UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ALFREDO VALENTIN,	)	
	)	
Plaintiff,	)	Docket No. 15-CV-00235
	)	
vs.	)	
	)	
CITY OF MANCHESTER,	)	
BRIAN LEVEILLE AND	)	
CHRISTOPHER SANDERS	)	
	)	
Defendants.	)	

Memorandum of Law in Support of Defendant Sanders' and LeVeille's Objection to Plaintiff's Motion for Partial Summary Judgment

I. Statement of the Case.

The Plaintiff has moved for summary judgment on First Amendment claims as to the two police officers involved in his arrest under New Hampshire's Wiretap Statute, RSA 570-A:2. The motion is supported in part by the police reports and the *Gerstein* Affidavit from one of the officers, which are assumed to be true for this motion and are verified by the sworn affidavit of Attorney Gilles Bissonnette, Plaintiff's counsel. The thrust of the Plaintiff's motion is that although the Plaintiff may have secretly recorded the police officers, the right to secretly audio record police officers is entitled to essentially absolute protection under the First Amendment, and this right is "clearly established"---and in fact that it is not even a close case, as was asserted several times in the motion.

To the contrary, the Defendants believe that there is no constitutional right to secretly audio record police officers in violation of a valid state statute, and, more immediately, the Defendants are entitled to qualified immunity because the law in this area is not clearly

established.

II. Facts Believed to be Uncontested.

1. The encounter with Mr. Valentin occurred because of an investigation of Christopher Chapman who lived in Mr. Valentin's house and was believed to be keeping and selling illegal drugs at the house. The investigation was a joint operation with the New Hampshire State Police. Affidavit of Officer Bryan K. LeVeille, Exhibit B.

2. A search warrant was sought for the premises and it was decided to perform a "dynamic" search of 6 Lawton Street to attempt to locate illegal drugs and other evidence. A dynamic search occurs when the officers assess that there is a risk of potential harm. Chapman was a fairly substantial drug dealer, he was known to be armed, and the officers believed there would probably be weapons in the house, and even though he might not be there at the time they knew there were others in the house, and that this was the reason for the dynamic search. A dynamic search is essentially using force to gain quick entry to the premises and is sometimes known as a "no knock" search. Exhibit B ¶ 3.

3. Officer LeVeille verified through his affidavit that the facts contained in his "supplement" which is part of Exhibit B attached to Plaintiff's Motion for Summary Judgment, page MAN014, and the Gerstein affidavit at pages MAN7-8, are an accurate, although not completely inclusive, recounting of the facts in regard to the encounter with the Plaintiff.

4.. Officer Sanders recalls first seeing Mr. Valentin outside the premises during the search, where Valenton was upset and speaking in a loud voice and demanding to see the search warrant. He was told that he would be contacted when the search was complete and he would be allowed to return. Exhibit A, Affidavit of Christopher Sanders ¶ 4.

5. Mr. Valentin returned approximately several hours later. He spoke with Officer Sanders and demanded that they move a police vehicle from the driveway or he was going to have it towed. Officer Sanders told him that they were still searching the address and that the vehicle would remain until the search had concluded. Mr. Valentin became argumentative and stated he was going to have the vehicle towed. Officer Sanders told him directly that he was not allowed on the property until they had concluded the search. Valentin asked for his name and badge number, which Officer Sanders provided, and Valentin used a cell phone to capture a picture of his badge, which Sanders held out in front of him. Mr. Valentin then said that the police had told him it would take an hour longer, and that time had passed and that he was not leaving. Despite Officer Sanders telling him he was not allowed on the property, Mr. Valentin then walked past him on to the property and continued up the walkway and attempted to make entry into the side entrance. Officer Sanders again told him he was not allowed to enter the premises. He then advised Sergeant LeVeille that Mr. Valentin had returned at which time he joined him in front of the residence. Exhibit A ¶ 5.

6. Sergeant Sanders and Sergeant LeVeille spoke with Valentin outside the residence and explained to him that the search was not complete and he was not allowed in until they were finished. He demanded to see the search warrant and was told he would get a copy as soon as the search was completed. He continued to ask for the warrant and Sergeant LeVeille agreed to show him the warrant to avoid further interference with their operation. He returned to Valentin and showed him the warrant. Valentin acknowledged the warrant but began questioning their ability to search the entire residence. Sergeant LeVeille explained to him that the judge had issued the warrant permitting them to search the entire residence including the curtilage. Exhibit B ¶ 6.

7. At this point during their conversation, Sergeant Sanders noticed the Valentin was holding his cell phone in his left hand down by his side partially obscured by his leg. He further observed that Mr. Valentin had engaged his cell phone voice recorder which he could observe was actively recording as the length of the recording was being visibly timed, denoted by changing numbers. Sergeant Sanders recalls that Sergeant LeVeille was speaking in a normal if not lower voice at that time when providing Mr. Valentin with an explanation as to what occurred inside the residence and the nature of the investigation. They were on the sidewalk while this conversation was occurring. There was no one nearby who could overhear their conversation.

8. Neither Officers LeVeille or Sanders noticed any sort of sign that said the premises were under surveillance. In any event they believed that such surveillance that would come from the building would not record a conversation in normal tones on the sidewalk. Exhibit A ¶ 8; Exhibit B ¶ 7.

9. Sergeant Sanders, after noticing that Valentin appeared to be recording their conversation asked him if that was the case. Valentin hesitated briefly and stated, "Um, yes." He was told he did not ask for their permission to record nor did he tell them that he was recording their conversation. He was told that this was criminal. Valentin stated that he would not use the recording because he did not know. Exhibit B ¶ 7. Both officers say that they had no idea that anyone was recording their conversation, including Mr. Valentin, until they discovered that was the case after he had already done so. Exhibit B ¶ 7; Exhibit A ¶ 8.

10. Sergeant Sanders recalls that when he asked Valentin if he was recording the conversation, he became very nervous. When confronted with this he recalls Valentin saying words to the effect of "oh, I didn't know, I won't use it." Exhibit A ¶9.

11. Sergeant LeVeille recalls then telling Mr. Valentin that he was under arrest and when he did so, Valentin began tapping buttons on his phone and held the phone away from them over his head, and Sergeant LeVeille says he went to grab it before he could throw it or otherwise continue to punch numbers on it. He says at that point he believed the recording on the phone contained evidence of their conversation which would have provided proof that the conversation was secretly recorded by Mr. Valentin. Exhibit B ¶ 7.

12. This is what Valentin says in his Complaint about what transpired; these allegations can be taken as true for purposes of this motion.

13. "56. While Valentin was speaking to LeVeille about the search warrant, Sanders observed that Valentin was holding a cell phone in Valentin's left hand.

58. After noting this condition of Valentin's phone, Sanders asked Valentin, "are you recording?"

59. Valentin confirmed that he was recording.

60. LeVeille stated that Valentin could not record and that it was a crime.

69. To prevent the destruction of the audio recordings, Valentin held the phone above his head and hit the lock button on the phone. Without the correct code, the phone's audio recording could not be accessed without non immediate technical efforts."

14. Officer Sanders says that he does not recall ever arresting an individual under the wiretap statute or having an individual secretly record his conversation with that individual as Mr. Valentin did. He was aware of the *Glik* case through guidance provided by the police department, but he understood that case to stand for the proposition that a citizen has the right to video record police while in a public place in the performance of their duties if the recording is done in an open manner. He viewed the situation as entirely different as it was obviously Mr.

Valentin's intent, the way he kept the phone hidden down by his leg and by his reactions once he was confronted, that he was attempting to secretly record their conversation. Exhibit A ¶ 10.

15. Sergeant LeVeille had the same understanding of the *Glik* case. He said because he was aware of the *Glik* case and the guidance provided by the police department, and because a violation of the wiretap statute was unusual he wanted to be sure that the charge was proper. Exhibit B ¶ 9.

16. From the scene of the arrest, outside of Mr. Valentin's house, Sgt. LeVeille made a call to Lieutenant Steven Reardon, a supervisor in the department's Legal Division, and explained the facts to him and how Valentin was secretly recording them without permission and asked his opinion. Lt.Reardon told him that the believed there was probable cause to arrest under the wiretap statute. He believes he also raised the *Hopkins* case, which Sergeant LeVeille was aware of. In that case an individual recorded a conversation over the phone with the principal at West High School and also with Captain Jonathan Hopkins of the Manchester Police Department without the permission of those two individuals. Sergeant LeVeille was aware that prosecution of the Defendant had been convicted of felony wiretapping in that case. Exhibit B ¶9.

17. Also attached is the affidavit of Lt. Steven Reardon as Exhibit C. Lieutenant Reardon is a supervisor in the Legal Division of the Manchester Police Department. He has supervisory authority over police prosecutors in the 9th Circuit Manchester District Court. A part of his job is to keep up with developments in the criminal law and, along with other supervisors in that division, makes sworn personnel aware of changes in the law. He avers that after hearing the fact pattern from Sgt. LeVeille and reviewing RSA 570-A, he told Sgt. LeVeille that in his opinion there was probable cause to arrest.

18. In his affidavit, Lieutenant Reardon references two representative "bulletins" sent to sworn personnel specifically discussing RSA 570-A:2 and which also discussed the *Glik* case. Those bulletins are attached as Exhibit C-1 and C-2. There is a training bulletin from July 2011 that has a section that discusses the wiretap law and states the understanding of the department that RSA 570-A:2 "prohibits someone from secretly audio recording them." The second memorandum captioned "MPD Training Memo—Dealing With Anti-police Activities" was issued in April 2012 and contains the same statement. It also discusses the *Glik* case and that it is a citizen's constitutional right to openly film or audio record police officers in a public place in the performance of their duty. He believes all of the police officers in the department have been adequately informed of this court ruling, and he do not recall an incident of this rule being violated. Exhibit C ¶3.

19. Lieutenant Reardon also states in his affidavit that it was the department's understanding that after *Glik*, it still violated the wiretap statute to secretly record another person without consent, and that included police officers, and the police officers in the department were advised of that in accordance with these two memorandums (which were not the only memorandums or e-mails that went out to officers, but are representative). Exhibit C ¶4.

20. Lt. Reardon's affidavit continued: "Officers were advised to be cautious and to be judicious in the use of this statute, and it was recommended, but not required, that an indictment be sought, which would involve the county attorney's office, as opposed to proceeding by preparing a criminal complaint. Nevertheless, to the extent that a police officer reasonably believed there was probable cause to for a violation of RSA 570:A-2 because the suspect had secretly recorded a conversation with them, then the officer in this case had the discretion to make an arrest and charge. Furthermore, it is my recollection that Sergeant LeVeille had been in

communication with the office of the Hillsborough County Attorney during the course of this investigation as it unfolded on the date in question." Exhibit C ¶5.

21. Because a violation of the wiretap statute was unusual, Sergeant LeVeille wanted to be sure that the charge was proper, so when he got back to the police station he also called a Hillsborough County Assistant County Attorney, Brett Harpster. Attorney Harpster prosecuted the Chapman drug case. Sergeant LeVeille presented him with a summary of the facts as outlined in Sergeant LeVeille's attached affidavit and Attorney Harpster gave him his opinion that he felt it that the facts described to him would constitute a violation of the wiretap statute. Exhibit B ¶9.

22. The affidavit of Attorney Brett Harpster is attached as Exhibit D which recalls the same conversation, and that he expressed his opinion to Sergeant LeVeille that he believed that based on the facts told to him he believed that there was a violation of the wiretap statute. Exhibit D.

23. On June 18, 2015 the Plaintiff was indicted under the wiretap statute for violation of RSA 570-A:2. See copy of indictment attached to Plaintiff's Complaint as Exhibit H.

24. After the indictment the police department sought a search warrant for the Plaintiff's phone. Attached as Exhibit E is the search warrant, the application for the search warrant, and affidavit in support of the application for search warrant signed by Detective Michael Buckley of the Manchester Police Department. In paragraph 3 of the affidavit, Detective Buckley records that:

> During Sergeant Sanders' and Sergeant LeVeille's contact with Valentin, Sergeant Sanders observed that they were secretly being audio recorded by Valentin through Valentin's cell phone. At the time of the recording, it was apparent to Sergeant Sanders that Valentin had his cell phone in his left hand and placed down by Valentin's left leg.

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25. Paragraph 4 of the affidavit notes that due to the arrest, the black Samsung cell phone was seized. However, it was apparent that the black Samsung cell phone had a digital security lock in place. This was by his own admission, a result of Valentin locking the phone so that the police could not get the recording. In his Complaint, Valentin alleges that this is because he did not want the recording destroyed, but nevertheless, it is undisputed that Valentin attempted to keep this evidence from the police. Plaintiff's Complaint, ¶69.

26. Paragraph 6 of the affidavit requests the court to have the cell phone "searched at a secured law enforcement location where its contents may be forensically examined in a manner best suited for the retrieval and preservation of all evidence in regards to this case." Exhibit E.

27. The search warrant was signed by Judge Lyons of the 9th Circuit Court, District Division, Manchester, based on "probable cause for believing that certain property is intended for the use or has been used as the means of committing a crime, is being used for an unlawful purpose, the evidence of violating RSA 570-A:1 wiretapping and eavesdropping statute, and may be found on the cellular device which is under the control of the Manchester Police Department." Exhibit E.

28. The report of Officer William Trombley is attached to the Plaintiff's Complaint as Exhibit B, pages MAN016-18, and records that he attempted to locate the recording on the phone through various technical measures but it was apparent that the phone had been "wiped" (i.e. all data removed) and he could not locate the recording that the police department sought.

III. The Defendant Police Officers are Entitled to Qualified Immunity.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known. Qualified immunity balances important interests -- the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government officials' error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223 (2009). The Court's typical approach is to first determine whether there was a constitutional right violated, and then secondly, determine whether that right was clearly established under the law. *Pearson*, 555 U.S. at 232. However, in *Pearson*, the Supreme Court recognized that in many cases it would be more useful to first determine whether the right was clearly established at all so that courts could avoid attempting to make uncertain assumptions about state law. *Id.* at 238. Determining whether the law is clearly established follows the Court's general policy preference to avoid passing on a constitutional question if there is also present some other ground upon which the case may be disposed of. *Id.* at 241. The Court noted that there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before having to turn to the more difficult question of whether the relevant facts make out a constitutional question at all. *Id.* at 239-240. The Defendants assert that this is one of those cases where the law is not clearly established, and that issue should be decided first.

A. The First Amendment right to secretly record a police officer in a public place was not clearly established.

"A right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Carroll v. Carman*, 135 S.Ct. 348, 350 (2014). Whether a right is clearly established for purposes of qualified immunity must

be determined in light of the law at the time the contested action was taken. *Messerschimidt v. Millender*, 132 S.Ct. 1235, 1245 (2012).

The Plaintiff's argument primarily rests upon two First Circuit Court of Appeal cases that were decided before the arrest in this case. The two cases are *Glik v. Cunniffe*, 655 F.3d 78 (2011), and *Gericke v. Begin*, 753 F.3d, 1 (1st Cir. 2014). Collectively, the Plaintiff claims that these authorities clearly established an absolute right to audio record a police officer secretly as long as the officer is in a public place performing a police duty, and the person recording is not interfering with the police. The Defendants believe that these cases did not consider the secret recording of police officers—as opposed to the open recording of police officers--and therefore do nothing to clearly establish a right to secretly record police officers in a public place.

1. The *Glik* case.

The Plaintiff says at Page 17 of his Memorandum that, "The right to secretly record the police in public is not an extension of *Glik* and *Gericke*, but rather has already been definitively recognized by these two cases."

In the *Glik* case, there was no issue whatsoever as to secret recording. In the Boston Municipal Court, the trial court, the Court there found no probable cause supporting the charge under the Massachusetts wiretap statute because the law required a secret recording, and the officers admitted that Glik had used his cell phone openly and in plain view to obtain the video and audio recording. *Glik v. Cunniffe*, 655 F.3d 78, 80 (1st Cir. 2011). The case was on appeal on a denial of a motion to dismiss on qualified immunity grounds.

It is worthwhile to note that in terms of the holding in the *Glik* case, if the Plaintiff's argument was accepted, then there would be no right to prohibit secret recording of *any* government official. As *Glik* found, "The filming of government officials engaged in their duties

in a public place, including police officers performing their responsibilities, fits [within the principles discussed by the court]." *Id*. at 82. The Court did note that the right to film was not without limitations, subject to reasonable time, place and manner restrictions. *Id*. at 84. In its discussion of the First Amendment, the Court noted that restraint on the part of police "must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Id*. at 84. That is entirely different than the case here where the Plaintiff intentionally engaged the police officers in conversation while they were trying to serve a search warrant in order to secretly record their conversation. It is also doubtful whether this conversation with the police officers was a matter of "public interest." See, *Id.* at 83..

The *Glik* Court also discussed whether there was a violation of the Fourth Amendment by the plaintiff's arrest, noting the thrust of Glik's claim was that he was arrested without probable cause for violating the Massachusetts wiretap statute. The Massachusetts wiretap statute is similar to the New Hampshire wiretap tatute which prohibits an "interception" which the court found essentially means a secret recording. *Glik*, 655 F.3d at 86. The relevant question was whether on the facts alleged in the complaint, Glik had "secretly" videotaped the appellant officers.

The court discussed at length the Massachusetts Supreme Court case of *Commonwealth v. Hyde*, 750 N.E. 2d 963 (2001). In *Hyde*, the Defendant was the subject of a traffic stop. He secretly recorded his interaction with the police officer. When he went to make a complaint and produced the tape, he was charged with violation of the Massachusetts wiretap statute. He was tried and convicted before a jury and appealed to the Massachusetts Supreme Judicial Court. The dissent in that case argued that based on the First Amendment the conviction should be reversed, and the plaintiff had a right to surreptitiously record police officers. The dissent made

the same arguments as the Plaintiff here. The court found that implicit in the dissent's position was the broader suggestion that police officers routinely act illegally or abusively to the degree that public policy strongly requires documentation of details of contacts between the police and members of the public to protect important rights, thus there must be secret recording of the words of police officers without restriction. The court doubted the validity of the dissent's premise and was not convinced that "the widespread clandestine recording of encounters between individuals and police officers would be desirable or even efficacious." Accordingly, the same issues were addressed in *Hyde* which found that there was no right to secret recording of police officers. The *Glik* court avoided coming within the holding of *Hyde* by making it clear that there was no secret recording in the *Glik* case. Therefore *Glik* does not "clearly establish" a First Amendment constitutional right for an individual to engage police officers in a conversation and secretly record them without their permission. ("The relevant question, then, is whether, on the facts alleged in the complaint, Glik "secretly" videotaped the appellant officer.") *Glik*, 655 F.3d at 86. The court found that this was not even arguable, and so qualified immunity did not apply to the Fourth Amendment claim.

In *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), cited by the Plaintiff, an injunction was sought to prevent enforcement of a statute passed by the Illinois legislature that would have made it illegal to openly record police officers. The court granted the injunction in the lawsuit, where the ACLU represented that it wanted to openly audio record police officers performing their duties in public places. As the Court said in that case, "At the risk of repeating ourselves, this case has nothing to do with private conversations or surreptitious interceptions. We accept Judge Posner's point "private talk in public places is common." But the communications in question here do not fall into this category; they are not conversations that carry privacy

expectations even though uttered in public places. Moreover the ACLU plans to record openly, thus giving the police and others notice that they are being recorded." *Id*. at 606-07.

2. The *Gericke* case.

In *Gericke*, the plaintiff was following a friend in a car who was pulled over by the Weare police. After she pulled over behind her friend, the police officer approached her car and asked her to move it because he was pulling over the friend and not her, and she pulled into an adjacent parking lot which was about 30 feet away from the police officer where he was interacting with the other driver. She announced to the officer that she was going to audio / video record him and pointed a camera at him and attempted to film him as he was interacting with the other driver. Under the plaintiff's account, the officer never asked her stop recording and when she pulled into the parking lot, he did not order her to leave the area. She was charged with several misdemeanors and also with a violation of unlawful interception of oral communications under RSA 570-A:2. The town prosecutor did not proceed on the pending charges, and sent it to the Hillsboro County Attorney who did not move forward with the charges. Gericke sued in federal district court and alleged that her First Amendment rights were violated when she was charged with illegal wiretapping in retaliation for her videotaping of this traffic stop, similar to what has been claimed in this case. "The police officer Defendant's violated Valentin's clearly established rights under the First Amendment when they detained, arrested, and charged him with wiretapping in retaliation for using his phone to record police officers doing their public duties in a public place without interfering with the performance of those duties." Paragraph 134, Plaintiff's complaint. Because there was a factual dispute about whether Gericke had been disruptive, the district court denied the officers' motions for summary judgment and they took an interlocutory appeal to the First Circuit Court of Appeals. On appeal,

the court specifically noted that it did not consider whether the wiretapping statute amounted to a reasonable time, place and manner restriction because the officers did not in any way challenge on appeal the district court's ruling that there was no probable cause for the wiretapping charge. That is relevant to our case where the secret recording of police officers should be considered just such a reasonable restriction on the manner of the Plaintiff's exercise of his alleged First Amendment rights.

Accordingly, *Gericke* is entirely dissimilar to our case. Instead it is very close to the *Glik* case where a remote observer, some 30 feet away, was holding up a video camera to record a police action involving another citizen. There was simply no element of secrecy involved in that case, the officer was entirely aware of the recording (or attempt to record, apparently the camera did not work) and there was no request to desist the recording. There is nothing in *Gericke* that would put a police officer on notice that he could be secretly recorded in a conversation with another person, and that that action was protected by the First Amendment.

3. The Plaintiff cites no authority to establish that secretly recording of a police officer in a public place in the performance of his duties is a "clearly established right."

As discussed above, neither *Glik* nor *Gericke* held that there is a First Amendment right to secretly record conversations with police officers. In fact, both opinions avoided doing so, and likewise in *Alvarez*, the court went out of its way to note that that issue was not included in its opinion.

Instead commentators and cases such as *Hyde* argue that such a right does not exist, or at the least, that it is not clearly established. "The most pressing--and least predictable--question that remains in the wake of *Glik* and *Alvarez* is whether the positive First Amendment right

conferred in those cases will extend to surreptitious recordings of police officers." Jesse Alderman, "*Before you press record: unanswered questions surrounding the First Amendment right to film public police activity*," NIU Law Review Volume 33, Issue 3 - Summer 2013.

In other secondary sources, similar statements of doubt over protection for secretly recording police officers exist. "According to Lyrissa Lidsky, an expert on the application of First Amendment principles to emerging media, secretly recording a police officer is less permissible and complicated than openly recording an officer for two reasons: laws and regulations in these matters differ between federal and state governments and how wiretapping or eavesdropping is interpreted under these laws. The reason secret recording is more problematic than open recording is it [secret recording] is much more likely to 'make it difficult to identify' the crime of eavesdropping or wiretapping," Lidsky said. "By the same token, the arguments for a First Amendment right to secretly record are much weaker than those used for open recording….A case [involving secretly recording a police officer in public place such as a traffic stop] suggests that secret recording is a violation of the wiretapping statute - - that even if there is a right to publicly record the police, there is no right to secretly record the police, so that is something to definitely be aware of," Lidsky said. See, *"Do you have the right to secretly record police actions?*" ABA News Dec.2012, available at: http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/do_you_have_the_righ0.html

4. Advice available to the police officers indicated that a charge for violating the wiretap statute for secretly recording police officers was not protected by the First Amendment.

Attached to the affidavit of Steven Reardon as Exhibits C-1 and C-2 which are several training bulletins that were provided to the sworn personnel in the Manchester Police

Department. For example, in the April 2012 memo, there is a discussion of the *Glik* case and that citizens have a right to record police officers. The March 22, 2012 New Hampshire Attorney General memorandum is also discussed (a full copy of that is attached to Plaintiff's Amended Complaint as Exhibit A). The opening line however in the MPD memo on the section of "Video/Audio Recording Officers" says: "The NH wiretapping RSA 570:A-2 prohibits someone from secretly audio recording you."

This is in accord with Officers Sanders' and LeVeille's affidavits, that they were well aware of the *Glik* case, would not arrest or impede citizens who were recording them openly while they were performing their police duties, but it was their belief that secretly recording police officers was a violation of the wiretap statute, which is in accord with their training as exhibited by the training memo just discussed.

Further, in accordance with the officer's affidavit, Officer LeVeille *from the scene* called Steven Reardon who was a police prosecutor generally knowledgeable as to New Hampshire criminal law and asked him if there was probable cause for an arrest where they had just been secretly recording. At this point Mr. Valentin would have been handcuffed but had not been charged or otherwise brought to the station. Lieutenant Reardon gave his opinion that he believed it was a good arrest and that there was probable cause for the charge. See Exhibit C, Reardon affidavit.

Back at the station before the charges were filed against Mr. Valentin, because issues over the wiretap statute were not entirely clear as expressed in the training memorandums, Officer LeVeille called Attorney Brett Harpster, an experienced assistant county attorney, who was also prosecuting the drug charges against Mr. Chapman, and he likewise expressed the opinion that based on the facts relayed to him which were similar to the facts in the affidavit that

there was a violation of the wiretap statute. Advice from a prosecutor is one factor that the court will consider in determining whether qualified immunity should apply. *Cox v. Hainey,* 391 F.3d 25, 35 (1st Cir. 2004).

Eventually, a New Hampshire grand jury found probable cause to indict Mr. Valentin under the wiretap statute, although under a different section than the original charge, with the main difference being the language "wilfully" in RSA 570-A:2, I (a) in the original complaint, and "knowingly" in RSA 570-A2, I-a in the indictment. See, Exhibit H to Plaintiff's amended complaint, Indictment. The fact that the Plaintiff was originally charged under a different section of the statute is irrelevant; if a lawful cause of arrest exists, the arrest will be lawful even though the officer charged the wrong offense or gave a reason that did not justify the arrest. See RSA 594:13.

After Mr. Valentin locked his phone to prevent access to the conversation that he had just had with the police officers, and thereby hiding evidence, the police department sought a search warrant to attempt to locate the conversation on the phone. In the affidavit for the warrant it was stated that, "during Sergeant Sanders and LeVeille's contact with Valentin, Sergeant Sanders observed that they were secretly being audio recorded by Valentin through Valentin's cell phone. At the time of the recording, it was apparent to Sergeant Sanders that Valentin had his cell phone in his left hand and placed down by Valentin's left leg." Judge Lyons of the 9th Circuit District Division of Manchester District Court issued the search warrant and found that there was "probable cause for believing that certain property intended for use or has been used as the means for committing a crime, is being used for an unlawful purpose the evidence of violating NH RSA 570-A:1 wiretapping and eavesdropping statute . . ." Exhibit E.

As Sergeant LeVeille also said in his affidavit he was aware of a case that came up

involving Lieutenant Hopkins where an individual recorded a conversation over the phone with Lieutenant Hopkins and also with the principal of West High School, and that Defendant had been convicted of violating RSA 570-A (in the New Hampshire Supreme Court the conviction was reversed, but for reasons other than the constitutionality of the statute). *See, State v. Mueller*, 166 N.H. 65 (2014).

Taking all these factors together, it cannot be said that it would be apparent to a reasonable police officer that it was clearly established that a citizen had an absolute right to secretly record police officers in a public place, and particularly within the facts of this case, where the officers were speaking in a moderate to low voice, and there was no one around other than the participant to the conversation that could overhear the conversation.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016). Here, two experienced police officers who had been trained on the *Glik* case, were aware of the right of citizens to film them and respected that right. However, there training had been that it was still a violation of the law to secretly audio record police officers. At the time of the arrest they spoke to a police prosecutor, who was of the same opinion. At the station before the plaintiff was charged, they spoke with an assistant county attorney who also held the same opinion. Judge Lyons issued a search warrant that was based on probable cause that a crime had been committed, and a grand jury handed down an indictment which conclusively established probable cause. They were aware of no case that held that there was a First Amendment right to secretly record the police, and the Plaintiff has not cited any case in this circuit or from the U. S. Supreme Court that holds that.

Accordingly, as the right to secretly record police officers in a public place has not been

clearly established, qualified immunity applies to both Officers LeVeille and Sanders.

5. Plaintiff's First Amendment Claim as to the officers is not clearly established as there was probable cause to arrest and prosecute.

"[A]n indictment 'fair upon its face,' and returned by a 'properly constituted grand jury,' " we have explained, "conclusively determines the existence of probable cause" to believe the defendant perpetrated the offense alleged." *Kaley v. United States*, 134 S. Ct. 1090, 1097-98, 188 L. Ed. 2d 46 (2014) *citing Gerstein v. Pugh,* 95 S.Ct. 854 (1975).

In a section 1983 claim of retaliatory prosecution for First Amendment activity, a plaintiff must prove that her conduct was constitutionally protected and was a " 'substantial' " or " 'motivating' " factor for the retaliatory decision, [citation omitted] **and that there was no probable cause for the criminal charge**." *Gericke v. Begin*, 753 F.3d 1, 6 (1st Cir. 2014). (Emphasis added.)

As there was conclusively probable cause to prosecute the Plaintiff for violation of the wiretap statute by virtue of the indictment, the Plaintiff is missing an element of proof for his First Amendment claim and it fails on that basis alone.

Alternatively, in terms of qualified immunity, there is no clearly established law that says the First Amendment is violated by a retaliatory prosecution where there is the presence of probable cause.

As far as an alleged violation of the First Amendment by a retaliatory arrest where there is probable cause, the U.S. Supreme court has held that it is not clearly established that such an arrest with probable cause violates the First Amendment. *Reichle v. Howards*, 132 S. Ct. 2088, 2093-94 (2012.).

"To obtain the benefit of qualified immunity, a police officer need not follow an

unquestionably constitutional path. The case at hand exemplifies this point; where, as here, a section 1983 action rests on a claim of false arrest, the qualified immunity standard is satisfied "so long as the presence of probable cause is at least arguable." Moses v. Mele, 711 F.3d 213, 216 (1st Cir. 2013). There was at least, *arguable* probable cause here.

The Plaintiff was initially charged with RSA 570-A:2, I(a) which provides that

> A person is guilty of a class B felony if, except as otherwise specifically provided in this chapter or without the consent of all parties to the communication, the person:
>
> (a) Wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any telecommunication or oral communication.

The prosecution did not go forward in district court but the Hillsborough County Attorney's Office put the case before a New Hampshire grand jury and the grand jury chose to indict under RSA 570-A:2, I-a which provides:

> A person is guilty of a misdemeanor if, except as otherwise specifically provided in this chapter or without consent of all parties to the communication, the person knowingly intercepts a telecommunication or oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication, but without the approval required by RSA 570-A:2, II(d). [The statute applies to investigations by law enforcement officers.]

The only difference between the two statutes are the required mental states—"willfully" and "knowingly"—and the penalty under each.

What is required for probable cause is the interception of an oral communication without the consent of all of the parties to the communication. "Intercept" means the aural or other acquisition of, or the recording of, the contents of any telecommunication or oral communication through the use of any electronic, mechanical, or other device. RSA 570-A:1. It is undisputed that this occurred. The *Glik* holding would cause an interpretation of this statute to be that where

a person is openly filming or audio recording a public official, in public performing his or her duties, the official will have deemed to have consented to the recording. Here, it is undisputed that the officers did not have notice that the Plaintiff was audio recording them with his cell phone, they did not consent to be recorded, the Plaintiff conceded that he recorded them, and therefore there would be probable cause to charge him under the statute.

As there is probable cause, there is no violation of clearly established law per *Reichle* and qualified immunity should apply to Plaintiff's First Amendment claim for retaliatory arrest.

It should also be noted that Judge Abramson's order in the superior court also supported a finding of probable cause. The State argued that if the First Amendment protected secret recordings, there could have been no probable cause to arrest the plaintiff, and the court would have no reason to decide whether the recording was secret. Judge Abramson implicitly found probable cause, noting the fact that a criminal charge violates the First Amendment does not mean underlying the charge violates the Fourth Amendment. "The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality…" Order, p. 4, Exhibit D to Plaintiff's Motion.

Finally, the Plaintiff's engagement with the police here was entirely different than in *Glik;* in that case the plaintiff was a passive bystander merely recording events from a distance. Here, the plaintiff was interfering with execution of a "dynamic" search, for example trying to go back into the house when told not to do so, threatening to have a police car towed, and even engaging the police officers in conversation so that he could secretly record them, which distracted them from their search, which ultimately turned up a substantial amount of heroin. These facts also make it less likely that the law was clearly established in the particularized circumstances of this case.

IV. RSA 570-A:2 is a reasonable time, place, or manner restriction on First Amendment rights and is therefore constitutional

The exercise of the right to film may be subject to reasonable time, place, and manner restrictions. *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014). In *Gericke* the court did not consider whether New Hampshire's wiretap statute was a reasonable time, place or manner restriction on the First Amendment because the defendant did not challenge the finding of no probable cause in the lower court. *Gericke*,753 F.3d at 9.

Secret recording, even of public officials, is entirely different than recording in an open manner that would put a subject on notice that he or she is being recorded.

As expressed in their affidavits, both Officers Sanders and LeVeille were well aware of the *Glik* case and that citizens had a right to openly record them when they were in a public place conducting police activities. However, secret recording is qualitatively different. As the court found in the *Hyde* case, even police officers have some expectation of privacy in their words; it may be more limited or circumscribed than the general public but it is not nonexistent. *Hyde*, 750 N.E. 2d 963, 967 (2001). Although the dissent in that case argued, as the Plaintiff does here, the value of removing all privacy rights from police officers and for allowing entirely unfettered secret recording of conversations with police officers, the court rejected that approach as unreasonable. The court observed that following that approach to its logical conclusion, drug manufacturers would hide video cameras in their facilities to record execution of search warrants and drug dealers would secretly tape record conversations with suspected undercover officers or informants, and "numerous other examples exist." *Id.*

With modern technological advances, all manner of listening devices could be used to record a conversation that a police officer is having with an individual without the officer's

knowledge. This would include remote devices. For example, a police officer could be talking on his cell phone working on a detail at a construction site and someone with one of a variety of devices, for example a parabolic microphone (see link http://www.scienceprog.com/long-range-directional-microphones-myth-and-reality/) could be listening in on and recording the police officer's conversation with his wife at a distance of 50 meters. The officer is in a public place, he is engaging in a police duty, i.e., present at a construction site he may or may not be directing traffic at that particular point in time, and there is nothing to restrict the Plaintiff from recording this conversation. Or, if the Plaintiff conceded that there needed to be at least one party consent to the conversation, using such a device to secretly record the conversation of an investigating police officer and a woman who was just sexually assaulted. Again, under Plaintiff's version this is all entirely protected and "clearly established" under existing law.

Additionally, if Plaintiff's argument is accepted, there is no reason why a police officer who was talking on a cell phone with a witness or a suspect and just happened to be standing in a public place, that that cell phone call could not be secretly recorded by either a person on the other end, or by a listening device. Similarly, listening devices could be planted in fixed locations that, although in public, are places where police officers are known to frequent to secretly record their conversations.

Importantly, as noted above, the *Glik* case does not apply by its language only to police officers. The language was "government officials, including police officers." Therefore, that would apply to every government official, including teachers and judges, who happen to be in a public place having a conversation that they believed was limited to the person they were speaking with, but could be overheard, recorded, and put on the internet if the Plaintiff's view of things prevails.

The Plaintiff makes no distinction between conversations, and recorded conversations, but there certainly is a difference. In the well reasoned dissent of Judge Richard Posner in the *Alvarez* case, he noted the qualitative difference, quoting Justice Harlan's dissent in United States v. White, 401 U.S. 745, 787-89 (1971):

> The impact of the practice of third party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of "informer" investigation . . . The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the difference occasioned by third party monitoring and recording which ensures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting. Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third party bugging a prevalent practice, it might well smother that spontaneity - - reflected in frivolous, impetuous, sacrilegious, and defiant discourse - - that liberates daily life. Much off hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

As Judge Posner concluded, "the distinction that Justice Harlan drew between an overheard private conversation recalled from memory and one that is recorded is something everyone feels - - and feels more acutely in the electronic age than 41 years ago." *ACLU v. Alvarez*, 679 F.3d 583, 612 (7th Cir. 2012).

In *Fischer v. Hooper*, 143 N.H. 585 (1999), the Plaintiff and Defendant had been divorced and there was friction as far as visitation rights for their daughter, and a guardian ad

litem recommended that they record the phone conversations with their daughter and with each other, but that they had to agree. The Defendant did not obtain the Plaintiff's permission to record telephone conversations but he nonetheless did so without her knowledge. The Plaintiff sued for violation of the wiretap statute, RSA 570-A, and also common law invasion of privacy. The jury found for the Plaintiff. In upholding the trial court's denial for a directed verdict, the New Hampshire Supreme Court said that, "although the Plaintiff could have expected the content of her conversations with her daughter to be repeated to the therapist, the jury could reasonably have concluded that the Plaintiff did not expect her actual words and voice to be captured on tape. See RSA 570-A:2 (requiring only that a person exhibit a reasonable expectation that her conversations will not be "subject to interception," not that the conversation will not be conveyed to a third person).

There is a very real difference between having a conversation with a person and then having a conversation with a person who surreptitiously records that conversation for whatever use such as broadcast on the internet, or other.

The fact that a conversation may occur on a public sidewalk does not mean that there is no expectation that it will not be recorded. There is no allegation in this case that there was a crowd of people around or others could overhear the conversation between Mr. Valentin and Officers LeVeille and Sanders. *See Cuviello v. Feld Entertainment Inc.*, 304 F.R.D. 585, 591 (N.D. Cal. 2015). ("[Plaintiff] provides no authority suggesting that just because a conversation takes place on a public sidewalk, the speaker forfeits any reasonable expectation of confidentiality. The court, for its part, has found none.")

Because it is qualitatively different to have a conversation with someone, and to have that person secretly and permanently record that conversation to be used in whatever manner, perhaps

in a manner that misrepresents the context, to be broadcast on the internet, etc., restricting recording of such conversations by simply allowing the person to be recorded notice that the conversation is going to be recorded is fair, reasonable, and a reasonable restriction on the manner of exercise of a First Amendment right. Accordingly, enforcement of this statute as to the Plaintiff did not violate Plaintiff's First Amendment rights.

V. Conclusion

The right to secretly record police officers in a public place was not clearly established, particularly where there is probable cause for the arrest and charge. Because the law was not clearly established, qualified immunity should apply to protect the two police officers.

If the Plaintiff's argument was accepted (because *Glik* does not apply to just police officers by its language, it applies to all government officials), the right to record teachers, judges, prosecutors and even meter maids who happen to be in a public place, and to do so secretly would be an absolute First Amendment right, and there simply is no support for that. The Plaintiff has cited no case that supports the proposition that even just police officers may be secretly recorded in a public place while performing their official duties; as discussed above, *Gericke* and *Glik* specifically do not hold that.

RSA 570-A provides a reasonable restriction on the manner of exercising the First Amendment right to audio or video record another, and as a reasonable restriction, enforcement of that statute did not violate the Constitution.

Accordingly, summary judgment should be granted for the two Officers on grounds of qualified immunity.

Respectfully submitted,

City of Manchester, Brian Leveille, and
Christopher Sanders

By their Attorneys,
McDonough, O'Shaughnessy, Whaland & Meagher, PLLC

June 8, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion has been served via ECF to opposing counsel, Brandon D. Ross and Gilles Bissonnette.

June 8, 2016

__/s/Robert J. Meagher_____
Robert J. Meagher, Esq.