CASE NO. 20-1420

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

MICHAEL BILLIONI,

Plaintiff – Appellant,

v.

SHERIFF BRUCE BRYANT,
individually and in his official capacity as York County Sheriff,

Defendant – Appellee,

and

YORK COUNTY DETENTION CENTER;
YORK COUNTY SHERIFFS OFFICE; YORK COUNTY

Defendants,

WCNC-TV INC

Respondent,

CONNIE McMILLAN; CHRISTOPHER PENLAND;
JAMES MOORE; LINDSAY HENSON; CAROL SUTTON;
FRANCINE WEYERS; JAMES BRACKETT,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA AT ROCK HILL

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 20-1420 Caption: Michael Billioni v. Bruce Bryant

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael Billioni
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ [signature] Date: 04/27/2020

Counsel for: Michael Billioni

CERTIFICATE OF SERVICE

****

I certify that on 04/27/2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Christopher Wofford Johnson
Marybeth E. Mullaney

/s/ [signature] 04/27/2020
(signature) (date)

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Introduction

"*[E]ach of us has a moral obligation to stand up, speak up and speak out. When you see something that is not right, you must say something. You must do something. Democracy is not a state. It is an act, and each generation must do its part to help build what we called the Beloved Community, a nation and world society at peace with itself.*" Rep. John Robert Lewis (February 21, 1940 – July 17, 2020), civil rights leader and congressman, from his essay in New York Times written shortly before his death.

This case, before the Court for a second time, takes on new importance in this era of civil-rights protests following the in-custody death of George Floyd in May 2020 (the import of which is reflected in this Court's decision, *Estate of Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 673 (4th Cir. 2020) as amended (June 10, 2020) and the Tenth Circuit's decision in *Jamison v. McClendon,* 3:16-cv-00595 DK 72 08/04/20). Mr. Floyd's death sparked a national movement and became a driving force for protests across the country due to the actions of bystanders, who captured haunting video of Mr. Floyd's last moments. The bystanders were ordinary citizens who, in

the words of Rep. Lewis, saw something they believed wasn't right and they did something.

Michael Billioni's speech is not unlike that of the bystanders. He, like the bystanders, was acting as a citizen when he advised the media there was a jail video[1] (which it is imperative that this Court view) of the death of detainee, Joshua Grose, that contradicted Defendant Sheriff Bryant's claims and official statements. Through Trent Faris, his public information officer, Bryant held a press conference about Grose's death. Farris stated that Grose was placed in a restraining chair for his own safety because he had been "very, very combative," and that Grose died as a result of injuries that he gave himself by hitting his head on the back of the chair. J.A. 1011. When asked by a reporter whether officers would face disciplinary action for Grose's death, Faris answered "[a]ll our officers, detention officers, did exactly what they were supposed to do last night." J.A. 214-215, 282-283, 1015, 1454.

[1] Stuart Watson has submitted several Freedom of Information Requests to obtain the video of Mr. Grose's death and to date, nearly 7 years later, Sheriff Bryant has neither released nor turned over the video.

Billioni was off duty when Grose died. J.A. 208. When he returned to work the following day, he and his co-workers viewed the jail video of the incident. J.A. 207-208, 216. What he saw concerned him. J.A. 222. It told a far different story then the one Sheriff Bryant was presenting to the public. J.A. 273, 282-283, 321. The video showed Detention Officer James Moore punch a naked and restrained detainee twelve times while other officers in the room did nothing to stop him. J.A. Vol. IV (video). Moreover, Moore had just returned to work after being suspended for excessive force involving another inmate in a restraint chair. J.A. 1422. The video also shows officers repeatedly tasing Grose in a high pain setting. J.A. 214, Vol. IV (video). The officers failed to properly secure a protective helmet on Grose's head. J.A. 217, Vol. IV. Billioni was haunted by the video. When he got home after work, he explained the contents of the video to his wife, who worked as a research analyst for WCNC, a local NBC affiliate in Charlotte, North Carolina. J.A. 231, 235-236. At first, because he was scared to lose his job, Mr. Billioni denied telling his wife about the video; the next day he advised his employer he told his wife. J.A. 286, 272, 287. When Sheriff Bryant learned Billioni alerted the media about the video, the Sheriff

terminated him, based on ethics and rules violations and for the release of confidential information. J.A. 45, 305, 422-426.

The lower court post remand granted Sheriff Bryant qualified immunity to terminate Billioni related to his speech in the death of Mr. Grose. This goes against the very core of our democracy. Billioni's speech is no less important than that of the bystanders who reported Mr. Floyd's death. It is time to stop allowing public employers tremendous power over their employees, labeling them protected by glorified notions of playing at a toxic paramilitary culture, which was surely never intended or envisioned by the Courts. This Court must protect First Amendment in cases like these to protect citizens, and discourage the cover-up of potential government misconduct (e.g. George Floyd, Trayvon Martin, Tamir Rice, Michael Brown, Eric Garner, Philando Castile, Breonna Taylor and many others) and therefore must reverse the judgment below.

Statement Of Jurisdiction

Michael Billioni filed this action in the United States District Court for the District of South Carolina. J.A. 24. The claim remaining at issue falls under 42 U.S.C. § 1983, which permits an injured party to bring a

civil action against a person who, acting under color of state law, ordinance, regulation, or custom, causes the injured party to be deprived of "any rights, privileges, or immunities secured by the Constitution and laws." *Id*. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367.

Initially the district court denied Defendant's Motion for Summary Judgment. J.A. 90-91 J.A.1452-1479. On appeal this Court remanded the case and ordered the lower court "to apply the correct legal standard to determine whether Billioni's speech is protected under the First Amendment." J.A. 1481-1495. On remand, the district court granted Defendants' Motion for Summary Judgment. J.A. 1568-1577. Billioni sought reconsideration which was denied on March 12, 2020. J.A. 1621-1634. Plaintiff filed a timely Notice of Appeal on April 10, 2020. *See* Fed. R. App. P. 4(a)(1)(A); J.A.1635. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement Of Issues

I. Whether Sheriff Bryant is entitled to qualified immunity in firing Billioni for his protected speech involving serious law enforcement misconduct.

II. Whether Sheriff Bryant presented credible evidence of reasonable apprehension of disruption, as required by *Pickering*.

III. Whether any apprehension of disruption was present and outweighed the high level of public interest in Billioni's statement regarding Grose's death in custody.

Statement Of The Case

Michael Billioni was hired in 2010 as an officer at the York County Detention Center by the York County Sheriff's Office (YCSO). He was promoted to corporal and assigned to the position of Master Control Specialist. J.A. 1053. Master Control functions as the eyes and ears of the Detention Center and controls access to various areas within it. J.A. 200, 204. In that position, Billioni was in a central control area and had access to the video system that recorded activities in the jail. J.A. 200, 204. On October 20, 2013, Mr. Grose died naked in a restraint chair at the Detention Center. J.A. 1453. Shortly prior to his death, Officer Moore punched him multiple times while he was strapped to a prisoner

restraint chair that rendered him completely immobile. J.A. Vol. IV (video). The officers, who had watched the attack, tased Grose in "drive stun" mode and placed his head into a football helmet and strapped to the restraint chair. J.A. 214, Vol. IV (video). Grose died a few hours later. Just months before, Moore had been the target of an internal investigation and was ordered by Sheriff Bryant to undergo psychological evaluation for repeatedly striking the head and neck of another inmate in a restraint chair. J.A. 1422.

Later that day, Trent Faris, a public information officer ("Officer Faris") for the YCDC, held a press conference about Mr. Grose's death. J.A 1011. He stated that Mr. Grose had been placed in a restraining chair for his own safety because he had been "very, very combative," and that Grose died as a result of injuries that he gave himself by hitting his head on the back of the chair. J.A. 1011. Faris said nothing about Officer Moore punching Grose twelve (12) times. When asked by a reporter whether officers would face disciplinary action for Mr. Grose's death, Officer Faris answered "[a]ll our officers, detention officers, did exactly what they were supposed to do last night." J.A. 214-215, 282-283, 1454. Following the incident all involved officers completed

reports and interviews with the state oversight agency, SLED, on October 20, 2013. J.A. 1267-1279.

Mr. Billioni was not on duty when Mr. Grose died; he returned to work his shift at 5:30 p.m. the next day, Monday, October 21, 2013. J.A. 208. He and his co-workers watched the surveillance video of the incident. J.A. 207-208, 216. It was common for the employees in the control position to review video major events. J.A. 1285. He was disturbed by what he saw. J.A. 222. On the video Officer Moore was seen punching Mr. Grose twelve (12) times after he was restrained, plus Officer Moore's three supervisors did not do anything to stop it. J.A. 213-217, 238, Vol. IV (video). The video showed officers tasing Mr. Grose on a setting designed to induce pain rather than to incapacitate. J.A. 214–217. Mr. Billioni saw the officers used flex cuffs to secure a football helmet to Grose's head; using flex cuffs, could "cut [Grose's] airway off." J.A. 219. Mr. Billioni had never seen officers secure a helmet in this way before. J.A. 219. Moreover, Billioni was aware that eight (8) months earlier, Moore was involved in an incident in which he attempted to assault another inmate in a restraint chair and had to be pulled away by fellow officers. J.A. 1422. Moore was suspended,

demoted, and initially found unfit for duty after a psychological evaluation. J.A. 1422 Sheriff Bryant allowed him to return after the suspension was lifted, after being sent to anger management and placed on medication. J.A. 1422. The internal affairs investigation of the earlier incident determined Office Moore was "out of control". J.A. 1422.

Billioni was disturbed by the video and by Sheriff Bryant's public conclusion that the officers involved did exactly what they were supposed to do. J.A. 214-215, 222, 282-283. After work, Mr. Billioni told his wife what he saw on the video of Mr. Grose, i.e., that he was "struck 12 times in the course of the incident that led to his death" and "that other officers were there and did nothing." J.A. 237-238. Billioni's wife worked as a research analyst with WCNC, the NBC affiliate in Charlotte, N.C. J.A. 236. Mr. Billioni's wife shared the information with the news director who shared it with reported Stuart Watson. Watson sent a FOIA request to the YCDC. J.A. 242- 244. Watson also contacted Kristie Jordan, Sheriff Bryant's general counsel, making inquiries that supposedly conveyed detailed information about the Grose incident and allegedly suggested criminal conduct by the Detention Center's officers. (ECF No. 145-8 at 106:2-108:1; ECF No.

145-7 at 74:19-75:5.). Sheriff Bryant reported that he became concerned about allegations of misconduct he did not know about and ordered Chief Administrator Arwood and Assistant Administrator Martin to investigate any leaks of information. J.A. 1455. They knew Plaintiff's wife worked for WCNC. They began the leak by Sheriff Bryant by first interviewing Mr. Billioni. J.A. 1455. The State Law Enforcement Division (SLED) also conducted an investigation into Mr. Grose's death. SLED investigates all in-custody deaths. J.A. 300. Statements were taken from the officers involved on October 20, 2013 by SLED. Billioni admitted to Chief Arwood and Assistant Chief Martin that he watched the video, but he lied about describing it to his wife. J.A. 286. The next day, Billioni sent Chief Arwood and Assistant Chief Martin an email admitting that he had told his wife — who told WCNC reporters — about the video. J.A 419. On October 25, 2013, Billioni met with Chief Arwood and Assistant Chief Martin, they gave him the choice to resign or be fired. Billioni chose to be fired. J.A. 1457. On the same day, Billioni received a Notice of Termination stating that he was fired for violations relating to the Code of Ethics, Employee Rules of Conduct and for the release of confidential information. J.A. 45, 302-305, 1458.

Following Billioni's termination, Sheriff Bryant held a second press conference where he showed reporters the jail video of Grose's death.[2] At the press conference, Sheriff Bryant told reporters that the officers who were involved in Mr. Grose's death were "heroic" and they did everything that they could to save him. J.A. 300-301. Moreover, he said that he had not found any fault by any officer concerning Grose's death or the other death of another inmate who previously died in a restraint chair.[3] Reporter Watson asked the question, "then why did you fire Mike Billioni"? Sheriff Bryant looked down at the floor, and he looked back up and very, very agitatedly said, "that man was terminated, and I believe you know the answer." He yelled Watson and pointed his finger at him saying, out of all the people in this room, you know the answer to that question. Sheriff Bryant refused to let Watson ask any further questions. J.A 300.

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[2] The media was only allowed to view the video. Sheriff Bryant did not allow them to record the video. To date, Sheriff Bryant has not complied with any FOIA requests to turn over the video and he also directed SLED to do the same.

[3] Jeffrey Waddell died when he was strapped in a restraint chair in the Detention Center. Although Sheriff Bryant denied liability at the press conference, the Sheriff's Office settled claims with both Jeffrey Waddell's and Joshua Grose's estates for substantial sums.

On July 31, 2014, Billioni filed suit against Sheriff Bryant alleging several claims, including the only claim relevant to this appeal: a claim pursuant to 42 U.S.C. § 1983 for violation of his First rights to free speech. J.A. 1459.

Summary Of The Argument

I. Law enforcement agencies may not retaliate against employees who speak as citizens on matters of public concern, absent an indication that the speech caused a serious disruption to the efficient management of the law enforcement office. *See, Andrew v. Clark*, 561 F.3d 261, 267–68 (4th Cir. 2009); *Durham v. Jones*, 737 F.3d at 300–303.

II. Disruption or apprehension of the type alleged herein by Sheriff Bryant fails to outweigh an *in-custody* death, *See Durham*, 737 F.3d at 302 ("law enforcement misconduct is a substantial concern that must be met with a similarly substantial disruption in the calibration of the controlling balancing test.").

III. Because Mr. Billioni's speech about a matter of the highest public concern outweighs any claims of reasonable

apprehension of disruption, the Sheriff should be denied qualified immunity, his Motion for Summary Judgment should be denied, and the case be remanded for trial.

Argument

A. Standard of Review:

This Court reviews *de novo* a district court's grant of summary judgment on qualified immunity grounds, viewing factual allegations and drawing reasonable inferences in the "light most favorable to the non-moving party." *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 407 (4th Cir. 2015). If there "exists any genuine dispute of material fact," summary judgment is improper. *See Pender v. Bank of Am. Corp.*, 788 F.3d 354, 361 (4th Cir. 2015).

B. Public employers may not require public employees to forsake their constitutional rights as a condition of employment:

Public employers may not require citizens to forsake their constitutional rights as a condition of employment. *See, e.g.*, *Pickering v. Bd. of Education*, 391 U.S. 563, 574 (1968); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

The law protects government employee speech because it has "considerable value", for "government employees are often in the best position to know what ails the agencies for which they work." *Lane*, 134 S. Ct. at 2377 (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)). In determining whether a government official has violated an employee's free speech rights, the Court conducts a two-step inquiry. It begins by asking whether the employee spoke as a citizen on a matter of public concern. "If, ..., the answer is yes, then we must ask whether the employee's interest in speaking out about the matter of public concern outweighed the government's interest in providing effective service to the public." *Hunter*, 789 F.3d at 397. At the end of the inquiry, the Court also asks whether "the employee's speech was a substantial factor in the employee's termination decision." *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *McVey v. Stacy*, 157 F.3d 271, 277–78 (4th Cir. 1998)).

This Court ruled that Mr. Billioni's speech was of high public concern, which was clearly established at the time of the speech. J.A. 1489. Yet on remand, the district court found the Sheriff's alleged reasonable fear of potential disruption outweighed Billioni's right to

speak out about a violent in-custody death, and that Billioni's speech had insignificant value. J.A. 1633. The Court must now decide whether the value of human life outweighs an elected Sheriff's[4] apprehension of disruption arising from fear of exposure by the press.

C. In The Context Of Public Safety Employer Misconduct, This Court Holds The Government To A Higher Standard In Proving Reasonable Anticipation of Disruption.

In deciding what speech impairs the efficiency of the workplace the test that has evolved looks at: "Whether the speech would create problems in maintaining discipline or harmony among co-workers, whether the employment relationship is one in which personal loyalty and confidence are necessary, whether the speech impeded the employee's ability to perform his or her responsibilities, the time, place

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[4] "There are two versions of law enforcement in America, the police departments led by hired chiefs who are accountable to mayors and city administrators, and the relatively less-scrutinized system of sheriffs — elected officials who have few professional requirements and are accountable only to the voters who put them in office...While sheriffs preside over thousands of rural and suburban counties across the country, they are especially powerful figures in the South.." https://www.washingtonpost.com/nation/2020/08/02/georgia-sheriff-harry-young-reelection/?arc404=true&utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most

and manner of the speech, the context in which the underlying dispute arose, whether the matter was one in which debate was vital to inform decision-making, and whether the speaker should be regarded as a member of the general public." See *McVey*, 157 F.3d at 277-278 (1998); *Bland*, 730 F.3d at 374 (2013).[5]

In the context of public safety employer misconduct, this Court holds the government to a higher standard in proving disruption. There is a heavy hand on the balancing scale in favor of protecting speech discussing police misconduct. Under *Durham*, "[s]erious to say nothing of corrupt, law enforcement misconduct is a substantial concern that must be dealt with a similarly substantial disruption in the calibration

[5] The need for disruption standard developed following the *Pickering* decision, *in Tinker v. Des Moines Independent School District,* 1967, which found that officials violated students' First Amendment rights by suspending them for wearing black armbands to protest the Vietnam War. *Tinker* adopted from *Burnside v. Byars,* 363 F.2d 744 (5th Cir. 1966), the **substantial disruption test**: school officials may not censor student expression unless they can **reasonably** forecast that the expression will cause a substantial disruption of activities. *Id.* at 749. The Court explained that officials must be able to point to **evidence** of disruption rather than rely on an "undifferentiated fear or apprehension of disturbance." *Tinker*, 393 U.S. at 508. Interestingly, the decision noted that an "*official memorandum"* prepared *after* the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption," and thus carried little weight.*(Emphasis supplied). Id*. at 509.

of the controlling balancing test." *Durham*, 737 F.3d at 302. Public safety employees speaking out about the inability of the department to carry out their public mission outweigh the government interests and anticipation of disruption. See, *Liverman v. City of Petersburg*, 844 F.3d 400, 410 (4th Cir. 2016), citing, *Cromer v. Brown*, 88 F.3d 1315, 1325-26 (4th Cir. 1996). In *Liverman*, the court found that statements by veteran officers raising "serious concerns regarding officer training and supervision" were sufficient to overcome the government's interests in preventing workplace disruption. *Id.* at 411. *Goldstein*, notes that "[t]he substance of the public concern included allegations that emergency personnel lacked training and certifications and that leadership overlooked violations of safety regulations and conduct of crew members jeopardized the safety of the crew and the public." *Goldstein*, 218 F.3d at 355. In each of the cases cited above, the speech was considered of highest public concern, and the employee entitled to the highest level of protection.

Given the import of speech regarding law enforcement misconduct, the law requires that the government not be allowed to rely on vague or generalized claims of disruption by the employer as justification to

suppress vitally important speech on law enforcement misconduct. *Durham*, 737 F.3d at 302; *Goldstein*, 218 F.3d at 356. Although concrete evidence of actual disruption is not required, the government must prove a "reasonable apprehension of such a disruption." *Durham*, 737 F.3d at 302. *Waters v. Churchill*, indicates that the court only gives substantial weight to government employers' "**reasonable** predictions of disruption," intimating that similar credit should not be given to fears of disruption that are not reasonable. See *Waters*, 511 U.S. at 673.

D. Disruption and Law Enforcement Speech In this Circuit under *Andrew,* Durham and their Progeny:

Andrew and *Durham* stand for the rule that police officers cannot be terminated for speech on matters of police misconduct absent evidence of severe disruption to the functioning of law enforcement as a result. *See Hunter v. Town of Mocksville*, 789 F. 3d 389,401-2 (4th Cir. 2015). *Andrew v. Clark* 561 F.3d 261 (4th Cir. 2009) dealt with police corruption. Andrew sent a memo critical of the department's handling of a police shooting outside his chain of command and to the press. As in Billioni, the defendant ordered an investigation charging Andrew with leaking information. 561 F.3d at 263. There were substantial ongoing

investigations into the citizen's death at the hands of the police and into Andrew's conduct; the fact that investigations were necessary or ongoing were irrelevant to the viability of the claim.

In *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013), Durham a deputy, used physical force and pepper spray to detain a suspect and refused to doctor his report to make it more favorable to his agency. Durham sent documents detailing his experiences outside the agency and to news outlets while an investigation was pending and prior to Durham's termination. In examining whether Durham's speech about police misconduct had an impact on the working environment or function of the Sheriff's office the Court found the fact of an ongoing investigation inconsequential: "Jones testified that officers had to spend time on the investigation, and there was office conversation about Durham and the entire incident. But it is not enough that there is some disruption; the amount of disruption has to outweigh the importance of the speech and its concern to the public." *Durham* at 302. "Given Jones' inability to show at trial how Durham's actions had an adverse impact on the proper functioning of the SCSO in some serious manner, the balance between Durham's rights as a private citizen under the First

Amendment and Jones' interest in ensuring an efficient and effective work environment tilts heavily in favor of Durham and his entitlement to enjoy protected speech." *Durham* at 302-303.

In *Lane v. Anderson*, 660 F. App'x 185 (4th Cir. 2016), Lane was injured on the job and questioned the investigation, which he suspected was a police cover-up. *Id.* at 3-4. Lane reported his concerns to media outlets. *Id.* at 3. Following an internal investigation into Lane for speaking to the media he was terminated. *Id.* at 4. Lane's speech related to police violence, a matter of public concern, so serious that like in *Durham,* the facts tipped the balance in favor of the employee. *Id.* at 14; see also *Hunter v. Town of Mocksville*, 789 F. 3d 389 (4th Cir. 2015), where investigations necessitated by law enforcement speech are not even mentioned as a disruption.

E. A Stronger Showing By The Sheriff Is Necessary As Billioni's Speech Substantially Involved Matters Of Public Concern.

Pickering protects the First Amendment rights of public employees. Teacher Pickering wrote a letter to a local paper criticizing school administration, resulting in his termination. *Pickering*, 391 U.S. at 567. *Pickering,* however, *does not use the term apprehension of disruption or*

disruption. The decision however, essentially found Pickering's letter to the press of a high public concern and low disruption, and thus, found he was wrongfully dismissed. *Pickering* at 572-574. Subsequently, *Connick v. Myers,* regarding disruption, stated: "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.*" (*Emphasis added*). *Connick v. Myers,* 461 U.S. 138, 152 (1983). Concerned about the implications of the decision, the dissent forecast abuse of the majority decision by employers fearing that:

> "If the employer's judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors. In order to protect public employees' First Amendment right to voice critical views on issues of public importance, the courts must make their own appraisal of the effects of the speech in question." *Id. at 168.*

The courts often resolve competing allegations regarding assertions of fear of disruption, without testimony or cross examination. See *Joyner v. Lancaster,* 815 F.2d 20, 23 (4th Cir. 1987). The idea of potential

disruption involves prediction, giving government employers license to predict disruption from any speech they find uncomfortable, including perpetuating a coverup. Accepting employers' post hoc allegations of a litany of potential disruptions, one could argue, equates with failure to engage in meaningful "apprehension" analysis.

In this matter, the court recounts as potentially disruptive the minimal investigation by the YCSO, an investigation designed not to determine what really happened to Grose, but to find out who reported the beating. J.A. 1455. The fact of the investigation however, the District Court previously found insufficiently disruptive to warrant suppressing speech. J.A. 1474. This Court, in *Durham*, examined the *Stroman* case as an example of anticipatory disruption. In *Stroman*, a teacher wrote letters to his colleagues regarding wage grievances and proposed a "sick-out" during exam week. *Id.* at 158-59. The potential for disruption was obvious: the school could not function without teachers. Here, the Sheriff provides no corresponding apprehension of yet-to-occur disruption of the function of the jail. And any that could now be manufactured -- the possibility of low morale at being outed for beating a restrained inmate -- does not compare to the value of Plaintiff's speech

about serious, police misconduct. To find otherwise is to render the First Amendment obsolete in the law enforcement context and ignores the well-recognized principle that public employees are often in the best position to witness and report misconduct by government officials. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

Looking at how the courts have balanced evidence of anticipatory disruptions, the District Court and the Defendant cite to *Maciariello v. Sumner*, 745 F.2d 868 (4th Cir. 1992) for the proposition that anticipation of disruption can weigh in the balance of suppressing otherwise protected speech. However, that case is inapposite to this one. There, plaintiffs engaged in surreptitious investigation of a colleague, whom they did not like and did not report the results. They recorded a local judge with a hidden tape recorder. They consulted an independent expert on destruction of evidence. Most importantly, Plaintiffs did not report their findings to the media or the public. This last fact is critical, because with no public speech to balance, an outcome in favor of the government-employer is a foregone conclusion.

Applying *Maciariello* here ignores a crucial aspect of First Amendment law-the right of the public to be informed. "[D]ebate on

public issues should be uninhibited, robust, and wide-open and . . . it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964)(emphasis added). The "function of free speech … is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1 (1949). These principles, while perhaps tempered in a police misconduct case, are not obsolete. Balancing requires speech.

The same can be said of any appeal to *Crouse v. Town of Moncks Corner*, 848 F.3d 576 (2017), where officers engaged in secret investigation of a colleague, again a person they did not like. The only step they took that could be characterized as speech is that they handed a complaint form to an arrestee. There, too, the value of the private speech did not serve a public function. The current case is distinguishable. Mr. Billioni, despite many uses of the term "investigation" by the defense, engaged in little that could be so

characterized. He did not interview witnesses.[6] He did not tamper with evidence. He did not consult outside sources. He watched a disturbing video and told his wife about it, with the hope that she would report what he saw to her news-station employer. Unlike in *Crouse* and *Maciariello*, Mr. Billioni clearly aimed to bring public attention to serious police misconduct, a factor that weighs heavily in favor of protecting speech.

Defendants and the District Court rely on the fact that Plaintiff did not bring his concerns "up the chain of command," or to SLED, who was conducting its own, independent investigation. As to the first, the Sheriff's spokesperson told the press that everyone acted appropriately, *before* Plaintiff viewed the video, saw that it contradicted what the Sheriff's agent reported, and told what he saw to his wife. At that point, it was safe to assume the Sheriff had conducted and completed his investigation and made his own determination as to the propriety of the conduct of his deputies (a determination at odds with what the video, to

[6] Ironically, Defendant appeals to this as a fact in favor of suppressing speech, when these cases make clear that conducting one's own investigation, including interviewing witnesses, contributes to disruption.

any viewer willing to see the truth, depicts). Secondly, SLED's charge, as a law enforcement agency, was only to determine whether criminal conduct occurred, not whether all acted appropriately or professionally. J.A. 1265-1266. Third, the public has a right to know what goes on behind the walls of its jails. This simply was not going to happen without someone like Plaintiff blowing the whistle. And this last fact cannot be emphasized enough -- the video speaks for itself. See *Scott v. Harris*, 550 U.S. 372 (2007). Additionally, the case law recognizes that in this context, bringing to public light sensitive issues will always have some disruptive effect. See *Durham*, 737 F3d at 302. And *Love-Lane v. Martin*, 355 F.3d 766, 779(4th Cir. 2004) The bottom line is that if Michael Billioni had not spoken out, this incident would have likely been ignored.

F. There is Insufficient Evidence That Sheriff Bryant Reasonably Apprehended Disruption That Outweighs Billioni's Interest in Speaking Out About the In-Custody Death.

Johnson v. Multnomah County, 48 F.3d 420, 425 -77 (9th Cir. 1995), states that "[w]e reasoned that the employer had to show actual injury to its *legitimate* interests in order to prevail under the *Pickering* test.

An employer does not have a 'legitimate interest in covering up mismanagement or corruption' and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure". *Id.*, citing *Voight v. Savell*, 70 F.3d 1552, 1562 (9th Cir. 1995).

The Sheriff first contends that a reasonable apprehension of disruption is demonstrated by having to investigate the source of conflicting information that allegedly got to the press. J.A. 1507. Sheriff Bryant claims that "his staff was telling him that officers handled Gross properly, but the media was accusing the Sheriff's officers of having murdered Gross". J.A. 1510. The Sheriff, however, offers no reasonable (ie admissible or credible) evidence upon which this assertion is based. There are no business records, recordings containing the supposed misinformation, or depositions, declarations or affidavits from the staff member, Ms. Jordan, who allegedly received this "misinformation". There is no testimony from the member of the press, who allegedly disseminated accusatory misinformation to the Sheriff's Office. Billioni testified to telling his wife only factual information that

Moore struck Grose, not the alleged and unsubstantiated statement that Moore struck Grose 12 times in the head. J.A. Vol. IV (video).

The second basis for anticipating that the operation of the jail be affected is that Plaintiff Billioni, should have reported up the chain of command or even to SLED. J.A. 1486. At the time, Mr. Billioni made his First Amendment articulation, the Sheriff had already concluded his investigation and rapidly publicized it through a press conference. Therefore, the claim of concern of disruption over a failure to report something that the Sheriff already knew and had intentionally disregarded is not reasonable. The Sheriff already concluded investigation. Billioni before he even made his articulation, saw a coverup in motion. Billioni and Bryant knew that Moore had a documented history of excessive force, was suspended, and was brought back anyway, despite prior incidents. Billioni and Bryant knew there had been a prior death in a restraint chair. Billioni and Bryant knew that Sheriff Bryant previously worked at SLED. J.A. 307. Thus there was no real or reasonable apprehendable disruption in operations from Billioni telling his wife about the tape, other than that the public might

watch it and find out how things really are for mentally disabled persons in custody.

As a third basis for apprehending disruption the lower court and the Defendant's claim is that Plaintiff Billioni "rushed to judgment without knowing all the facts," putting a reasonable fear of disruption into the mind of the Sheriff. This an unreasonable attempt at gaslighting by the Defendant. There is no rush to judgment by Billioni, but there was most definitely a rush to publicize, cover-up and get the elected Sheriff's version of events out before any other truth could come out, including the tape. Billioni saw the tape *after* the Sheriff got his version out and *after* the officers involved wrote their reports and were interviewed by SLED.

With regard to the SLED investigation, SLED had the tape and statements/official reports of the involved officers, the morning of October 20, 2013, before Mr. Billioni saw the tapes or spoke to his wife. J.A. 1267-1279. He did not see the tapes until he returned to work at 5:30 p.m., October 21, 2013. (ECF No. 155 at 3 (referencing ECF No. 145-6 at 41:6-18). Interestingly SLED did not do lengthy recorded interviews, other than with Billioni, and nothing came of the concerns

articulated by Billioni to SLED about the in custody death. There is no testimony that Billioni potentially interfered with or affected SLED's proforma investigation in any way. [7]

The evidence shows that not only was there no real disruption from Mr. Billions actions, but no reasonably apprehended disruption with business as usual at Sheriff Bryant's detention center. The high level of concern the law places on law enforcement conduction and distaste for excessive use of force, mandates that the Sheriff not be granted immunity and that this case should go to trial.

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[7] Interestingly the reports of the involved officers are less than complete and leave out key details related to officer behavior. Moore in his report said that Mr. Grose was, "out of his mind" and that he had to strike Mr. Grose with an "open palm" an unknown amount of times. Officer Moore can be seen on video striking Mr. Grose twelve times and not with an open palm. J.A. Vol. IV (video). The tape shows Mr. Grose being tased, J.A. Vol. IV (video), a fact denied or significantly absent from most of the officer statements. J.A. 1277. Some statements did not mention that Mr. Grose was nude, his hands and feet bound, he was beaten, and that he repeatedly lost consciousness, or needed to be revived during the altercation. J.A. Vol. IV (video). SLED had access to the video but did not seek to clarify, compare or contrast the statements, or in fact any of YCDC's documentations. This includes looking at the documentation from YCDC that claim Mr. Grose had no observable mental or health issues, yet officers could not complete the booking process from 10-18 through 10-20, and YCDC had to use photos and information from a prior booking in 2012.

Conclusion

Viewed in a light most favorable to Billioni as the non-moving party in the Summary Judgment Motion, this case presents speech involving serious law enforcement misconduct with little to no disruptive or potential disruptive impact as defined in *Durham*. Absent a greater showing, "speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected." *Hunter*, 789 F.3d at 401–02; *Durham*, 737 F.3d at 303–04. For the foregoing reasons, the judgment should be vacated and this case should be remanded to the district court for further proceedings.

Request for Oral Argument

Oral argument is needed for two reasons. First, the importance of this case cannot be overstated. Detention officers must feel free to report misconduct—especially instances of excessive force—committed by their fellow officers without fear of retaliation by the Sheriff.

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Certificate Of Compliance With Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,262 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, Size 14.

Dated: August 7, 2020

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Certificate Of Service

I HEREBY CERTIFY that on this 7th day of August 2020, I electronically filed the foregoing Opening Brief of Appellant and Joint Appendix, and certify that the following attorneys are registered ECF participants for whom service will be accomplished by the CM/ECF system.

I FURTHER CERTIFY that on this 7th day of August 2020, I served Sealed Joint Appendix Volume IV – DVD, via USPS, on opposing counsel listed below:

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