ARGUMENT

Across North Africa and the Middle East, during what became known as the "Arab Spring," ordinary citizens, using cell phones and video cameras, preserve the truth about the events that unfolded before them. Here, in the United States, we have a tradition of protecting those of us who seek to gather, record and preserve information about public events.

The prosecution of Gregory Koger was initiated because he used a cell phone camera to capture and record the words of Sunsara Taylor, and preserved on video her treatment by the Ethical Humanist Society of Chicago (hereinafter, "EHSC") and Skokie police officers present at an open meeting at the EHSC. It is clear that others photographed the events of the EHSC that Sunday morning. (R. at 142). No one other than Gregory Koger was told to stop taping or photographing. It is equally clear that capturing Ms. Taylor's statement about her censorship by EHSC (and the police reaction to it) was constitutionally protected.

This ill-conceived arrest and prosecution was made worse by the prosecution's confounding of law of trespass, incorrectly telling the trial court and jury that Mr. Koger's continued taping constituted a trespass.

I. THE STATE MISAPPREHENDS THE FACTS CONTAINED IN THE RECORD ON APPEAL.

In crafting its response to Gregory Koger's opening brief, the State mischaracterizes many of the facts they rely on in their brief.

The State misrepresented the testimony of Paul Ozarowski. The State alleges that Mr. Ozarowski testified that Sunsara Taylor was never formally invited to speak at the Sunday Platform. (State's Br. at 5). This allegation is unsupported by citation to the record. Mr.

Ozarowski actually testified that in June 2009, he sent Ms. Taylor an invitation to speak at the EHSC Sunday Platform. (R. at 514). Mr. Ozarowski also testified on cross examination that Sunsara Taylor was "officially invited." (R. at 496). Shirlee Rubenstein, an EHSC member, also testified that the Ethical Humanist Society Newsletter carried a printed announcement of Ms. Taylor's Sunday speech. (R. at 528-9).

Further, the State mischaracterized the testimony of Jill McLaughlin, an audience member. The State alleges that Ms. McLaughlin testified that she did not see anything after Officers Bello and Mendoza grabbed Mr. Koger and began to drag him out of the auditorium. (State's Br. at 5). In reality, Ms. McLaughlin testified that she saw Bello and Mendoza drag Gregory into the entrance vestibule (R. at 406), saw his ripped clothing (R. at 408), saw Gregory being grabbed at the elevator (R. at 408), and saw Skokie Police pile upon Gregory. (R. at 410-11).

In their brief, the State asserts that Sunsara Taylor, Gregory Koger, and the others with them arrived at 10:29 A.M., just one minute before the program was to begin. (State's Br. at 2). This is a misstatement, lacking any citation to the record. Most witnesses testified that Gregory Koger and Sunsara Taylor actually arrived at times closer to 10:15 A.M. (R. at 138).

Throughout its brief, the State attempts to paint a picture of uninvited disrupters who arrived at the EHSC auditorium during the Sunday Platform to cause mayhem at an otherwise peaceful meeting. This is not supported by the record on appeal or the video shown at trial. The record is clear that Gregory Koger, Sunsara Taylor, and the others arrived prior to the start of the Sunday Platform, with the intention of addressing Ms. Taylor's disinvitation, inviting those interested to

hear Sunsara speak at an off-site location, and to leave for the alternate venue without causing any disruption to the EHSC Sunday Platform.

II. APPENDIX EXHIBIT A-1, PEOPLE'S TRIAL EXHIBIT 1, ATTACHED TO MR. KOGER'S OPENING BRIEF, IS PROPERLY INCLUDED IN THE BRIEF.

The State's suggestion that Gregory Koger attempted to improperly supplement the record on appeal with People's Trial Exhibit 1 is without merit. *People v. Appelgren*, citing Illinois Supreme Court Rule 608, states that a record on appeal contains three elements: the common law record, the report of proceedings, and trial exhibits. *People v. Appelgre*n, 377 Ill.App.3d 137, 140, 879 N.E.2d 343, 345-6 (2d Dist. 2007). People's Trial Exhibit 1, the video attached to the Petitioner's Brief as Appendix Exhibit A-1, was presented to the jury by the State at Mr. Koger's trial and was admitted as a prosecution exhibit.

The People's reliance upon *People v. Heaton* and *People v. Velez* is misplaced. *Heaton* and *Velez* held that evidence which is not a part of the record on appeal is not to be considered by a reviewing court. However, Mr. Koger's Appendix A-1 is a video that the State submitted at trial and showed to the jury. It is part of the record below.

The State relied heavily at trial upon People's Trial Exhibit 1. It was played before the jury several times and entered into evidence. It is not an unverified piece of evidence shoehorned into the Appellant's argument, but rather a critical exhibit that is part of the record on appeal. Pursuant to both *People v. Appelgren* and Illinois Supreme Court Rule 608, Appendix A-1 is properly appended to Mr. Koger's opening brief. It should be viewed and relied upon by this court.

III. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GREGORY KOGER COMMITTED THE OFFENSE OF CRIMINAL TRESPASS TO REAL PROPERTY.

A *de novo* standard of review is proper. The prosecution repeatedly told the trial court that the request to "stop filming or leave" constituted notice of trespass. (R. at 337). The State misstated the law of trespass and failed to prove beyond a reasonable doubt the elements of the offense of criminal trespass to real property.

A. The Prosecution Repeatedly Misstated The Law Of Criminal Trespass To Real Property.

Throughout Gregory Koger's trial, the State equated the act of filming Sunsara Taylor with criminal trespass to real property. Beginning with the day-of-trial amendment of the charging instrument to read, " . . . to wit: asking Δ to stop filming or leave" (C. at 6) and concluding with the State's closing argument – equating the act of filming to committing criminal trespass to real property (R. at 546) – the State repeatedly misstated the law of trespass.

In an attempt to trivialize their amendment of the charging instrument on the morning of trial, the State asserts that they are well within their rights to make facial alterations to the charging instrument. (State's Br. at 9). The State's argument is misplaced. The alterations made to the charging instrument on the morning of trial were not small, "facial changes," such as changing the date of offense or correcting typographical errors. Instead, the State attempted to redefine notice under the trespass statute. By altering the language of the charging instrument, the State

conflated the meaning of "notice to depart" with "notice to stop filming" and enabled the jury to wrongfully convict Gregory Koger of a crime undefined by statute.

The court must look also to the totality of the circumstances in order to determine that the State's amendment of the charging instrument, coupled with witness testimony that Mr. Koger was directed to "stop filming or leave," and the State's closing argument clearly uncovers the State's egregious and incorrect equation of videotaping with criminal trespass to real property.

B. The State Failed To Prove Beyond A Reasonable Doubt That Gregory Koger Received Notice To Depart The EHSC Auditorium.

A condition precedent to being convicted of trespass to real property is a "notice to depart." Matthew Cole, EHSC president, did not give Gregory Koger notice to depart the EHSC auditorium. In his cross-examination, Matthew Cole, the owner/occupant of the EHSC property (for purposes of the case at bar), admitted that he gave no notice to depart to Gregory Koger. (R. at 192). He only told him to stop filming. Upon being asked if he ever told Gregory Koger to leave the building, he answered, "No." (R. at 192).

The prosecution again misapprehends the facts as they relate to the issue of "notice to depart." Cole himself admitted that he never ordered Koger to leave the building. (R. at 192).

Under the legal principles of *People v. Ulatowski*,

> In the absence of an express statutory mental state, the Criminal Code provides that either knowledge, intent, or recklessness can apply. (Ill.Rev.Stat.1975, ch. 38, par. 4-3(b).) We agree with defendant that knowledge (as defined in par. 4-3 of the Criminal Code) is the appropriate mental state and best suits the crime of criminal trespass to land. The fact that the statute requires that the accused have notice that he is trespassing implies that the defendant must have knowledge that he is on the premises without permission . . . Therefore, in order to be guilty of criminal

> trespass to land, [the defendant] must have known that he had notice to depart the premises and remained in spite of this notice. *People v. Ulatowski*, 54 Ill.App.3d 893, 896-97, 368 N.E.2d 174, 176-77 (4th Dist. 1977).

If a "notice to depart" did not come from Cole, did it come from Skokie police officer Bello? Officer Baldo Bello did not give Gregory Koger notice to depart the EHSC auditorium. On direct examination, Bello testified as follows:

> Q: What did you do when you saw the defendant filming?
> A: At first I asked him to step outside with me so I could speak with him.
> Q: What did he say to you?
> A: He didn't say anything at that point. I think he just put the camera down when I asked him the first time to step outside with me.
> . . .
> Q: And about how soon after the defendant had originally put the camera down did you speak with him?
>
> A: Twenty seconds after that.
> Q: Okay. What did you say to the defendant?
> A: I approached him. I leaned forward. He was already seated. I spoke directly into his ear in a very low tone. I didn't want to make a scene or make anybody else aware that there might be a problem.
>
> I identified myself as a police officer, and I asked him once again to step outside with me and asked him to quit filming and told him that he had been advised by the manager of the property that he wasn't allowed to film and that if he did it again he'd either be escorted out or arrested for criminal trespass. (R. at 293, l. 3-24; 294, l. 3-19).

Bello never told Koger that he had to depart the EHSC premises. Bello only advised Gregory that he could not film, and that if he did, he would have to leave.

Even according to the State's own witnesses, there was no link from this deficient "notice" given by Officer Bello back to the owner/occupant as required by the statute. Matthew Cole failed to give Gregory Koger notice to depart the EHSC auditorium. He only told him to stop filming and never told him that he had to leave the building. (R. at 192). Officer Bello advised

Koger only that Koger had to “quit filming,” not that he had to depart the EHSC auditorium. Bello did not instruct Gregory Koger that Matthew Cole had directed Bello to tell Koger that he had to depart the premises. Bello only told Koger that the manager had advised Bello that Gregory Koger couldn’t film, and if he did it again, he would be escorted out or arrested for trespass. (R. at 294). There was no notice from the owner/occupant of the property; no notice from any agent of that owner/occupant; and no notice from that agent communicating the owner/occupant’s notice to depart the auditorium. (R. at 294).

The lack of notice to depart takes on even greater significance in the case at bar. The EHSC Sunday Platform was open to the public, Mr. Koger was welcomed onto the premises while openly filming – as he had done at another public event at EHSC the day before. Finally, others were taking photographs and there was no signage prohibiting photography or filming. Given all of the above, the notice requirements for criminal trespass to real property should have been even higher.

Under *Ulatowski*, this failure to give notice to Gregory Koger that he was trespassing and that he must depart the premises defeats the prosecution. The State failed to prove that Gregory was given notice to depart. A conviction for criminal trespass to real property cannot be sustained.

C. Gregory Koger Was Not Given Adequate Opportunity To Depart The EHSC Auditorium.

Furthermore, Gregory Koger was not given an adequate opportunity to depart the EHSC auditorium. “[725 ILCS 5/21-3] expressly requires that notice be given the intruder to depart. Implicit in this notice requirement is the additional requirement that defendant be given

reasonable opportunity to leave the premises." *People v. Mims*, 8 Ill. App. 3d 32, 35, 288 N.E.2d 891, 893 (5th Dist. 1972). In *People v. Mims*, the defendant was a former student of a high school who was on school grounds. Upon being approached by a police officer who inquired as to his presence, the defendant stated that he was on school grounds to visit friends. *Id.* at 34. The police officer informed the defendant that he was not allowed to be on school grounds and immediately placed him under arrest. *Id*.

In reversing the judgment of the trial court, the court in *Mims* held that there exist two types of situations under the criminal trespass to property statute – where the offender is given notice prior to entry upon the land and where the offender is given notice to depart. *Id*. at 34. The court stated that because the defendant was not barred from entering school property before entry, opportunity must have been given to depart before he was placed under arrest. *Id*. The court reasoned that, " . . . [i]mplicit in this notice requirement is the additional requirement that defendant be given reasonable opportunity to leave the premises." *Id*. at 35. Upon cross-examination, the arresting officer stated that he affected the arrest on the defendant immediately after giving him the warning to leave. *Id*. Based upon this, the Appellate Court reversed the conviction for criminal trespass.

People v. Mims is helpful in directly refuting the State's theory advanced in their brief. Here, Gregory Koger had permission to enter the Ethical Humanist Society auditorium for the Sunday Platform. Although Mr. Koger was lawfully present, Skokie police officer Baldo Bello testified that he "spoke in a low tone" into Gregory's ear to "quit filming." (R. at 294). Moments later, when he approached Gregory Koger filming with his iPhone, Bello stated:

Q: What did you say when you got to the defendant?

A: I approached the defendant and I – I once again told him, you know, in a very close, personal space we have to go right now, you're leaving right now with us.

Q: Did you again identify yourself as a police officer?

A: Correct.

Q: And when you asked the defendant if they had – that he had to go at that point, how close were you to him?

A: Inches. I was very close to him.

Q: Can you describe exactly how you spoke to the defendant? Did you lean in and just whisper or did you have a conversation kind of face to face?

A: No. I leaned in. As I was speaking to him, I was also directing him physically towards the rear of the room by simply putting my hand on his back and kind of gesturing in which direction he needed to walk with us.

Q: When you say that you put your hand on his back and gestured him, did you lightly gesture him or did you kind of push him and move him in the direction?

A: I believe at first we were lightly gesturing him and he was not compliant. He didn't want to put the phone down, one; and, two, he didn't want to move in the direction in which we were, you know, kind of guiding him to. And then as seconds went by, then our guiding became a little more forceful, if you want to call it that.

Q: Now, on which side of the defendant were you standing?

A: On his left side.

Q: And where was Mendoza – Officer Mendoza?

A: Officer Mendoza was on his right side.

Q: And after you had told the defendant it was time to go, did you say anything else to him?

A: Yes.

Q: What did you say?

A: I told him to put the phone away, which he handed off to someone else. I don't recall who in the crowd he handed it off as he finally agreed to start walking with us towards the rear.
As we made our way towards the exit of the auditorium and into the hallway leading into the lobby, I advised him that he was under arrest for criminal trespass. (R. at 299, l. 10 – 301, l. 12).

Mere seconds passed between the Skokie police officers grabbing Gregory Koger and their placing Koger under arrest for criminal trespass as he was being dragged out of the auditorium.

Just as the defendant in *Mims* was placed under arrest immediately after being told to leave the school, Koger was placed under arrest as he was dragged out of the EHSC auditorium immediately after being told "he wasn't allowed to film and that if he did it again he'd either be escorted out or arrested for criminal trespass" – a conditional warning which did not constitute the requisite notice to depart. (R. at 294).

Gregory Koger also did not intend to remain on the EHSC property. As noted in Gregory Koger's opening brief (Appellant's Opening Brief at 24-25), Sunsara Taylor, Gregory Koger, and others were getting ready to leave following Ms. Taylor's brief statement when their exit was interrupted by Officer Bello's dragging Koger from the auditorium. Jill McLaughlin confirmed that this was the plan of those who accompanied Ms. Taylor in her testimony. (R. at 405 – 06).

IV. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GREGORY KOGER BATTERED SKOKIE POLICE OFFICER BELLO AND RESISTED ARREST.

Witnesses for the State at trial provided conflicting accounts of the events that transpired in the EHSC auditorium when Gregory Koger was informed that he was being placed under arrest for criminal trespass to property.

Officer Baldo Bello of the Skokie Police Department claimed that as he was escorting Gregory Koger out of the auditorium, when they were "six to ten feet" from the door to the auditorium, Officer Bello informed Gregory that he was under arrest, at which point Gregory became angry, turned to Officer Bello, and pushed him in the chest. (R. at 301). Officer Bello stated,

Q: What did the defendant do when you told him he was under arrest?

A: He became irate. He turned in my direction, he pushed me in the chest, and that's when he began to resist me.

Q: . . . Now, as you're walking towards the back of that auditorium, about how far were you to the door when you told the defendant he was under arrest?

A: I'd say about six to ten feet. (R. at 301, l. 13-23).

EHSC board member David Hardesty described a different set of circumstances. Hardesty stated that the alleged battery occurred not as the officers were escorting Gregory Koger out of the auditorium, but *right where they approached him at the front of the auditorium*. David Hardesty stated,

Q: When [the officers] approached [Gregory Koger], could you describe for the jury what you saw occur?

A: Yeah. What I saw was that they approached him and that they were asking him to leave. They identified themselves and asked him to leave. And they took a few steps to the right-hand side. They started to move toward where I could see, and at that point, the defendant shoved one of the policemen. (R. at 233, l. 3-11).

Officer Lacarion Mendoza provided yet a third version. (R. at 366). Mendoza was dragging Gregory Koger out of the auditorium with Bello when he informed Mr. Koger that he was under arrest. (R. at 366). Mendoza did not testify that the battery occurred at all:

Q: What did the defendant do once he was told he was under arrest?

A: He basically stopped from – stopped moving from walking. He – he would pull his arms away from us as I was grabbing his arms to escort him out. He basically hold onto the wall by the hallway to prevent us from walking out of the room.

Q: Now, were you in the auditorium when the defendant started to move his arms?

A: Correct, we were still in the auditorium.

Q: While you were – while the defendant was moving his arms, is it fair to say that he was struggling with you?

A: Yes.

Q: Were you eventually able to get the defendant out of the auditorium?
A: We were able to but we had to struggle with him. (R. at 366; l. 11 – 367; l. 4)

In *People v. Poltrock*, the First District Appellate Court of Illinois reversed the judgment of the trial court based upon the conflicting testimony of three different trial witnesses. *People v. Poltrock*, 18 Ill.App.3d 847, 850, 310 N.E.2d 770, 773 (1st Dist. 1974). The court stated that the findings of the trial court are " . . . not conclusive, and it is this court's duty to set aside a conviction where the evidence is so unsatisfactory that it leaves a reasonable doubt of the defendant's guilt." *Id.* at 849. As in the case at bar, the defendant in *Poltrock* was convicted for the offense of battery, stemming from an altercation among five youths. *Id*. at 848. Upon reviewing the contradictory testimony of three witnesses, the court determined that the cumulative effect of the contradictions within and between the three stories raised a reasonable doubt of the defendant's guilt. *Id*. at 850.

The three different versions of the events of November 1, 2009, at the EHSC Sunday Platform raise a reasonable doubt as to Gregory Koger's guilt. Officer Bello testified that Koger pushed him as they were six to ten feet from the auditorium exit. (R. at 301). David Hardesty testified that Koger pushed Bello as they were standing next to Koger's seat near the front of the auditorium. (R. at 233). Officer Mendoza did not testify to a battery at all. (R. at 366). Mr. Koger denies that he pushed Officer Bello at all. These contradictions in the testimony of Koger's battery and resisting arrest charges raise a reasonable doubt as to his guilt. The convictions for battery and resisting arrest should be reversed.

V. THE ARREST OF GREGORY KOGER FOR DOCUMENTING MS. TAYLOR'S STATEMENT PRIOR TO THE ETHICAL HUMANIST SOCIETY SUNDAY

PLATFORM AND THE STATE'S THEORY OF PROSECUTION HAVE CHILLING IMPLICATIONS.

The arrest of Greogry Koger had little to do with the property rights of the Ethical Humanist Society. Rather, it was a forceful effort to stop a videographer from filming a statement by Sunsara Taylor and the response to that statement by the EHSC and the Skokie police.

In its brief, the State cites *People v. DiGuida* in arguing that Gregory Koger's First Amendment rights were not violated, since the actions of Officers Bello and Mendoza did not constitute state action, but rather action taken by private persons. The defendant in *DiGuida*, in a grocery store parking lot, was gathering signatures for an election unrelated to the grocery store. The case at bar must be distinguished from *DiGuida*. Unlike *DiGuida*, the Ethical Humanist Society was the **only** place where Sunsara Taylor could register her objection before the assembly, ask for last-minute reconsideration of the cancellation of her speech, and – if not forthcoming – invite people to the off-site location to listen to her speech. Gregory Koger was present only to document her statement and reaction to it, and then leave peacefully before the Sunday Platform began.

The Ethical Humanist Society is open to the public for the Sunday Platform. The Ethical Humanist Society touts itself as a forum for free expression of ideas, unlike the Dominick's Supermarket at the center of *DiGuida*. Gregory was permitted to film at EHSC the previous day at the Saturday Workshop. The Saturday filming was done *in the presence of Matt Cole, the EHSC president*. (R. at 184). Paul Ozarowski, an EHSC board member and officer, spoke with Mr. Koger on Saturday about his plans to return to film on Sunday. (R. at 498).

While this is not a First Amendment case, the State's theory and its persistent misstatement of the law of criminal trespass have dangerous implications. It is helpful to visit the recent opinion of the United States Circuit Court of Appeals for the First Circuit in *Glik v. Cunniffe*:

> "As the Supreme Court has observed, 'the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.'... An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news "from any source by means within the law"... The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press... Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Glik v. Cunniffe*, 2011 WL 3769092, (1st Cir.), August 26, 2011.

The arrest and prosecution of Gregory Koger were born out of the Ethical Humanist Society's attempt to prevent Mr. Koger from documenting Sunsara Taylor's peaceful statement opposing their censorship of her speech. The involvement of Skokie Police and the misuse of the criminal trespass statute to further this aim have grave implications for the public's right to document public events.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING GREGORY KOGER TO THREE HUNDRED DAYS IN THE CUSTODY OF THE COOK COUNTY JAIL.

Without any facts to support her position, the trial judge announced that Gregory Koger "chose a path of violence" in the EHSC auditorium that day. (R. at 643). Videotaping the statement of Sunsara Taylor was not "choosing a path of violence." The misdemeanor battery charge brought against Gregory Koger alleges only "contact of an insulting or provoking nature." (C. at 9). Furthermore, the trial judge's claims are unsupported by any evidence in the record. No one was injured in the EHSC auditorium. The sentence of three hundred days in the Cook County Jail is based on hyperbole and not fact.

A court must consider the rehabilitative potential of the defendant in imposing a sentence. *People v. Smith*, 178 Ill. App. 3d 967, 985, 533 N.E.2d 1169, 1175 (3d Dist. 1989). "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." (Ill. Const. 1970, Art. I, § 11). Here, the trial judge abnegated her responsibility to impose a sentence that would assist the "offender in a return to useful citizenship." The judge instead stated that she was, " . . . allowed to consider the facts of the case as a demonstration of the defendant's volatile nature and calling into question whether he really has any rehabilitative potential." (R. at 644). The trial judge explicitly ignored Gregory Koger's rehabilitative potential and instead imposed an excessive sentence of three hundred days in the Cook County Jail.

Contrary to the trial judge's position, the record is replete with evidence that Gregory Koger possesses rehabilitative potential. Gregory spent time in prison for offenses committed as a teenager. He utilized his time in prison to better himself, and upon his release, had no run-ins with the law for three years. In fact, Mr. Koger was discharged one year early from mandatory supervised release upon the recommendation of his parole officer. (C. at 126). As presented in

mitigation, Gregory earned a paralegal certificate in prison and has earned college credits since his release. He is gainfully employed as a paralegal. He presented numerous witnesses – including two attorneys, two professors, and a priest – at sentencing who testified as to his success in life after incarceration. (R. at 607-639). The sentence imposed by the judge of 300 days for each count for which Gregory was convicted is excessive and unreasonable. It ignores Mr. Koger's rehabilitative potential and was not imposed with the objective of rehabilitation.

WHEREFORE, Gregory Koger respectfully requests that this Honorable Court reverse his convictions for criminal trespass to real property, battery, and resisting arrest or, as a less-favorable alternative, modify his sentence to reflect time served.

Respectfully submitted,

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