IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, PENNSYLVANIA CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. CR 771-2019
v.	:	
TRAVIS A. RICE	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO WITHDRAW PLEA

AND NOW, this 14th day of May 2020, comes the Defendant, Travis Rice, by and through his attorneys J. Wesley Rowden, Esq., and Robert D. Friedman, Esq., and files this memorandum in support of his motion to withdraw his plea.

INTRODUCTION

On February 10, 2020, Defendant Travis A. Rice moved to withdraw his plea of guilty to one count of violating 18 Pa. C.S. § 5103.1, which makes it a crime to record a person in a "judicial facility" without court approval. This memorandum of law explains the reasons underlying that motion.

The Pennsylvania Supreme Court has directed the Courts of Common Pleas to exercise their discretion to grant motions to withdraw guilty pleas "liberally in favor of the accused." *Com. v. Carrasquillo*, 631 Pa. 692, 704 (2015). "[W]ithdrawal of the plea before sentence should be freely permitted" and is warranted if this Court finds "any fair and just reason" for withdrawal and the Commonwealth will not be "substantially prejudiced." *Com. v. Forbes*, 450 Pa. 185, 191 (1973). Mr. Rice's motion easily satisfies this standard.

Mr. Rice has two fair and just reasons for withdrawing his plea. First, his conduct did not violate § 5103.1. Mr. Rice stands accused of recording a custody mediation in a conference room in the Crawford County Judicial Center. Although Mr. Rice does not deny

making the recording, the conference room was not a "judicial facility" under § 5103.1. A "plausible" claim of innocence constitutes a "fair and just reason" warranting withdrawal, *see, e.g.*, *Commonwealth v. Islas*, 156 A.3d 1185, 1190 (2017), and Mr. Rice's claim is not merely "plausible," but conclusive.[1] Second, even if the recording transgressed the text of the statute—and it did not—Mr. Rice's conduct is still not punishable because § 5103.1 is unconstitutional under the First Amendment of the United States Constitution and Article I, § 7 of the Pennsylvania Constitution. "[A]n offense created by an unconstitutional law 'is not a crime.'" *Commonwealth v. Derhammer*, 643 Pa. 391, 399 (2017). Fairness and justice dictate that Mr. Rice be allowed to withdraw his plea to a criminal complaint that did not charge a valid crime. *Cf. Com. v. Muhammed*, 992 A.2d 897, 899 (Pa. Super. 2010) (sua sponte vacating conviction under unconstitutional statute).

Additionally, the Commonwealth will suffer no prejudice if this Court grants Mr. Rice's motion. The Commonwealth will be in the exact same position if Mr. Rice's motion is granted as it was at the time of his plea, just six weeks before he filed his motion.

Accordingly, this Court should grant Mr. Rice's motion.

ARGUMENT

I. Mr. Rice Did Not Violate § 5103.1

As relevant here, § 5103.1 makes it unlawful to create an audio recording of a person "within a judicial facility" without court approval. Mr. Rice did not violate this prohibition because the recording he made was not within a "judicial facility."

[1] Mr. Rice's participation in a plea colloquy does not preclude him from withdrawing his plea based on an assertion of innocence. *See, e.g.*, *Com. v. Randolph*, 553 Pa. 224, 230 (1998); *Islas*, 156 A.3d at 1191 ("[A] defendant's participation in a guilty plea may not be used to negate his later assertion of innocence when seeking to withdraw.").

Section 5103.1 defines "judicial facility" as "a courtroom, hearing room or judicial chambers used by the court to conduct trials or hearings or any other court-related business or any other room made available to interview witnesses." Mr. Rice made his recording in Room 4402, a "mediation room." Room 4402 consists of nothing more than a table and chairs used during custody mediations. It is not a "courtroom," as no judicial proceedings are ever held there. It is not a judge's "chambers," as no judge maintains an office or staff there. And it is not a room made available for "interview[ing] witnesses," as the courthouse sets aside other spaces for that purpose.

Nor can Room 4402 be classified as a "hearing room." "Mediation" is a distinct concept from a "hearing." Under the Pennsylvania Rules of Civil Procedure, "mediation" is a process through which a neutral third party—the mediator—assists parties in "attempting to reach a *mutually acceptable agreement* on issues arising in a custody action." Pa. R.C.P. 1940.2 (emphasis added); *see also id.* (explaining that a mediation is "not a court proceeding" and "[a]n agreement reached by the parties must be based on the voluntary decisions of the parties *and not the decision of the mediator*.") (emphasis added). A hearing, by contrast, is a process through which adverse parties present arguments and evidence to a decisionmaker who issues a binding ruling. *See* HEARING, Black's Law Dictionary (11th ed. 2019); *see also, e.g.*, 63 Pa. C.S. § 485.3 (" 'Hearing' means any proceeding initiated before the board in which the legal rights, duties, privileges or immunities of a specific party or parties are determined.").

The Crawford County judicial system recognizes the difference between a mediation and a hearing in several ways. The local rules governing custody distinguish between a "*conference* before a Court appointed Custody Mediator," Local Rule 1915.4-1(1) (emphasis added), and a "hearing de novo," Local Rule 1915.4-1(11). Likewise, an informational video

posted on this Court's website explicitly states, "The mediation *conference* is only a meeting, *not a formal hearing*." *See* Exhibit 1 (emphasis added).[2] Similarly, a template motion for a custody "hearing" made available on the court's website distinguishes between the two: "the *hearing* will not be a second mediation *conference*." Exhibit 2 (emphasis added). Finally, even the criminal complaint in this case accuses Mr. Rice of making a recording "during a custody mediation *conference*." Exhibit 3 (emphasis added).[3]

In sum, because Room 4402 was not a "hearing room," Mr. Rice did not violate § 5103.1 and is innocent of the offense charged.[4] This is a fair and just reason to allow him to withdraw his plea.

II. Section 5103.1 Is Facially Unconstitutional

Even if this Court concludes that Mr. Rice's conduct contravened the text of § 5103.1, this Court should still grant his motion because the statute's facial unconstitutionality provides an additional fair and just reason to withdraw a plea. Section 5103.1 is both (1) an impermissible prior restraint of speech and (2) overbroad in violation of the First Amendment of the United States Constitution and Article I, § 7 of the

[2] The full video can be viewed at https://perma.cc/N7SW-3GQJ. Exhibit 1 is a screenshot of the relevant portion of the video.

[3] The criminal complaint does not accuse Mr. Rice of making a recording in an "area" "adjacent to" or "immediately surrounding" a judicial facility under § 5103.1, nor could it credibly do so. A separate, walled-off room is not the type of "area" the statute concerns. Indeed, the text of the statute differentiates between "areas" and "rooms." "Area" refers, instead, to lobbies, stairwells, hallways, and similar spaces that witnesses to judicial proceedings are expected to occupy and that, if flooded with people making recordings of court participants, could obstruct the flow of people throughout the courthouse. *Cf.* Pa. R. Crim. P. 112(A) (prohibiting recording in "area immediately surrounding the entrances and exits to the hearing room or courtroom").

[4] Of course, that the mediation conference room is not a "hearing room" under this criminal statute does not mean that participants in mediation must be allowed to make recordings. The Court of Common Pleas has ample authority to promulgate a local rule prohibiting such recording and to punish any violation of that rule.

Pennsylvania Constitution. Each of these constitutional defects independently constitutes a fair and just reason to allow Mr. Rice to withdraw his plea.

A. Section 5103.1 Is an Unconstitutional Prior Restraint Under the First Amendment

A regulation that makes the exercise of expressive activity "contingent upon" the approval of government officials constitutes a prior restraint and is presumptively unconstitutional. *Staub v. City of Baxley,* 355 U.S. 313, 321 (1958); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Section 5103.1 does exactly that: it conditions the rights of the public and the press to make recordings and take photographs on securing the "approval of the court or presiding judicial officer." 18 Pa. C.S. § 5103.1(a).

The activity that § 5103.1 inhibits—recording, photographing, and broadcasting public activity in and around the courtroom—constitutes protected expression under the First Amendment.[5] "The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material." *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017). This principle is necessary to give effect to the First Amendment's protections. The rule against prior restraints would be "upended if it were a prior restraint to require a permit for a film to be shown, a book to be published, or a painting to be displayed but not a prior restraint to require a permit for a movie to be filmed, a book to be written, or a painting to be painted." *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1128 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566 (9th Cir. 2014); *see also Jay-Lee, Inc. v. Kingston Zoning Hearing Bd.*, 799 A.2d 923, 929 (Pa.

[5] The same is true under the Pennsylvania Constitution. The Pennsylvania Supreme Court has recognized that "Article I, § 7 'provides protection for freedom of expression that is broader than the federal constitutional guarantee.'" *Pap's A.M. v. City of Erie*, 571 Pa. 375, 399 (2002).

Commw. Ct. 2002) (analyzing law governing "occupancy permits" for nude dancing establishments under prior-restraint framework).

The First Amendment requires that the government's discretion to grant or deny someone the right to engage in expressive activity—such as that covered by § 5103.1—be limited by clear, objective criteria. As the U.S. Supreme Court has explained,

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood, 486 U.S. at 758. Accordingly, any prior restraint that lacks "narrowly drawn, reasonable and definite standards" to control the government's decision-making violates the First Amendment. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (quoting *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951)). These standards must be expressly stated on the face of the law, articulated in a "binding judicial or administrative construction," or evidenced by "well-established practice." *City of Lakewood*, 486 U.S. at 770. Courts will not simply assume that the government official tasked with granting permission will "act in good faith." *Id.*

Applying these principles, courts routinely strike down prior restraints that provide government officials with expansive discretion. *See, e.g.*, *City of Lakewood*, 486 U.S. at 769 (striking ordinance that placed "no explicit limits on the mayor's discretion" other than that the mayor "make the statement 'it is not in the public interest' when denying a permit application"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (striking statute that allowed officials to withhold permit to demonstrate based only on their "own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience' "); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking ordinance that contained no constraints on

city manager's authority to deny permit to distribute literature); *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 69 (3d Cir. 1990) (striking rule that "empowers the Port Authority to grant or deny publishers the permission to distribute their newspapers at Newark Airport, but says nothing at all about how that power may be wielded"); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 298 (E.D. Pa. 1991) (striking policy that conditioned ability to distribute materials on school property on securing approval from the principal, but did not constrain principal's discretion); *cf. Commonwealth v. Speraw*, 25 Pa. D. & C.3d 690, 695-96 (Pa. Com. Pl. 1983) (striking loitering ordinance on the ground that it was no different than a law that "expressly provided that there can only be street and sidewalk assemblies in the unbridled discretion of the city police").

Like the prior restraints struck down in these cases, § 5103.1 provides government officials with unconstitutionally broad discretion to control expressive activity. The statute vests the "the court or presiding judicial officer" with free reign to grant or deny permission to record, photograph, or broadcast court proceedings for any reason—or no reason at all. The statute contains no standards to guide a judicial officer's decision, let alone "narrowly drawn, reasonable and definite standards." *Forsyth County*, 505 U.S. at 133. Further, no binding judicial decision limits § 5103.1's reach (or reasonably could, given its plain terms), and there is no historical practice that constrains its application. Indeed, because § 5103.1 makes every judicial officer in the Commonwealth a licensor, it is difficult to see how a consistent, unwritten, and constitutional practice could ever exist. Pennsylvania has over 500 magisterial district judges alone, on top of all of the judges of the Courts of Common Pleas, Superior Court, and Commonwealth Court.

This extensive scope also demonstrates how § 5103.1 is ripe for abuse. Even if some judges might grant or deny permission to take photographs without regard to the requestor's

viewpoint, the statute vests censorial power in the hands of hundreds of different individuals across the Commonwealth. It requires no leap of imagination to envision an official granting photography permission to a journalist who wants to write a glowing profile, but not to a journalist who wants to document perceived injustices. That risk of censorship is, by itself, enough to do harm: the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood*, 486 U.S. at 757.

Finally, the presumption of invalidity applies with full force to prior restraints that condition expressive activity in the courthouse. "There is broad agreement that, even in limited public and nonpublic forums"—where the government's authority to restrict speech is ordinarily at its height—"investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Child Evangelism Fellowship of Md. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006) (collecting cases scrutinizing prior restraints in non-public fora); *see also, e.g.*, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (striking down statute regulating speech in polling places, even though polling places are nonpublic fora, on the ground that no "objective, workable standards" constrained election officials). This consensus recognizes that the core danger that prior restraints pose—unbridled discretion to engage in viewpoint discrimination—violates the First Amendment no matter the forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (regulations of nonpublic forums must still be "viewpoint neutral"); *Higher Soc'y of Indiana v. Tippecanoe County*, 858 F.3d 1113 (7th Cir. 2017) (even

where "courthouse grounds are a nonpublic forum," viewpoint discrimination is still unconstitutional).[6]

B. Section 5103.1 violates Article I, § 7's additional protections

Article I, § 7 of the Pennsylvania Constitution provides even broader protections against prior restraints than the First Amendment. The Pennsylvania Constitution "differs" from the federal constitution "in that it has codified the proscription of prior restraints on speech." *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 244 (2003); *see also DePaul v. Commonwealth*, 600 Pa. 573, 589 (2009) (identifying prior restraints as one of a "number of different contexts" where the Pennsylvania Constitution "provides broader protections of expression than the related First Amendment guarantee"). Specifically, Article I, § 7 provides: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." This mandate "is designed . . . to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege," *i.e.*, in a prosecution or other enforcement action targeting any injury caused after the speech has taken place. *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 88 (1961). To give teeth to the added protection that the Pennsylvania Constitution provides, the Pennsylvania Supreme Court has prohibited the use of prior

[6] Nor is it of any help to the Commonwealth to claim that, because it could prohibit all photography and recording in the courthouse and its environs, it has authority to grant exceptions at its discretion. As explained below, that premise is incorrect: Section 5103.1, even apart from acting as an unconstitutional licensing scheme, impermissibly proscribes constitutionally protected conduct. *See infra* Section II.C. Further, the U.S. Supreme Court has already rejected this " 'greater-includes-the-lesser' syllogism," explaining that authority to prohibit speech in a "viewpoint neutral" manner with a blanket ban does not translate to authority to grant discretionary permission through a licensing system that "raises the specter of content and viewpoint censorship." *City of Lakewood*, 486 U.S. at 762-63.

restraints where the Commonwealth's aims can "be accomplished practicably in another, less intrusive manner." *Insurance Adjustment Bureau v. Insurance Com'r*, 518 Pa. 210, 225 (1988).

Here, the Commonwealth's aims can be accomplished through other means that do not involve, as § 5103.1 does, targeting a wide range of constitutionally protected expressive activity with a prior restraint backed by criminal penalties. The principal evil § 5103.1 aims to combat is witness intimidation in criminal prosecutions.[7] The Commonwealth has ample alternative means to pursue that aim more directly. For instance, other criminal statutes already make it illegal to intimidate witnesses and victims from participating in ongoing or future proceedings, 18 Pa. Cons. Stat. § 4952, or to retaliate against them for their past participation, 18 Pa. Cons. Stat. § 4953. These statutes are tailored to criminalize the actual, specific wrong—witness intimidation—without sweeping up constitutionally protected activity along the way. And these criminal statutes are not even the only safeguards at the Commonwealth's disposal. The Pennsylvania Court System recently released a handbook outlining the many other tools judges can use to prevent witness intimidation, such as issuing protective orders, closing the courtroom, and using their contempt powers, among others. Section 5103.1 is mentioned in only a single paragraph of the fifty-page handbook.[8]

To the extent that § 5103.1 is designed to limit disruptions of judicial proceedings or advance any other interests, less intrusive means exist to further those interests, as well. Through the use of statewide procedural rules and judges' inherent authority to control their courtrooms, Pennsylvania courts functioned for decades prior to the enactment of § 5103.1

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[7] In a press release about the bill, the sponsor of § 5103.1 cited only concerns about witness intimidation as motivation for the legislation. *See* Rep. Jerry Knowles, *Knowles Bill to Punish Intimidating Camera Use in Courtrooms Goes to Governor* (Oct. 18, 2018), https://perma.cc/D676-QJ3B.

[8] *Free To Tell the Truth: Preventing and Combating Intimidation in Court* 5 (2019), https://perma.cc/8S7R-2E5H.

without photography, broadcasting, and recording imperiling these interests. Viewed against this network of different tools available to the Commonwealth, it is evident that the prior restraint that § 5103.1 establishes is not the least restrictive means of achieving the Commonwealth's aims. The statute therefore violates Article I, § 7.

C. Section 5103.1 Is Unconstitutionally Overbroad

In addition to serving as an unconstitutional prior restraint, § 5103.1 is also unconstitutional because it is overly broad. "The Constitution provides 'significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.' " *Commonwealth v. Davidson*, 595 Pa. 1, 18 (2007) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)). Thus, a statute that targets unprotected speech may nevertheless be struck down as overbroad if it also "punishes lawful 'constitutionally protected activity.' " *Id.* (citation omitted).

To determine whether a given law is overbroad, courts examine whether "the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Commonwealth v. Ickes*, 582 Pa. 561, 567 (2005) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)). "The showing that a law punishes a '*substantial*' amount of protected free speech . . . suffices to invalidate all enforcement of that law." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (emphasis added; citations omitted). Section 5103.1 punishes numerous activities that fall squarely within the ambit of First Amendment protection and, consequently, is unconstitutional.

1. Section 5103.1's blanket ban on recording court "proceedings" proscribes protected First Amendment activity

By its plain terms, § 5103.1 makes it unlawful for members of the public to record any judicial "proceeding" in "any manner" for "any purpose." The U.S. Supreme Court has long recognized, however, that "the press and general public have a constitutional right of

access to criminal trials." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). A growing body of cases have held that this right is infringed when a rule or statute restricts the public's ability to document what happens during judicial proceedings. *See, e.g.*, *People v. Boss*, 705, 701 N.Y.S.2d 891, 895 (Sup. Ct. 2000) (holding that a New York criminal statute that imposed "an absolute ban on audio-visual coverage in the courtroom . . . is unconstitutional").[9]

Most recently, the U.S. District Court for the Eastern District of Pennsylvania confirmed that, if the public has a right to attend a court proceeding, then it has a right to create a record unless the court provides one itself. *See Philadelphia Bail Fund v. Arraignment Court Magistrate Judges*, 19-cv-3110, 2020 WL 906990 (E.D. Pa. Feb. 25, 2020). The plaintiff in *Philadelphia Bail Fund* sought to make audio recordings of bail hearings in Philadelphia's Municipal Court that were off-the-record but open to the public. Pennsylvania's Rules of Criminal Procedure and Judicial Administration, however, prevented them from doing so. *See* Pa. R. Crim. P. 112(C); Pa. R. J. Admin. 1910. The court held that those recording prohibitions violated the First Amendment insofar as they operated to prevent the public from recording bail proceedings for which there was no publicly available transcript. *Philadelphia Bail Fund*, 2020 WL 906990, at *9.

Section 5103.1 operates in the same unconstitutional manner. Indeed, it criminalizes the act of recording not only off-the-record bail proceedings across the state but also any other off-the-record judicial proceeding that the public has a right to attend. As *Philadelphia*

[9] *See also, e.g.*, *United States v. Columbia Broad. Sys.*, 497 F.2d 102, 107 (5th Cir. 1974) ("We are unwilling, however, to condone a sweeping prohibition of in-court sketching when there has been no showing whatsoever that sketching is in any way obtrusive or disruptive."); *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952 (N.D. Ill. 2006) ("A sweeping prohibition of all note-taking by any outside party seems unlikely to withstand a challenge under the First Amendment.").

Bail Fund makes clear, that is unconstitutional. *See also Whiteland Woods v. Township of West Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999) (holding that the First Amendment prohibits any regulation that "meaningfully interferes with the public's ability to inform itself of [a] proceeding" it has the right to attend).

2. Section 5103.1's ban on photographing, broadcasting, or recording any "person within a judicial facility" prohibits a wide swath of First Amendment activity

Section 5103.1's overbreadth is not limited to its prohibition on constitutionally protected efforts to document public judicial "proceedings." As noted above, the statute also makes it a crime to photograph, broadcast, or record any "person" in a "courtroom, hearing room or judicial chambers." 18 Pa. Cons. Stat. §§ 5103.1(a), (c). That proscription sweeps in a host of other constitutionally protected activities.

The statute reaches a vast array of protected expression and association by everyday citizens. It would bar wedding photographers, for example, from taking pictures of couples who exchange their vows inside a courtroom or judge's chambers—an almost weekly occurrence in some Pennsylvania courthouses.[10] The statute would also prohibit parents and educators from filming the many mock-trial and moot-court competitions that take place in state courthouses throughout the school year.[11] And it would preclude families from sharing photos of courtroom ceremonies where loved ones take the oath of citizenship, graduate

[10] *See, e.g.*, *Tara Nelson Photography, Jon + Ashley: A Center County Courthouse and Penn State Wedding*, https://perma.cc/5X97-WAEX (last visited Aug. 24, 2019); Michael Goldberg, *Montgomery County District Judge Vows To Wed as Many Couples as He Can*, MainLine Media News (Jan. 20, 2018), https://perma.cc/K8BX-9CL7; *Philly Court Weds Scores on Valentine's Day*, Phila. Public Record (Feb. 23, 2018), https://perma.cc/EW8J-AN4G.

[11] *See, e.g.*, *Northwestern to Compete in Mock Trial Final*, GoErie.com (Mar. 6, 2020, 11:10 a.m.), https://perma.cc/PB38-LJ9J (displaying image of local high school students posing inside Erie County Courthouse).

from drug-court programs, or are honored by local bar associations.[12] Capturing these defining personal moments—and sharing the images or recordings with others—is a core example of First Amendment expression and association. *See Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000) ("Two types of association are protected by the federal Constitution: intimate association (i.e., certain close and intimate human relationships like family relationships) and expressive association (i.e., association for the purpose of engaging in activities protected by the First Amendment)."). Yet, § 5103.1 renders all of those activities criminal.

Pennsylvania courtrooms also routinely play host to newsworthy events such as local-government meetings, public legislative hearings, and other non-judicial proceedings.[13] The press and the public enjoy a constitutional right to photograph, broadcast, and record these events. But § 5103.1 expressly precludes any audio or visual coverage of such events as well if they are held inside a courtroom. *Cf. In re 24th Statewide Investigating Grand Jury*, 589 Pa. 89, 102-05 (2006) (striking down a grand-jury subpoena as overbroad because of its "potential chilling effect" on the news media).

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[12] *See, e.g.*, *Lancaster County, Pa.*, *Naturalization*, https://perma.cc/QMW6-NFL6 (last visited Aug. 26, 2019) (noting that naturalization ceremonies "are held in courtroom 'A' of the Historic Courthouse"); Renatta Signorini, *Westmoreland Drug Court Graduate: 'It Feels Like I'm Starting Over,'* Pitt. Tribune-Review (Dec. 28, 2017), https://perma.cc/X396-C8JM; *Pa. Bar Assoc., Pro Bono Month*, https://perma.cc/Q242-HTH3 (last visited Aug. 26, 2019) (featuring photos of recipients of 2018 pro bono awards inside courtrooms).

[13] *See, e.g.*, Sen. Michele Brooks, *2018 Photo Gallery*, https://perma.cc/2SBM-YHFA (displaying photograph of an "opioid roundtable with Attorney General Josh Shapiro and state and county leaders at the Crawford County Courthouse"); *Warren County, Pa.*, *Commissioner Meetings*, https://perma.cc/6ZV2-Y2C4 (last visited Aug. 25, 2019) (listing various courtroom locations for upcoming county commissioner meetings); *Center for Rural Pa., Public Hearing: State of Addiction, Confronting the Heroin/Opioid Epidemic in Pennsylvania*, https://perma.cc/Y6MF-EDT7 (last visited Aug. 25, 2019) (listing agenda for 2018 public hearing to be held in courtroom of Cambria County courthouse).

Finally, § 5103.1's overbreadth is exacerbated by extending to prohibit recording in "any other room made available to interview witnesses." 18 Pa. Cons. Stat. § 5103.1(c). Under this clause, any lawyer who records a conversation with a client in a courthouse office—even a privileged conversation—would be guilty of violating § 5103.1. So, too, would a court-appointed psychiatrist who records a mental-health evaluation of a juvenile defendant. Even police detectives would be barred from recording interviews with suspects housed at the courthouse jail. Section 5103.1's lack of exemptions for any of these activities—all of which involve recording a "person within a judicial facility" under the statute's literal text—underscores the provision's staggering breadth.

3. Section 5103.1's ban on photography, broadcasting, and recording in areas "adjacent to or immediately surrounding a judicial facility" prohibits even more protected activity

Section 5103.1's sweeping prohibition on photography, broadcasting, and recording inside a "judicial facility" raises a serious overbreadth problem on its own. But the statute compounds that problem by prohibiting the same activities in any "area *adjacent to* or *immediately surrounding* a judicial facility." 18 Pa. Cons. Stat. § 5103.1(a) (emphases added).

Federal courts have struck down similar bans on photographing, broadcasting, or recording people in areas surrounding the courtroom. In 2018, for instance, the Sixth Circuit upheld a First Amendment claim brought by a pair of Ohio journalists who alleged that they had been arrested for photographing a criminal defendant and her lawyer in a courthouse hallway. *See Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018). The court reasoned that "the First Amendment protects the rights of both the media and the general public to attend and share information about the conduct of trials." *Id.* (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 578 (1980)). Punishing people for engaging in

newsgathering activities in public places outside of the courtroom—as § 5103.1 does—plainly implicates those rights.

Other courts have relied on similar reasoning in striking down local rules prohibiting recording or photography inside courthouses. In *Dorfman v. Meiszner*, for example, the Seventh Circuit invalidated a court rule that prohibited "[t]he taking of photographs in the courtroom or its environs or radio or television broadcasting from the courtroom or its environs . . . whether or not court is actually in session." 430 F.2d 558, 560 (7th Cir. 1970) (quoting challenged rule). The court acknowledged that circumstances may sometimes justify narrow restrictions on courthouse photography, but held that imposing such restrictions "by a *blanket rule* is inconsistent with both the letter and the spirit of the first amendment." *Id.* at 563 (emphasis added). As the court explained, any prohibition on photography "must be confined to those activities which offer immediate threat to the judicial proceedings and not to those which are merely potentially threatening." *Id.*

The same principle applies here—especially in light of the large volume of expressive and newsgathering activity that occurs in the areas surrounding courtrooms and judicial chambers. Prosecutors and defense attorneys regularly hold press conferences and make public statements in courthouse hallways, on courthouse steps, and in courthouse offices. Members of the press and the public have a constitutionally protected interest in photographing, broadcasting, or recording those events. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."). The press and the public also share similar interests in capturing images or recordings of litigants—particularly in high-profile

criminal matters—as they enter or exit the courtroom.[14] Section 5103.1 impinges directly on those interests.

Section 5103.1's ban on photography and recording in "area[s] adjacent to or immediately surrounding" judicial facilitates poses an especially grave threat to First Amendment activity in Pennsylvania. Many of the Commonwealth's magisterial district courts—including here in Crawford County—are housed in small, one-story buildings with courtrooms and judicial chambers that open directly onto public thoroughfares. In those places, § 5103.1 would operate to restrict photography, broadcasting, and recording even on *public streets and sidewalks*. Restricting First Amendment activity in those places raises obvious constitutional problems. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) (noting that "speech in public areas is at its most protected on public sidewalks").

Those problems are especially stark insofar as § 5103.1 prohibits people from photographing or recording law-enforcement officers performing their official duties in public places. The Third Circuit has explicitly held that "recording police activity in public falls squarely within the First Amendment right of access to information." *Fields*, 862 F.3d at 359. By purporting to criminalize that same behavior in the public areas surrounding courtrooms, § 5103.1 reaches beyond permissible constitutional limits.

D. Mr. Rice Has Standing to Raise These Constitutional Arguments

Although Mr. Rice's prosecution does not directly implicate every single one of the many constitutional infirmities in § 5103.1, he is a proper party to challenge the statute's validity as a whole. "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its

[14] *See, e.g.*, Daveen Rae Kurutz, *Charges Dropped Against Aliquippa Assistant Chief Again*, Beaver County Times (May 28, 2019), https://perma.cc/R33N-99P3 (featuring photo of local police official leaving court hearing).

application in the case under consideration may be constitutionally unobjectionable." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). Criminal defendants likewise may therefore challenge the constitutional validity of any law that "creates an impermissible risk of suppression of ideas" by "delegate[ing] overly broad discretion to the decisionmaker" or "sweeps too broadly" by "penalizing a substantial amount of speech that is constitutionally protected." *Id.* at 129-30 (citations omitted).

III. The Commonwealth Will Not Suffer "Substantial Prejudice" If Mr. Rice Is Permitted to Withdraw His Plea

The Commonwealth will not be prejudiced at all, let alone "substantially," if Mr. Rice's motion is granted. Substantial prejudice requires that the Commonwealth demonstrate that, "due to events occurring after the plea was entered, the Commonwealth is placed in a worse position than it would have been had trial taken place as scheduled." *Commonwealth v. Blango*, 150 A.3d 45, 51 (Pa. Super. 2016); *see also, e.g.*, *Com. v. Gordy*, 73 A.3d 620, 628 (Pa. Super. 2013) (inconvenience and stress for the complainants does not demonstrate substantial prejudice to the Commonwealth).

Here, the Commonwealth is in the exact same position it would have been in had Mr. Rice not pleaded guilty. Indeed, Mr. Rice's motion came just six weeks after he pleaded guilty. *See Commonwealth v. Islas, 2017 PA Super 43, 156 A.3d 1185, 1194 (2017)* ("[T]he relevant time for measuring prejudice to the Commonwealth is at the filing of the motion to withdraw."). At that point—as remains true to this day—no evidence had been spoliated; no witness became unavailable to testify; and no trial strategy has been revealed. *See, e.g.*, *id.* (substantial prejudice existed where defendant had been able to "preview" Commonwealth's trial strategy at co-defendant's trial); *Commonwealth v. Islas*, 156 A.3d 1185, 1194 (Pa. Super. 2017) (no substantial prejudice where witnesses and evidence were still available). Accordingly, the Commonwealth cannot claim prejudice if Mr. Rice's plea is withdrawn.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Rice's motion.

Dated: May 14, 2020

Respectfully submitted,

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CERTIFICATION OF SERVICE

This document has been served upon the District Attorney's Office by first class United States mail, hand delivered, or facsimiled on the date indicated below.

Submitted By:

_____

J. Wesley Rowden
Chief Public Defender
Crawford County Public Defender's Office

CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy Of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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