construction*, 269 U.S. 385, 391 (1926).

7. When reviewing these ordinances, the Court must use a heightened level of scrutiny. The level of scrutiny used by a court depends on the nature of the enactment, which is determined by considering four factors:

   (1) Whether the statute is an economic regulation;

   (2) Whether the statute imposes civil or criminal penalties;

   (3) Whether the statute contains a scienter requirement; and

   (4) Whether the statute threatens to inhibit the exercise of a constitutionally protected right. *Robertson*, 978 P.2d 156 at 159.

8. "When a statute imposes criminal penalties or threatens to inhibit the exercise of constitutionally protected rights, more specificity is required." *Id.* ". . . a more strict vagueness test applies when the statute imposes criminal penalties." *Parrish v. Lamm*, 758 P.2d 1356, at 1366 (Colo. 1988). ". . . an ordinance must clearly define its prohibitions so as not to forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally*, 269 U.S. 385 at 391 (1926).

9. "As a general rule, if a statute or ordinance is constitutional in one part and unconstitutional in another, the constitutional provision may be sustained and the unconstitutional stricken. Whether unconstitutional provisions are excised from an otherwise sound law depends on two factors" *Robertson*, at 162.

(1) "The autonomy of the portions remaining after the defective provisions have been deleted; and

(2) "The intent of the enacting legislative body." *Id.*

10. "There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations. There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal." *Cox v. Louisiana*, 379 U.S. 536 at 574 (1965).

11. "When compelling circumstances are present, the police may be justified in detaining an undifferentiated crowd of protestors, but only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order." *Barham v. Ramesy*, 369 U.S. App. D.C. 146 at 156 (2006).

III. SECTION 38-86 OF THE ORDINANCE IS UNCONSTITUTIONAL AS APPLIED TO MR. ELLIS

1. Den. Mun. Code § 38-86 is unconstitutional as applied to Mr. Ellis because "A statute not objectionable on its face, may be adjudged unconstitutional because of its effect in operation. A statute that is valid when enacted may become invalid by a change in the conditions to which it is applied." *People v. Albrecht*, 358 P.2d 4, 8 (Colo.1960). (Citing *People v. Clifford*, 105 Colo. 316, 98 P.2d 272); and (*Nashville C. & St. L. Ry. v. Walter*, 294 U.S. 405).

2. The language used in Denver Rev. Mun. Code Section 38-86(a) as applied to these facts fails to pass constitutional muster. The phrase "obstruct a highway, street, [or] sidewalk . . . to which the public has access or any other place used for the passage of persons, vehicles or conveyances" is void for vagueness and violates the "fair warning" requirement of the due process clause of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution. The provisions of Section 38-86 do not explicitly inform any person of what conduct will render them liable to their penalties. Instead of prescribing a primary standard of conduct, the ordinance authorizes law enforcement unfettered discretion to determine what conduct is prohibited. This ordinance has caused Mr. Ellis to guess at its meaning because the applicable coverage of the ordinance is unclear. For example, Section 38-86(a) could be read as a prohibition against crossing a street without a green light, walking slowly with a group of friends down a sidewalk, or stopping to tie one's shoe. The ordinance simply fails to specify what conduct constitutes the offense of obstruction.

3. The ordinance's failure to specify what conduct constitutes obstruction is easily remedied by a lawful order to disperse. With a group of nearly 300 individuals, such an order clarifies for bystanders, protesters, legal observers and members of the media exactly what they are doing that violates the law. "There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal." *Cox v. Louisiana*, 379 U.S. 536 at 574 (1965).

4. When an ordinance is challenged on vagueness grounds, a court should consider the *Robertson* test as it pertains to the level of scrutiny to be applied to the law. One factor is whether the ordinance imposes criminal or civil penalties:

a. "When a statute imposes criminal penalties . . . more specificity is required." *Robertson,* 978 P.2d at 159. This ordinance imposes criminal penalties. In order for it to be Constitutional, the enacting legislative body must be more specific in describing the behavior which it proscribes.

i. Since the enacting legislative body has neither proscribed the specific behavior that Mr. Ellis is being punished for, nor set out guidelines for the court to follow when determining whether Mr. Ellis is in violation of the law, the Court should use a heightened level of scrutiny when reviewing the ordinance and hold that it is unconstitutionally vague as applied to Mr. Ellis.

5. When challenging a statute under the "void for vagueness" doctrine, the language of the ordinance itself must be scrutinized to see if it passes constitutional muster. *Connally*, 269 U.S. 385. The word "obstruct" in Section 38-86(a) is defined in the Denver Rev. Mun. Code as ". . . to render *impassable* or to render passage *unreasonably inconvenient* or *hazardous*." Denver Rev. Mun. Code § 38-86 (2) (emphasis added). The terms "impassable," "unreasonably inconvenient," and "hazardous" are vague and open to subjective interpretation. They are not defined by the legislature. The ordinance fails to clearly delineate its reach in words of common understanding such that they convey a sufficiently accurate concept of the behavior that they prohibit. Therefore, Mr. Ellis was not put on notice as to what specific conduct on his part would render him liable to the penalties of the ordinance.

a. "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Connally*, 269 U.S. at 393. Each of the terms identified above are susceptible to multiple meanings and violate the vagueness standards for the following reasons:

i. "**Impassable**" – "Impassable" is a subjective term that ordinary members of the community would define differently in different situations. For example, impassable to one person might mean a physical barrier such as concrete blocks, while to another, it might mean one person crossing the street against the light, forcing traffic to stop in order for that person to pass.

ii. "**Unreasonably inconvenient**" – There is no way to place a measure on what renders a passage "unreasonably inconvenient." It can mean being forced to cross the street to walk on the other side, or it can mean stepping two feet to the side in order to bypass a group of people window shopping. What is unreasonable for one person may not be unreasonable for another. The definition of this term should not be left up to the discretion of enforcing officers whose impressions of these words could differ depending upon which officer ends up responding to a dispatch call.

ii. "**Hazardous**" – This language is problematic because it can apply to multiple scenarios, not all of which are criminal. For example, a passage can be hazardous if it snowed, and the owner, for whatever reason, failed to shovel the walk before the snow melted into ice. Or, a passage could be hazardous because

of a car accident or a dog breaking free of its leash and running into the street amid traffic. In other words, the word "hazardous" criminalizes events that are beyond a person's control. The definition in Section 38-86(2) fails to proscribe the specific behavior for which Mr. Ellis is being prosecuted. Nowhere in the ordinance is there a section that specifically indicates that walking down a public street and/or sidewalk for a short distance is prohibited. Nor is there a prohibition against expressing one's political viewpoint in a public arena. Therefore, there was no way for Mr. Ellis to have known or perceived that he had to avoid that behavior.

6. The terms in the Denver Rev. Mun. Code 38-86 are unconstitutionally vague in their application, not only because they are elusive and unjustified, but also because they are based on subjective standards that are left to be determined by individual sensitivities. If this ordinance is to be enforced, the determination of what "obstruct" means is left up to the subjective sensibilities of members of the community and responding police officers. The law in this area states that, "Statutes phrased in terms of individual sensibilities are susceptible to attack on vagueness grounds because of the danger of arbitrary and discriminatory enforcement." *Parrish*, 758 P.2d at 1369.

7. The ordinance would also be void for vagueness if the Court were to determine that it must be analyzed using an objective approach. Leaving the determination of what "obstruct" means to whether reasonable people in the community believe a person rendered a passage "impassable, unreasonably inconvenient, or hazardous" does not provide Mr. Ellis fair notice of the proscriptions of the ordinance nor does it provide protection from arbitrary and discriminatory enforcement.

    a. Even under an objective approach, Mr. Ellis would not have notice of what actions the ordinance proscribes because reasonable minds may differ as to what constitutes the rendering of a passage *impassable, unreasonably inconvenient,* or *hazardous*. Under an objective approach, the application of this ordinance depends, not upon a word of fixed meaning in itself, or one made definite by legislative or judicial definition, but instead on the varying impressions of juries and the varying meanings given to these terms by individual jurors. "The Constitutional guarantee of due process cannot be allowed to rest upon a support so equivocal." *Connally*, at 395.

        i. Some members of the community might believe that obstructing a passage requires a physical barrier such as people linked in arms sitting in the street, while some might believe a large group of friends stopped outside a restaurant to look at a menu is an obstruction. A family pushing a stroller or walking their dog could be considered obstructive. Factors such as the time of day, the season, the type of passage …etc, would play a role in the determination of whether a passage was "obstructed." This open interpretation of the ordinance would not give Mr. Ellis the ability to comport his actions with those that are required of him by the law.

8. When a law is vague, the Court must decide whether to declare the law unconstitutional or to excise its defective provisions. *Robertson v. City and County of Denver*, 978 P.2d 156, 162 (Colo. 1999). The court must base its decision on two factors. *Id*.

    a. "The autonomy of the portions remaining after the defective provisions have been deleted." *Id*.

i. Absent the defectively vague provisions, the ordinance would be incoherent and unintelligible. The remaining subsections and definitions would lose their full force and effect without the supporting vague language. Since these remaining sections could not stand alone, the excision of the vague language would fail to bring the ordinance into compliance with the United States and the Colorado Constitutions and it should be found unconstitutional.

b. "The intent of the enacting legislative body." *Id*.

i. When analyzing a statute under a void for vagueness challenge, ". . . a court must seek out the intent of the legislature in voting for its passage;" *Id*. Here, the intent of the enacting legislative body in enacting this ordinance is not clear from Code.

9. The ordinance lacks sufficient textual and contextual limits to prevent arbitrary or ad hoc law enforcement actions. As a result, individual officers are endowed with broad discretion in defining whether a given behavior contravenes the law's mandates. As applied to Mr. Ellis, Section 38-86(a) is so vague and standardless as to what behavior may or may not cause obstruction of a passage that she and others similarly situated were left with no objective measure to which their behavior can be conformed. The ordinance, as applied, is over inclusive and prohibits conduct that the legislature clearly did not intend to proscribe. According to the ordinance:

a. Several people walking down the sidewalk on 15th Street toward Court Place could be deemed to be obstructing a passage because some people might find it was unreasonably inconvenient to walk around them.

b. If Mr. Ellis slowed as he crossed the street, he could be deemed to have violated this ordinance.

c. Press members who gathered to report on the situation could be indiscriminately prosecuted under this ordinance for obstructing the sidewalk.

d. If Mr. Ellis stopped a few seconds too long at a traffic light that recently turned green he could be prosecuted for making the street "impassable."

e. A bystander walking down 15th on the way home from the library could have been inadvertently caught between police and protesters and prosecuted.

f. The number of situations in which the vague provisions of this ordinance could be applied are too innumerable to list in this motion. The fact that so many of these situations exist supports the conclusion that the ordinance is unconstitutional on its face.

10. The City bases its allegations in the theory that a "mob" of people were intent on destroying downtown Denver, and that their individual actions, in concert, caused the streets and sidewalks to be blocked. The City further alleges that all those in the streets at that time therefore are guilty of violating 38-86. Without a lawful order to disperse, the hundreds of bystanders and members of the press that were present to watch and document the march would have no idea that their actions had risen to the level of criminality. Furthermore, they became subject to arrest

at the arbitrary discretion of law enforcement. The City is attempting to punish Mr. Ellis for behavior which he could not have known was forbidden unless communicated to him. Nowhere in the ordinance is it clearly enunciated that simply walking down a sidewalk or a street, taking photos, can subject a person to criminal municipal sanctions.

11. The City is further alleging that a lawful order to disperse is not a requirement for 38-86(a). However, in this situation, because specific terms within the ordinance cannot be clearly defined, and because the composition of the crowd was one that included not just protesters, but bystanders and members of the press and legal observers as well, the failure to give a lawful order to disperse renders the statute vague as applied. The law "trap(s) the innocent by not providing "fair warning" of what conduct is illegal." *VanMeveren v. County Court*, 551 P.2d 716, 719 (Colo. 1976).

12. Additionally, the law "impermissibly delegate(s) 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". *Grayned v. City of Rockford*, 408 U.S. 102 at 108-109 (1972). Testimony from members of the Denver Police Department confirms that 200-300 protesters were split into two groups. A group of approximately 200 people next to the Wellington Webb building were let go by the police because no officer could say anyone of them had committed a crime. Additional testimony indicates that the police made a decision to arrest approximately 100 people because Sergeant Anthony Foster could say that they all had committed a crime. Mr. Ellis never was given either an order to disperse, or a meaningful opportunity to leave, and then he was rounded up with approximately 100 other individuals who were simply caught in the wrong group. He was, and will continue to be, unsure of what behavior on his part will render him liable to the penalties of violating Section 38-86.

13. To the extent the City bases its allegations on Mr. Ellis's remaining in the vicinity of 15th and Court after the police cordoned off the area, § 38-86 is void as applied to Mr. Ellis because due to police orders and cordoning procedures, Mr. Ellis had no choice but to remain in the area. In this circumstance, the impermissibly vague language of the statute rendered it impossible for Mr. Ellis to determine what conduct was prohibited by § 38-86, without an order to disperse and an opportunity to do so.

14. The result of this vague language is to deprive Mr. Ellis of rights guaranteed to him under the due process clauses of the United States and Colorado Constitutions. This ordinance should be held unconstitutional as it is being applied to Mr. Ellis and the charge pending against him should be dismissed.

WHEREFORE, Mr. Ellis requests that this Court dismiss the charge against him and find the ordinance unconstitutional as applied so that he and other ordinary members of the community will not be prosecuted based on a defectively vague ordinance that can be applied on an ad hoc basis to individuals without notice of the conduct that it proscribes.

NADLER & WESTON

BY:_____

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ATTORNEY FOR DEFENDANT

Copy To:

City Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon an attorney of record for each party to the above-entitled cause at their respective address as disclosed by the pleadings on **December 5, 2008.**

By ☒ U.S. Mail ☐ Fax
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other
☐ Electronic Noticing (CM-ECF, or other)

Signature _____

☒ County and Municipal Court ❑ District Court The City and County of Denver, Colorado Court Address: 1437 Bannock Street Denver, CO 80202 **The City and County of Denver,** **Plaintiff,** **v** **Evans, Stephanie,** **Defendant.**	**COURT USE ONLY**
Attorney (Name and Address): Charles H Nadler 1625 Larimer Street, Unit 901 Denver, CO 80202-1529 Phone Number: (303) 825-0585 E-mail: charlesnadler2@gmail.com FAX Number: (303) 825-0585 Atty. Reg. CO#: 37698	Case Number: **08GS093819** Division: General Sessions Courtroom: 282
Motion In Limine	

COMES NOW Stephanie Evans, Defendant in the above matter, by and through her attorney, Charles H Nadler, of Nadler and Weston, hereby makes her MOTION IN LIMINE, as follows:

I. OTHER PERSON'S CRIMES, WRONGS OR ACTS - Feces and Urine

1. The City during prior trials in the DNC series has introduced or sought to introduce evidence of "feces collection", "urine collection", bags of feces, bottles of urine, bottles of a mixture of feces and urine, etc., all with a promise to connect it up.

2. In those prior trials these things were never connected up to the Defendants.

3. Use of such things would violate CRE 403 and 404, or will have a greater prejudicial effect than probative value.

The Defendant moves this Court pursuant to CRE 403 and 404 to exclude these alleged crimes, wrongs or acts of other persons.

II. INCIDENTS AT BANNOCK STREET PRIOR TO 15TH STREET INCIDENT

1. Prior to the incident alleged in the amended complaint, other incidents took place at Bannock Street.

2. In at least one prior DNC trial testimony was given about those prior incidents.

3. Those prior incidents were not connected up with the Defendants.

4. Use of such incidents would be in violation of CRE 403 and 404, or will have a greater prejudicial effect than probative value.

The Defendant moves this Court pursuant to CRE 403 and 404 to exclude these prior incidents at Bannock Street.

III. USE OF DEROGATORY TERMINOLOGY

1. The City and its witnesses at prior DNC trials have referred to the group of people who were halted, surrounded and arrested at 15th Street and Court Place as "anarchists", "mob", "rioters", "black bloc" and "violent crowd or mob".

2. Such terminology immediately imputes some inference of criminal conduct on the crowd – when none exists.

3. It does so where the City has been unable to connect up specific acts of violence to the Defendants.

4. Use of such terminology would be in violation of CRE 403 and 404, will have a greater prejudicial effect than probative value, would undermine the presumption of innocence and would violate the US and Colorado Constitutions' guarantee of individualized justice.

The Defendant moves this Court on those grounds to exclude such references.

IV. OTHER PERSON'S CRIMES, WRONGS OR ACTS -Hammers, Crowbars, Pipes, Large Backpack

1. The City during prior trials in the DNC series has introduced or sought to introduce evidence of hammers, crowbars, pipes and an ominous large backpack, all with a promise to connect it up.

2. In those prior trials these things were never connected up to the Defendants.

3. Use of such things would violate CRE 403 and 404, or will have a greater prejudicial effect than probative value.

The Defendant moves this Court pursuant to CRE 403 and 404 to exclude these alleged crimes, wrongs or acts of other persons.

V. **OTHER PERSON'S CRIMES, WRONGS OR ACTS** - Anarchist Symbols & Other Graffiti

1. The City during prior trials in the DNC series has introduced or sought to introduce evidence of anarchist symbols and other graffiti such as "Get police", all with a promise to connect it up.

2. The City produced photographs of those markings as attachments to an email and later on a disk.

3. In those prior trials these things were never connected up to the Defendants.

4. Use of such things would violate CRE 403 and 404, will have a greater prejudicial effect than probative value, and would violate the US and Colorado Constitutions' guarantee of individualized justice, by the use of guilt by incidental association.

The Defendant moves this Court pursuant to CRE 403 and 404, and the US and Colorado Constitutions to exclude these alleged crimes, wrongs or acts of other persons.

VI. USE OF THE "ANARCHIST BROCHURE"

1. The City, at prior trials, introduced or sought to introduce a so-called "Anarchist brochure" detailing a plan to disrupt the Democratic National Convention, all with a promise to connect it up.

2. The brochure was located on the internet by Commander Dilley.

3. In those prior trials these things were never connected up to the Defendants.

4. The term "anarchist" especially in Colorado has a longer history than "terrorist" because it was associated with the IWW who were active in the Western United States.

5. Use of such things would violate CRE 402, 403 and 404, will have a greater prejudicial effect than probative value, and would violate the US and Colorado Constitutions' guarantee of individualized justice.

The Defendant moves this Court pursuant to CRE 402, 403 and 404, and the US and Colorado Constitutions to exclude these alleged crimes, wrongs or acts of other persons.

VII. USE OF A "SPEEDING" ANALOGY

1. The City in at least one prior trial argued that this case was analogous to the situation where several people are going 90 miles per hour in a 60 mile zone, but only one person is pulled over.

2. This argument is tantamount to "if you were there, you were guilty", which suggests a strict liability offense.

3. Such suggestion is contrary to the requirement of the requisite mental state of "knowingly".

4. Use of such analogy violates the US and Colorado Constitutions' right to a fair trial.

The Defendant moves this Court on those grounds to prohibit the use of that analogy.

VIII. FELLOW OFFICER HEARSAY

The defendant moves this court to order the City and its police witnesses to testify within the bounds set by CRE 602 and the Confrontation provisions of the U.S. and Colorado Constitutions.

1. In the city's effort to prosecute other defendants charged in the August 25 mass arrest, the city sought to introduce through police witnesses hearsay testimony in violation of the confrontation rights of the defendants under Article VI of the U.S. Constitution and Article II, Section 16 of the Colorado Constitution. See also *Crawford v. Washington*, 541 U.S. 36 (2004), as applied in Colorado by *People v. Vigil*, 127 P. 3d 916 (Colo. 2006).

2. Defendant requests an order requiring the city's witnesses to testify from the witness's own personal knowledge as required by CRE 602.

3. If the witness will offer testimony based on what the witness was told by another, that witness should inform the court of that intent to permit determination of the hearsay and confrontation of witnesses issues before the matter is exposed to the finder of fact.

4. The City has argued such evidence is not offered to prove the truth of the matter asserted but rather is presented to establish the "state of mind" of the officer as part of the res gestae to give the finder of fact a more full picture of the background.

5. The court must balance the benefit of that background against the prejudice inadmissible statements will cause. *Peo. v. Czemerynski*, 786 P.2d 1100 (Colo. 1990), *Peo. v. Quintana*, 882 P.2d 1366 (Colo. 1994).

6. To the extent such evidence is testimonial and relates to the case against the particular defendant, such evidence is barred under the Confrontation Clauses of the U.S. and Colorado Constitutions.

7. When all officers are present on the scene at the same time, the "fellow officer rule" does not apply. *See Killmon v. Miami*, 199 Fed. Appx. 796 (11th Cir. 2006).

8. In addition, the fellow officer rule is traditionally only allowed to help establish probable cause.

9. It is not intended to be an exception to the hearsay rules or rights to confront witnesses.

10. Further, as has been seen in the prior trials the City has been unable to produce a chain of fellow officer hearsay to connect up the arrests for the alleged charges to the first officer in the chain.

11. Finally, in none of the trials has any officer claimed to have seen a particular Defendant actually violating the law, and there is no notice in the instant case to the contrary.

Wherefore, Defendant requests an order directing the City and its witnesses to testify only from personal knowledge and to inform the court of the intent to introduce evidence of the statements of others to permit determination of hearsay and Confrontation Clause issues.

IX. USE OF PROBABLE CAUSE PHOTOGRAPH #646

1. The City has used Probable Cause photographs in prior DNC trials.

2. There is a Probable Cause photograph of Stephanie Evans (#646).

3. The photograph shows alleged violations for dismissed charges.

4. Use of such things would violate CRE 403 and 404, and will have a greater prejudicial effect than probative value.

The Defendant moves this Court on those grounds to either exclude the photograph or require that the offending parts be covered over.

X. USE OF FRAUDULENT PROBABLE CAUSE VIDEO #646

1. The City has turned over a Probable Cause video in discovery of Stephanie Evans (#646).

2. In the video the officer states that she charged with violations of 38-31, 38-31(c), and 38-86.

3. In the video the officer states that he observed her, suggesting that he observed her violating the law, even though he knew that to be false at the time.

4. In the video the officer states that she was given an order to disperse by Sgt. Foster, and she refused to do so., even though he knew that to be false at the time, or should have known it to be false.

5. In the video an officer off screen, the director, asks how many times the order was given, and the Officer responds three times, even though he knew or should have known at the time that it was false.

6. On the basis of Sgt. Foster's testimony, we know he did not give the order to disperse, as suggested, in conformity to the policies and procedures of the City.

7. In the video an officer asks where she was when he contacted her, and he responds "in the street", suggesting that he apprehended her when she was violating the law, even though he knew or should have known that at that time it was false that she was in violation of law, because she was surrounded and ordered to sit in the street by the Police.

8. Use of such things would violate CRE 403 and 404, will have a greater prejudicial effect than probative value.

The Defendant moves this Court on those grounds to exclude the video, and exclude any testimony by the arresting officers and by anyone else who may have participated to the making of the video, on the grounds that the video is fraudulent, and as part of the City's attempt to show probable cause, the City and all the participants have attempted to perpetrate a fraud upon this Court, and the City and County of Denver, and the State of Colorado, and all of its citizens.

In the alternative, if any officer is permitted to testify, and repeats any of the falsehoods on this video, this Court is requested to allow the Defense to explore the making of this video or the story in it, and that officer's participation, for the purposes of impeachment.

XI. PRIOR CRIMES, WRONGS OR ACTS

1. The City in its paper discovery produced a criminal history search showing one conviction.

2. There were three Ordinance violations in Case No. 07GS980646, viz. Disturbing the Peace, Threats to Person or Property and Public Fighting.

3. The charges were dismissed after satisfactory completion of a Deferred Judgment.

4. The government may try to introduce those convictions at trial.

5. Use of this conviction would either violate CRE 403, 404, and 609, or will have a greater prejudicial effect than its probative value.

6. Further, the charges are for a Municipal violation and as such should not be admitted into evidence, and since the judgment was deferred and the charges dismissed the violations should not be admitted into evidence.

The defendant moves this Court pursuant to CRE 403, 404, and 609 to preclude the government from using any of her prior convictions, wrongs or acts against her.

XII. ALIAS

1. The in its paper discovery reveals that it believes that Ms. Evans has been using aliases.

2. The aliases are "Stephanie Evans" and "Stephanie Evans Brynn".

3. It is unclear what name the City thinks is her true name. If they say: Stephanie B Evans, they overlook the fact that her birth name is Stephanie Brynn Evans. "Stephanie Evans" is what most credit card companies would take to be her legal name to spend plastic money.

4. The City may try to use those aliases against the defendant at trial.

The defendant moves this Court pursuant to Fed. R. Ev. 403 to preclude the use of those "aliases" as incoherent and unfairly prejudicial.

NADLER & WESTON

BY:_____

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ATTORNEY FOR DEFENDANT

Copy To:

City Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon an attorney of record for each party to the above-entitled cause at their respective address as disclosed by the pleadings on **December 5, 2008.**

By ☒ U.S. Mail ☐ Fax
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other
☐ Electronic Noticing (CM-ECF, or other)

Signature _____

The City and County of Denver, Colorado Court Address: 1437 Bannock Street Denver, CO 80202	
PEOPLE OF THE STATE OF COLORADO, **Plaintiff** **v.** **LEON HAYES,** **Defendant**	σ COURT USE ONLY σ
Attorney (Name and Address): Joshua Norkin 1632 S. Milwaukee Denver, CO 80210 Joshua.Norkin@hotmail.com Attorney Reg. 40152	Case Number: **08 GS 094007** Division: General Sessions Courtroom: 282
MOTION TO SUPPRESS ID	

Leon Hayes, by and through counsel, respectfully requests that this Court suppress any testimony at trial regarding the out-of-court identification of Mr. Hayes by Sergeant Tony Foster, Sergeant Anthony Martinez, Officer Schluck, Officer Englebert, Officer Duran, Officer Sanchez, Officer Buschy, Officer Hines and other individuals currently unknown to the defense, as well as any in-court identification of Mr. Hayes during trial, on the grounds that the out-of-court identification procedure(s) were unduly suggestive. As grounds he states as follows:

PROCEDURAL HISTORY

1. Leon Hayes is charged with violating 38-86: Obstructing Passageway.

2. On October 2, 2008, Mr. Hayes entered a not guilty plea to the charge against him.

3. The court also ordered that the City disclose to the Defendant any specific video evidence of the Defendant one week prior to trial. Trial was set for December 1, 2008.

4. At status conference on November 3, 2008, the City amended the complaint against Mr. Hayes and dropped the 38-31 charges.

5. In the course of their investigation, the City obtained a copy of a videotape of the alleged incident from a legal observer named Scott Humphrey's.

    a. This video was taken by a citizen in a neutral capacity and not by a member of the Denver Police Department. Neither the City Attorney, nor the Denver Police Department, would have seen this video before it was obtained by them sometime in late October 2008.

6. On November 25, 2008 Defendant received an email and a phone call from Bronwyn Scurlock, the City Attorney, indicating that the City intended to use the video taken by Mr. Humphreys, a legal observer.

7. Since obtaining the video, the City and members of the Denver Police Department have allegedly identified Leon Hayes as an individual who was on the tape. The City Attorney indicated in both her email and phone call that they had identified Leon Hayes at 7:11:10 on the video.

8. The Defendant has received no details of how Mr. Hayes was identified on the tape, and there is no evidence the individual who identified Mr. Hayes has ever met him. However, based on the fact that a both video of Mr. Hayes during his arrest and a probable cause photo taken of Mr. Hayes were provided in discovery, it is believed that the identifying officer or City Attorney simply compared the video or photo to the Humphrey's videotape in coming to the conclusion.

I. The out of court identification of Mr. Hayes on Mr. Humphreys' video was unduly suggestive and his in-court identification must be suppressed.

1. Courts generally disapprove of suggestive lineups because of the increased likelihood of misidentification. Bernal v. People, 44 P.3d 184, 190 (Colo. 2002). Furthermore, one-on-one confrontations are viewed with even greater disfavor because they tend to be suggestive and present greater risks of mistaken identification. People v. Walker, 666.P.2d 113, 119 (Colo. 1983). "In some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." Foster v. California, 394 U.S. 440, 442 n.2 (1969).

2. An individual is denied due process of law when an out-of-court identification is so unnecessarily suggestive that it renders the in-court identification unreliable. Manson v. Brathwaite, 432 U.S. 98, (1977); People v. Borghesi, 66 P.3d 93, 103 (Colo. 2003). The threshold question to be determined is whether the out-of-court identification procedures were unnecessarily suggestive based on the totality of the circumstances. Id. The factors considered in this determination are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. People v. Smith, 620 P.2d 232, 237-238 (Colo. 1981)

    2.1. The video allegedly depicting Mr. Hayes occurs at 7:11:10. It was taken at a point in time at which no police officer was present at the scene. Additionally, it was taken by a citizen and not a member of the Denver Police Department. Any identification would have had to have occurred after the City obtained the video from Mr. Humphreys. There would have been no opportunity for the identifying party to have viewed Mr. Hayes at the time of the crime.

2.2. Mr. Hayes was arrested with over 100 other individuals on August 25, 2008. There have been approximately five different trials relating to this arrest during the Democratic National Convention. As of yet, there has been no member of the Denver Police Department who has been able to specifically identify any individual as having committed a crime. Sergeant Tony Foster, who has testified that he gave the order to arrest Mr. Hayes, has also testified that he can't identify anyone as having specifically committed the crime, only that "that group" of people was in the street.

2.3. The officer making the identification in this video would not have had a chance to do so until sometime around October 25, 2008; nearly two months after the incident. This is a significant period of time, and it would be nearly impossible for an officer on the scene to identify an individual from behind, at great distance, and amongst hundreds of other people without help as they would have had to do in this situation.

3. Where the pre-trial identification procedure is found to be impermissibly suggestive, the state must prove by clear and convincing evidence that the in-court identification of the defendant is based on an independent source. Otherwise, the in-court identification must be suppressed. People v. Monroe, 925 P.2d 767 (Colo. 1996), citing United States v. Wade, 388 U.S. 218, 239-40 (1967). The same five factors used in the totality of circumstances test cited above should be considered in determining whether there is an independent basis for the in-court identification. People v. Smith, 620 P.2d at 238.

4. Defendants are entitled to have counsel present at post-indictment, pre-trial identification procedures to protect against suggestiveness. People v. Monroe, 925 P.2d at 770, citing Wade, 388 U.S. at 236-237 (a lineup is a "critical stage" in the prosecution, at which the accused must be given the opportunity to be represented by counsel.) The Wade court based their decision on recognition of the fact that "many variables and pitfalls exist" in pre-trial identification procedures, thus "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself", which can only be effectively ensured by the presence of counsel. Id. at 235.

WHEREFORE, Mr. Hayes respectfully requests that this Court enter an order suppressing both the out-of-court identification of Mr. Hayes as well as any in-court identification at trial, pursuant to the above statements of fact and law. Mr. Hayes makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: federal and state constitutional rights to bail, the due process, trial by jury, right to counsel, equal protection, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution.

Copy To:

City Attorney, Bronwyn Scurlock

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon an attorney of record for each party to the above-entitled cause at their respective address as disclosed by the pleadings on **December 1, 2008.**

By □ U.S. Mail □ Fax
□ Hand Delivered □ Overnight Courier
□ Federal Express □ Other
□ Electronic Noticing (CM-ECF, or other)

Signature _____

JURY INSTRUCTION NO. 15

It is the defendant's theory of their case that they are individuals who should be treated as individuals. There were many innocent bystanders or watchers at 15th Street and Court Place on August 25, 2008.

Once the defendants were not free to leave then they could not have committed the crime of obstruction of passageways.

Defendants argue that the conduct engaged in by the defendant(s) was justified as a peaceable exercise of their rights.

The defendants contend the government's theory amounts to guilt by association.