ANITA P. ARRIOLA, ESQ.
JOAQUIN C. ARRIOLA, ESQ.
LEEVIN T. CAMACHO, ESQ.
ARRIOLA, COWAN & ARRIOLA
259 MARTYR STREET, SUITE 201
P.O. BOX X, HAGATNA, GUAM 96910
TELEPHONE: (671) 477-9730/33
TELECOPIER: (671) 477-9734
Attorneys for Plaintiff James L. Adkins

IN THE DISTRICT COURT OF GUAM

JAMES L. ADKINS, Plaintiff, vs. ALICIA G. LIMTIACO, ATTORNEY GENERAL OF GUAM; OFFICE OF THE ATTORNEY GENERAL OF GUAM; PAUL SUBA, CHIEF OF GUAM POLICE DEPARTMENT; GUAM POLICE DEPARTMENT; D.B. ANCIANO; SERAFINO ARTUI; AND DOES I THROUGH X, Defendants.	CIVIL CASE NO. **CV09-00029** **PLAINTIFF JAMES L. ADKIN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION**

Plaintiff James L. Adkins ("Mr. Adkins") requests that this Court reconsider its Order and Opinion of August 24, 2010 ("Order"). In its Order, the Court held that a reasonable police officer would not have known it is unlawful to order an individual to delete photographs of an accident from their camera, and then arrest them in retaliation for challenging the officer's authority.

The Court's Opinion focuses solely on whether Defendants Anciano ("Anciano") and Artui (collectively "Defendants") violated Mr. Adkins' clearly established rights when they forced him to choose between deleting the photos he had taken, allowing Defendants to delete the photos, or being placed under arrest. Wholly ignored is the fact that Defendants arrested Mr.

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Adkins in retaliation for verbally challenging their authority and served him with a Notice to Appear on charges of "failure to comply" and obstructing governmental functions. Defendants' conduct in this case is especially egregious given the opinion issued by the Supreme Court of Guam in 2005 where Anciano arrested an individual and charged them with, amongst other charges, "failure to comply" after the two "exchanged words." All of the charges that Anciano made against the individual were eventually dismissed due to a lack of sufficient evidence. The lack of appropriate training, supervision, and or disciplinary measures in response to the Supreme Court's opinion, written by then-Justice Tydingco-Gatewood, demonstrates deliberate indifference on the parts of Defendants individually, and the Guam Police Department ("GPD") as a whole, to the use of arrest, confinement and the threat of criminal charges as an intimidation tactic by some police officers.

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." United States v. In Hyuk Kim, 2009 WL 5033934 (D. Guam 2009) (quoting Nunes v. Ashcroft, 375 F.3d 805, 807-808 (9th Cir. 2004)). Mr. Adkins submits that the standards governing reconsideration are met here: the Court failed to consider the overwhelming weight of authority that gathering information about what public officials do on public property by taking photographs is protected by the First Amendment; the Court made findings of fact regarding the conduct of Defendants which were not alleged in the First Amended Complaint ("FAC"); the Court dismissed the third cause of action without addressing Mr. Adkins' First Amendment claims of retaliatory arrest and unlawful prior restraint; and the Court did not permit leave for Mr. Adkins to amend the FAC.

I. The Court erred in holding that a right is not clearly established unless it has been explicitly recognized in the Ninth Circuit.

The Court held that "[i]f the only way to find there is a clearly established right is to look to other circuits for guidance then it is likely that the right is not, in fact, clearly established by the circuit." Order, p. 18. This holding is contrary to the law of qualified immunity established by the Ninth Circuit. The Ninth Circuit Court of Appeals has held that, "in the absence of binding precedent, a court should look at *whatever decisional law is available* to ascertain whether the law is clearly established for qualified immunity purposes, *including decisions of state courts, other circuits, and district courts*." Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (emphasis added) (quoting Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995)). See also Pearson v. Callahan, 129 S. Ct. 808 (relying on federal and state caselaw to determine whether a right was or was not clearly established).

The plaintiff in Drummond filed a section 1983 claim against police officers alleging that the officers used excessive force. Id. at 1052. The trial court granted the police officers' motion for summary judgment finding that there was no constitutional violation and, assuming there was a violation, the law was not sufficiently clearly established that a reasonable officer would have known the conduct was unconstitutional. Id. at 1055. The Court of Appeals reversed on both grounds, finding that the use of force was constitutionally excessive. Id. at 1060. The court recognized that the right to be free from excessive force was clearly established, but the specific inquiry was whether a reasonable officer would have had fair notice that the force used was unlawful. Id. The court considered a series of stories in the local newspaper, two district court cases and the training materials from the police department and concluded that, "[v]iewing the evidence in the light most favorable to [the plaintiff], we conclude that the officers had 'fair warning' that the force they used was constitutionally excessive *even absent a Ninth Circuit case presenting the same set of facts*." Id. at 1061 (emphasis added).

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In this case, a reasonable police officer would have had fair warning that it is unlawful to force an individual to delete photos on their camera, or seize the camera so the officer could delete the photos. The Sixth Circuit and the Second Circuit have recognized that the protection of the First Amendment extends to photographs. See ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 924 (6th Cir. 2003); Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996). Furthermore, all of the federal Courts of Appeals that have addressed whether the First Amendment protects the photographing or videotaping of police conduct have held that it does. Order, p. 18 (citing Gilles v. Davis, 427 F.3d 197, 212 n. 14 (3d Cir. 2005); Smith v. City of Cummings, 212 F.3d 1332, 1333 (11th Cir. 2000). As the court in Smith observed, free speech "protects the right to gather information about what public officials do on public property, and specifically, *a right to record matters of public interest*." Smith, 212 F.3d at 1332 (emphasis added). See also Robinson v. Fetterman, 387 F.Supp.2d 545, 540-41 (E.D. Pa. 2005) (videotaping state troopers protected by the First Amendment).

In Robinson, the plaintiff suspected that state troopers were not inspecting trucks on the highway in a safe manner. Id. The plaintiff began filming the troopers from a safe distance away, never interfering with their activities. Id. The troopers approached Robinson and asked him to stop videotaping and to leave the area. Id. When Robinson refused to stop filming or leave, the troopers arrested him. Id. Robinson filed a section 1983 suit, claiming that the troopers had violated his First Amendment rights. The court agreed with the plaintiff, finding "there can be no doubt that the free speech clause of the Constitution protected [the plaintiff] as he videotaped the defendants . . . ." Id.

Here, there were at least two (2) police officers at the scene of the accident when Mr. Adkins took the photos. FAC ¶¶ 12-14. Defendants demanded that Mr. Adkins delete the

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pictures on his camera, or turn over his camera so that they could delete the pictures. Id. A reasonable inference can be drawn from these facts that Mr. Adkins photographed an accident scene still the subject of police activity. As Defendants themselves concede, a reasonable reading of the FAC is that "a satellite scene had now developed in orbit around the accident with the green truck." Defendants' Memorandum, p. 9. Defendants should have known that it was unlawful to stop Mr. Adkins in order to force him to delete the pictures on his camera, or seize the camera to delete the pictures themselves was unlawful.

Despite the weight of authority supporting the finding that photography and the ability to gather information about public officials and matters of public interest is protected by the First Amendment, this Court limited its discussion to a single case, Chavez v. City of Oakland, 2009 WL 1547875 (N.D. Cal. June 2, 2009), which is factually and legally distinguishable from the instant matter. The plaintiff in Chavez, a newspaper photographer, was stopped in traffic, and saw one car in front of him, an overturned car, and a woman on the ground. Id. at *1. The plaintiff exited his car and approached the scene of the accident. Id. The plaintiff was taking photographs of the accident for fifteen (15) minutes when he was asked by a police officer whether he had witnessed the accident and where he was parked. Id. The plaintiff told the officer that he had not witnessed the scene, and that his car was parked in lane one of the highway. Id. The officer asked the plaintiff to return to his car and leave, but the plaintiff said that as a member of the media he had a right to cover accident scenes. Id. The officer advised the plaintiff that it was a crime scene and again instructed the plaintiff to return to his car and leave. Id. The plaintiff agreed, then began walking to his car. Id. The plaintiff heard an ambulance at the scene, and then turned to look. Id. The officer told the plaintiff that he was going to issue a citation and demanded the plaintiff's driver's license, proof of insurance and

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vehicle registration. Id. The plaintiff again started walking back toward his car, when he stopped to take another picture of a California Highway Patrol car. Id. It was at this point that the officer grabbed the camera away from the plaintiff, handcuffed him, and made him sit on the highway. Id. The plaintiff was parked in lane one and at the accident scene for approximately 30 minutes. Id.

The court held that the plaintiff "did not have a First Amendment right to take the photograph in the first place in the absence of evidence that the general public is allowed such access to accident sites, and this accident in particular." Id. at *3. The court then held that "[e]ven assuming that members of the press have a federal First Amendment right to exit a vehicle in the middle of a freeway to photograph an accident, such a right was not clearly established . . . ." Id. at *4.

The plaintiff in Chavez refused an order from the police officer to return to his car and leave. On three (3) occasions, the plaintiff refused to move his car from lane one of the highway so that he could continue to take photographs of the accident scene. The court's holding in Chavez was dependent on the fact that the plaintiff left his car in the middle of the freeway for over thirty (30) minutes so that he could take pictures of the accident. In this case, the FAC alleges that "Plaintiff took out his cell phone with camera and took pictures of the accident *while in his car*." FAC ¶ 12 (emphasis added). Furthermore, Defendants never told Mr. Adkins to return to his car or leave the accident scene. In fact, it was Defendants who stopped Mr. Adkins and prevented him from driving away. FAC ¶ 13. A reasonable inference can be drawn that Mr. Adkins never interfered with the ability of the police officers to conduct their investigation, that Mr. Adkins never left public property, or that Mr. Adkins ever stopped the flow of traffic.

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While the Ninth Circuit may not have had an opportunity to address this issue, the law in other circuits is clearly established that an individual such as Mr. Adkins has the right to take photographs about policy activity and matters of public interest on public property. Under Drummond, the Court must consider the caselaw and authorities of other jurisdictions. After reviewing the above cited decisions, this Court should reconsider its Order and adopt the recommendation that the motion to dismiss the FAC against Defendants be denied as to the third cause of action. See Deorle v. Rutherford, 272 F.3d 1272, 1285-6 (9th Cir. 2001) (reversing a district court's finding of qualified immunity and holding that, "[a]lthough there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle [the defendant] to qualified immunity . . . .").

II. This Court's findings regarding the conduct of Defendants are unsupported by the facts of this case.

A court may not dismiss a complaint if it contains "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

The Court held that Mr. Adkins had failed to state a claim that Defendants violated his right to free speech, specifically finding that "[i]t would not have been clear to a reasonable officer in the Defendants' position that prohibiting the Plaintiff from taking photos at an accident scene would violate the Plaintiff's First Amendment rights." Order, p. 18.

The FAC alleges much more than Defendants "prohibiting" Mr. Adkins from taking photos. Throughout the Opinion this Court portrays the conduct of Defendants in a matter inconsistent with the facts actually alleged in the FAC. Mr. Adkins alleged that he took pictures

of an accident with the camera on his cell phone. FAC at ¶ 12. As he began to drive away from the accident, Mr. Adkins was stopped by a police officer. Id. at ¶ 13. The police officer told him that he could not take pictures and demanded that Mr. Adkins "give me your camera." Id. A reasonable inference can be drawn from these facts that (1) Mr. Adkins had taken pictures of the accident, (2) Mr. Adkins was driving away from the accident, (3) Mr. Adkins was stopped by Defendants, and (4) Mr. Adkins was ordered by Defendants to either turn over his cell phone or delete the pictures.

This Court first characterized the conduct of Defendants as "admonishment of the Plaintiff to stop taking photographs . . . ." Order, p. 15. The FAC does not allege that Defendants "admonished" Mr. Adkins to stop taking photographs. The officers stopped his car and *demanded* that Mr. Adkins delete the pictures on his cell phone. FAC at ¶¶ 12-13. The Court then erroneously finds that Defendants were "prohibiting" Mr. Adkins from taking photographs at an accident scene. Opinion, pp. 15, 18. There are no allegations before the Court that Mr. Adkins was trying to take any additional photographs when Defendants stopped him. A reasonable inference could be drawn that, when the officer told Mr. Adkins that "he could not take pictures," the officer intended to have Mr. Adkins delete the photos he had already taken or delete the photos himself. FAC ¶ 13.

The Court concludes that there was no "fair warning" that Defendants "telling the Plaintiff he had no right to take photos and to move on from the scene of an accident, was unlawful and in violation of the First Amendment." Opinion, p. 18. This is not what was alleged in the FAC. The FAC establishes that Defendants did not simply tell Mr. Adkins he had no right to take photos. Defendants were intent on deleting the pictures themselves, forcing Mr. Adkins to delete them, or taking away his cell phone. FAC ¶¶ 12-13. Finally, Defendants stopped Mr.

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Adkins. FAC ¶ 13. There are no allegations that Defendants told Mr. Adkins to "move on from the scene of an accident . . . ." Opinion, p. 18. The Court's Opinion appears to try to mold the facts of this case to fit the facts alleged in Chavez. But as discussed above, Chavez is wholly distinguishable from this case.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 544 U.S. 194, 201 (2001). This Court characterized Defendants' conduct as "prohibiting" Mr. Adkins from taking pictures of an accident. This is inconsistent with the factual allegations actually contained in the FAC, which firmly establish that Defendants stopped Mr. Adkins for the purpose of ordering him to delete photographs on his cell phone or to take away his cell phone. When viewed in a light most favorable to Mr. Adkins, the FAC sets forth facts which create a reasonable inference that Defendants violated his clearly established First Amendment right to photograph police conduct and matters of public interest at the scene of an accident and, therefore, reconsideration is warranted. Assuming facts outside of the pleadings in order to find that Defendants were entitled to qualified immunity, as the Court did here, constitutes reversible error. See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (reversing the district court's dismissal of section 1983 claims because, in part, "the court assumed the existence of facts that favor defendant based on evidence outside of plaintiffs' pleadings . . . and did not construe plaintiffs' allegations in the light most favorable to plaintiffs.").

III. The Court failed to address Mr. Adkins' First Amendment claim that he was arrested in retaliation for challenging Defendants' authority.

In its Order, the Court focused solely on whether Mr. Adkins' right to gather information at the scene of an accident was clearly established. The Court failed to address Plaintiff's other

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First Amendment claims. The First Amendment right to verbally challenge police officers is well established by the Supreme Court. City of Houston v. Hill, 482 U.S. 451, 461 (1987). "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Id. at 462-63. "Thus, while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." Duran v. City of Douglas, Ariz, 904 F.2d 1372, 1378 (9th Cir 1990) (holding that making obscene gestures and yelling profanities in Spanish at a police officer was criticism protected by the First Amendment).

Defendants violated Mr. Adkins' clearly established First Amendment right to verbally challenge police action. The FAC states that when the first officer stopped Mr. Adkins and demanded that he turn over his cell phone, Mr. Adkins refused and stated that "there is nothing wrong with taking pictures". FAC ¶ 13. The second officer approached Mr. Adkins and demanded his cell phone camera and Mr. Adkins repeated "there's no law against taking pictures." Id. at ¶ 14. The facts are clear that Defendants arrested Mr. Adkins because he challenged their authority, thus violating Mr. Adkins' clearly established First Amendment right.

Defendants, and Anciano in particular, had fair warning their conduct was unlawful in light of People v. Maysho, 2005 Guam 4. In that case, Anciano was directing traffic when the driver of a car failed to stop immediately in accordance with his hand and whistle instructions. Id. at ¶ 2. "The two *exchanged words* and [Anciano] thereafter arrested Maysho and took him into custody." Id. (emphasis added). Maysho was charged with Failure to Comply With a Lawful Order, Reckless Driving and Disorderly Conduct. Id. at ¶ 3. The trial court *dismissed*

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the charges of Failure to Comply and Disorderly Conduct, but found Maysho guilty of Reckless Driving. Id. On appeal, the Supreme Court of Guam reversed the conviction. Id. at ¶ 24. In an opinion authored by then Justice Tydingco-Gatewood, the court held that there was insufficient evidence that Maysho had engaged in reckless conduct. Id. The trial court and Supreme Court of Guam therefore dismissed *all* of the charges that Defendant Anciano made against Maysho due to a lack of evidence.

Although the court in Maysho did not explicitly address the First Amendment, the court's holding read in conjunction with the trial court's dismissal of the failure to comply charge provided Defendants with fair warning that their conduct in *this* case was unlawful. Defendants arrested Mr. Adkins only after there was an exchange of words. FAC ¶¶ 12-14. Based on Mr. Adkins' refusal to delete the pictures on his cell phone, or permit Defendants to delete the pictures, Defendants arrested Mr. Adkins and served him with a Notice to Appear alleging that he had committed the crimes of "failure to comply" and "obstructing government functions." FAC ¶¶ 19-20. Maysho and the facts of this case demonstrates that Defendants in general, and Anciano in particular, have a pattern of arresting individuals who challenge their authority and serving Notices to Appear for "failure to comply."

Dismissal of Mr. Adkins' third cause of action without addressing Mr. Adkins' First Amendment claim of retaliatory arrest is clear error. Therefore, reconsideration is necessary and warranted.

IV. The Court failed to address Mr. Adkins' First Amendment claim that Defendants' conduct constituted a prior restraint.

In addition to the right to gather information about police conduct and matters of public interest on public property, the First Amendment protects photography that has a communicative or expressive purpose, and that is not obscene. Giles v. Davis, 427 F.3d 197, 212 n. 14 (3d Cir.

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2005); Showwalter v. Brubaker, 493 F.Supp.2d 752, 756 (E.D. Pa. 2007). Mr. Adkins had taken pictures of the accident scene. FAC ¶ 12. Defendants seized Mr. Adkins's camera and did not return it. FAC ¶ 17. The FAC alleges that the Defendants' "purpose and intent in arresting plaintiff and *seizing his cell phone camera* was to deprive him of his freedom of speech." FAC ¶ 29 (emphasis added).

Defendants had no right to seize the camera. Furthermore, the contents of the camera were completely unrelated to the allegations of obstructing governmental function and failing to comply with the orders of a police officer. Several cases examining this question have held that preventing an individual from publicizing photographs of police conduct and matters of public interest violates the First Amendment. See Robinson, 387 F.Supp.2d at 541 (holding that "to the extent that the troopers were restraining [the plaintiff] from making any future videotapes and from publicizing or publishing what he had filmed, the conduct clearly amounted to an unlawful prior restraint upon his protected speech."); Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634, 638 (D. Minn. 1972). It is noteworthy that, in Chavez, the police officer never seized the reporter's camera. See also Ass'n de Periodistas de Puerto Rico v. Mueller, 2007 WL 5312566 * 4 (D. Puerto Rico 2007) (finding no First Amendment violation where law enforcement agents did not ask plaintiffs to turn over their cameras or films).

Dismissal of Mr. Adkins' third cause of action without addressing his claim of unlawful prior restraint constitutes clear error. The Court should reconsider its ruling.

V. The Court committed error by not granting Mr. Adkins leave to amend the Complaint.

"Rule 12(b)(6) motions are viewed with disfavor. Dismissal without leave to amend is proper only in 'extraordinary cases.'" Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003) (internal citations omitted). The Ninth Circuit Court of Appeals has "repeatedly held that a

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district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (citing Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)). The Court dismissed the third cause of action without granting leave for Mr. Adkins to amend the FAC or finding that any amendment of the FAC would be futile. Dismissal of a section 1983 claim that could be cured by alleging additional facts is reversible error. See Broam, 320 F.3d at 1028 (reversing the district court's dismissal of a section 1983 claim without leave to amend based on finding that plaintiffs may have been able to amend their complaint to plead additional facts that would state claims against defendants). Accordingly, reconsideration of the Court's Opinion is warranted.

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CONCLUSION

The Court focused solely on the absence of Ninth Circuit caselaw in determining whether a reasonable officer would have had fair warning that it was unlawful to force an individual to delete pictures from their camera or seize the camera and delete the pictures. The Court committed an error of law by ignoring the weight of authority in other jurisdictions that Defendants' conduct violated Mr. Adkins' clearly established First Amendment rights, as required by the Ninth Circuit. Furthermore, the Court erred by going beyond the facts alleged in the FAC and making assumptions in favor of Defendants in order to fit the one case that would support a finding of qualified immunity. Moreover, the Court also dismissed the third cause of action in its entirety without considering Mr. Adkins' additional First Amendment claims that Defendants' conduct constituted a prior restraint and that Defendants arrested him in retaliation for verbally challenging their authority. Finally, the Court dismissed the third cause of action without granting Mr. Adkins leave to amend the FAC in the absence of any finding that

amendment would be futile. Based on the foregoing, reconsideration of this Court's August 24, 2010 Opinion is necessary.

Dated: September 21, 2010.

ARRIOLA, COWAN & ARRIOLA
Attorneys for Plaintiff James L. Adkins

By: ______________________
for **ANITA P. ARRIOLA**

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910