CAUSE NO. 7886004

STATE OF TEXAS	**§**	**IN THE MUNICIPAL COURT**
	§	
VS.	**§**	**CITY OF AUSTIN**
	§	
ANTONIO BUEHLER	**§**	**TRAVIS COUNTY, TEXAS**

DEFENDANT'S MID-TRIAL
MOTION IN LIMINE
CONCERNING CORRECTLY STATING THE LAW
DURING CLOSING ARGUMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes ANTONIO BUEHLER, Defendant in the above numbered cause, and Moves for Due Process during closing argument, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and in support thereof would show as follows:

Background:

The State's witnesses misstated the law regarding search and seizure during the State's case-in-chief and on redirect. For example, Officer Robert Snider testified that he does not need to believe a crime is happening in order to detain someone, he can detain a person if the person is merely doing something out of the ordinary. Likewise, Officer Patrick Oborski testified that he can handcuff an

individual without reasonable suspicion to believe the person is committing an actual crime. Officer Carillo was uncertain on the issue. Officer Snider also testified that a passenger during a traffic stop is also *Terry* stopped and such is not a consensual encounter.

Our defensive theory in the case at bar is that the order Patrick Oborski gave Antonio Buehler to put his hands behind his back was an unlawful order because Patrick Oborski illegally seized Mr. Buehler without reasonable suspicion or probable cause. Five witnesses have testified that Patrick Oborski approached Mr. Buehler aggressively and immediately began putting his hands on Mr. Buehler.

Both Jermaine Hopkins, who has trained over 600 Iraqi troops in human rights and ethics and trained military police officers at Fort Hood regarding Texas law, as well as Officer Carillo testified that the immediate act of shoving a person for whom one has no reasonable suspicion that the individual has committed a crime is 1) an illegal detention, and 2) an assault. This illegal detention and assault came on the heels of the illegal detention and assault of Norma Pizana.

Three witnesses have testified that Antonio Buehler did not spit on Patrick Oborski. Four witnesses have testified that Patrick Oborski never wiped his face during his encounter with Mr. Buehler.

The Law:

To Detain, Question, or Make Demands on a Passenger, the Police Must Have Specific Articulable Facts to Believe the Passenger Was, Is, or Will Commit a Crime:

"Absent reasonable suspicion, officers may conduct only consensual questioning of passengers in a vehicle." *St. George v. State*, 237 S.W.3d 720, 726 (Tex. Crim. App. 2007) (citing *Florida v. Bostick*, 501 U.S. 429, 435 (1991). "If an encounter is determined to be consensual, reasonable suspicion is unnecessary." *Id*. When officers make demands or give orders to a passenger without reasonable suspicion to believe that a crime has, is, or will occur, that is unreasonable:

> At the time the driver was issued the warning citation, the deputies did not have specific articulable facts to believe that Appellant was involved in criminal activity, thus, the questioning of Appellant regarding his identity and checks for warrants, without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration.

St. George, 237 S.W.3d at 727.

Officer Oborski has conceded that verbal interruptions are not enough to detain someone for the crime of interfering with a police officer – such is protected by the First Amendment, *per Houston v. Hill*. Because Norma Pizana was only verbally interrupting him, he had no grounds to detain her for any crime. Because the law is clear, as set forth in *St. George*, that Norma Pizana could not be detained without facts specific to her that she was committing a crime, the demands placed

on her by the officers to shut up and not use her cell phone were illegal. Because those demands were illegal, the officers further violated her Fourth Amendment rights when they yanked her from the vehicle for using her cell phone. Such constituted an assault.

The First Contact Officer Oborski Had With Antonio Buehler Was Illegal:

Whether a *Terry* stop is reasonable, as that word is understood in Fourth Amendment jurisprudence,

> [I]s examined n terms of the totality of the circumstances and will be justified when the detaining officer has specific articulable facts, which, taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity.

Sieffert v. State, 290 S.W.3d 478, 483 (Tex. App.—Amarillo 2009, no pet.).

> To justify the investigative detention, the individual officer must have a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, **and some indication that the activity is related to crime**."

State v. Fudge, 42 S.W.3d 226, 229 (Tex. App.—Austin 2001, no pet.) (*citing Terry v. Ohio*, 392 U.S. 1, 22-26 (1968).

Here, the officers – in part encouraged by the State – have testified that they need not connect the unusual activity with an actual crime. That is not the law.

All of the police officers in this case have testified that a person has a First

Amendment right to photograph the police, and a person has a First Amendment right to speak and question police on the street. And, the officers have all testified that verbal interference alone is not sufficient to satisfy the requirements of the crime of interfering with a police officer. *Consistent with Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2403, 96 L.Ed.2d 398 (1987) (holding that Houston, Texas cannot criminalize a person's speech when he shouted out to a policeman making an arrest "Pick on someone your own size.").

It is for the jury to decide whether Oborski began his face-to-face encounter with Mr. Buehler by shoving him. It is for the jury to decide whether Mr. Buehler spat upon Officer Oborski. If the jury finds that Oborski did shove Mr. Buehler upon their initial contact, and finds that there was no spit, Officer Oborski would have had neither probable cause to arrest nor reasonable suspicion to detain Mr. Buehler.

Should the State Misstate the Law On Search and Seizure, Such Constitutes Prosecutorial Misconduct and Would Require a Mistrial:

"An argument which contains a statement of the law contrary to the court's charge is error." *Burke v. State*, 652 S.W.2d 788, 790 (Tex.Cr.App. 1983). When a prosecutor completely misstates the law to the jury, there is irreparable harm to the defendant: "The prosecutor's remark was not only erroneous but so manifestly improper under the circumstances, to require the reversal of the judgment. […] The

prosecutor's subsequent reference to the court's charge, without correcting the misstatement of the law, was not sufficient to overcome the irreparable harm to the [defendant]." *Id*. at 791.

WHEREFORE, PREMISES CONSIDERED, Antonio Buehler prays that the Court properly instruct the jury on the law of search and seizure in the Court's charge, and that the State be ordered not to depart from those instructions or in any way misstate the law to the jury before their deliberations.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

This is to certify that on October 26, 2014, a true and correct copy of the above and foregoing document was served on the City of Austin by fax, and by email.

_____

MILLIE L. THOMPSON

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ORDER ON DEFENDANT'S MID-TRIAL MOTION IN LIMINE

Having considered the law, argument of counsel, the facts, and pleadings, the Court is of the opinion that said Motion should be GRANTED

SIGNED_____, 2014.

_____
HON. JUDGE SOLOMON, PRESIDING