



February 10, 2010

Via UPS Overnight Mail

The Honorable Jonathan Lippman
c/o Clerk of the Court
State of New York Court of Appeals
20 Eagle Street
Albany, NY 12207

RE: *People of the State of New York v. Julian Raven*

Dear Chief Judge Lippman,

Pursuant to New York Criminal Procedure § 460.10(5)(a) and § 460.20, Defendant Julian Raven hereby requests that this Court issue a certificate granting him leave to appeal to the court of appeals a decision rendered by Chemung County Court Judge James T. Hayden in *State v. Julian Raven*, ECC Docket No. 2007-56740. This court should accept this appeal as the decision below conflicts with established United States Supreme Court precedent and New York law.

The facts in this case are very simple and not in dispute, making this a good case for the New York Court of Appeals to clarify this area of the law. The following are the undisputed facts, with citations to the record:

- On Saturday, June 23, 2007, Defendant Julian Raven and others¹ attended an event at Wisner Park, a public park in Elmira, New York. Transcript of February 29, 2008, Bench Trial at 40:24 – 41:7 (“Transcript”).
- The event held at Wisner Park was called the Southern Tier Pride Festival, an event that celebrated diversity, especially with regard to various sexual practices like homosexual behavior. While the event was organized by a

¹ Seven persons were originally arrested for disorderly conduct for this event. Three of them took a plea agreement. Three of them, Gloria Raven, Walter Quick and Maurice Kienenberger were convicted, along with Julian Raven, but their convictions were overturned by the Chemung County Court.

private group, it was open to the general public and was promoted on the City's website. *Id.* at 19:4-8; 20:4-12; 33:12-25.

- Elmira police officer Sgt. Sharon Moyer instructed Defendant Raven that while he could go to the event, he could not *disrupt* the event. *See* Order dated January 11, 2010, at 2.
- Consequently, Defendant and others entered the event to pray silently for event participants and to share the Gospel with them. *Id.* at 133:15-17; 141:25 – 142:2. Through their expression, they wanted to communicate the message that Jesus Christ forgives sins. *Id.* at 129:20 – 130:4; 146:17 – 147:6.
- Approximately 200 members of the public were present at that time. *Id.* at 30:21-23. There was plenty of room in the park for everyone; no one was being turned away for overcrowding. *Id.* at 33:9. They walked in silence, *id.* at 90:10-12, in a prayerful fashion, to be as peaceful as possible. *Id.* at 133:10-11; 156:3 – 154:2. Neither Defendant nor anyone from the group bumped into anyone as they entered, and they did not force others out of their way. *Id.* at 133:20 – 134:9.
- At least one other event participant became verbally abusive towards Defendant and the others. *Id.* at 98:12-24; 134:1-13. Sgt. Moyer claims that she saw a demonstrators return words to the abusive event participant, but she could not hear what was supposedly said, and she does not know which demonstrator supposedly did so. *Id.* at 52:21 – 53:3; 75:3-23.
- Defendant and the others walked to a grassy area towards the front of the event, where other event participants were present and where a stage was set up for the event. *Id.* at 99:17 – 100:19. They knelt or laid down on the ground together and prayed or read the Bible, and they chose this posture in order to be as non-threatening as possible. *Id.* at 135:3-6. They did not take anyone's place when they laid down. *Id.* at 100:23-24. There was nothing occurring on the stage at this time; recorded music was playing over event loudspeakers. *Id.* at 35:9-21; 105:12-15; 133:7-9. They did not obstruct people's view of the stage. *Id.* at 83: 1-5. There were two other event participants sitting closer to the stage than Defendants. Just a few feet in front of Defendant, these women were enjoying lunch. *See* Defendant's Trial Exs. A-G.

- The police followed and arrested Defendant and six others. Sgt. Moyer initiated the arrests because she was concerned that others might react to their message in a hostile manner. *See* Transcript at 47:18 – 48:2; 52:19 – 53:11; 75:24 – 77:17.
- On February 29, 2008, Defendant and three others (Gloria Raven, Walter Quick, and Maurice Kienenberger), were convicted of disorderly conduct because the court determined that they should have known that others would have reacted to their message in a hostile manner. The city court issued its order from the bench and also codified its ruling in its Return on Appeal, attached.
- On January 11, 2010, the Chemung County Court reversed the convictions for Gloria Raven, Walter Quick, and Maurice Kienenberger, but upheld the conviction of Julian Raven.

The County Court erred in ruling that Defendant Raven could be guilty of disorderly conduct because others might react to his message in a hostile manner. This case is controlled by the U.S. Supreme Court’s “sit-in” cases and similar cases involving peaceful demonstrations. Under the First and Fourteenth Amendments to the U.S. Constitution, peaceful speakers may not be arrested simply because others in the forum may react to their message in a hostile manner. “Starting with *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), and continuing to *Gregory v. City of Chicago*, 394 U.S. 111 (1969), it has become patent that a hostile audience is not a basis for restraining otherwise legal First Amendment activity.” *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972).

In *Terminiello*, a Catholic priest delivered an address in an auditorium in Chicago to the Christian Veterans of America, an anti-communist group. *See* 337 U.S. at 2-3. Hundreds of persons were present, and about 1,000 persons were gathered outside the auditorium to protest. *Id.* at 3. The speaker “criticized various political and racial groups whose activities he denounced as inimical to the nation’s welfare,” as his speech was anti-communist and anti-Semitic. *Id.*; *see id.* at 22 (Jackson, J., dissenting). Although police were present, they could not completely control the crowd and “were not able to prevent several disturbances. The crowd outside was angry and turbulent.” *Id.* Therefore, the priest was soon arrested and convicted of disorderly conduct. The U.S. Supreme Court, however, reversed his conviction, finding that because he did not engage in “fighting words”

his speech was protected by the First Amendment. *Id.* at 4. The Court stated that “a function of the free speech under our system of government 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.” *Id.*

The Court reinforced this idea in *Gregory*. Therein, a group of citizens became unsatisfied with their public school system for lagging behind on the issue of desegregation. *See* 394 U.S. at 115. After a speech by the group’s leader that insulted the mayor and school superintendant, the group demonstrated by marching through town toward city hall, ending by the mayor’s home. “Meanwhile the crowd of spectators from the neighborhood kept increasing, and its language and conduct became rougher and tougher.” *Id.* at 116-117 (noting “jeers, insults, and assaults with rocks and eggs”). “Fearful that the threatening crowd of onlookers could no longer be contained, the police asked [the group] to leave the area. When they refused, they were arrested and charged [with disorderly conduct].” *Id.* The Court, however, wasted no time in reversing the convictions:

This is a simple case. Petitioners . . . marched in a peaceful and orderly procession from city hall to the mayor’s residence to press their claims for desegregation of the public schools . . . [but] onlookers became unruly as the number of bystanders increased. Chicago police, to prevent what they regarded as an impending civil disorder [arrested defendants for disturbing the peace].

Petitioner’s march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment. There is no evidence that petitioners’ conduct was disorderly. Therefore, . . . convictions so totally devoid of evidentiary support violate due process.

Id. at 111 (citations omitted).

This principle that a peaceful speaker cannot be arrested because others might react to the message in a hostile fashion soon became a staple of civil rights and free speech cases. The Court has repeatedly protected the right of peaceful speakers to deliver a message in an area where they are permitted to be, but where their presence is not wanted by others. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 550-51 (1965) (reversing conviction for breach of the peace where defendants continued to demonstrate at the state capitol building, even though it was asserted that “violence was about to erupt” and people were “jeering” at them); *Taylor v.*

Louisiana, 370 U.S. 154, 155 (1962) (reversing convictions for breach of the peace where defendants peacefully demonstrated in the whites-only section of a bus depot, even though “many of the people therein became restless”); *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963) (reversing convictions for breach of the peace where defendants were peacefully playing basketball in a customarily whites-only park); *Lombard v. Louisiana*, 373 U.S. 267, 271(1963) (reversing criminal mischief convictions of college students who remained in the whites-only section of a private restaurant, even though the police cited “public safety” concerns); *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (reversing convictions for breach of the peace where defendants were arrested for engaging in the “peaceful expression of unpopular views,” even though white onlookers had assembled nearby) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963)); *Brown v. Louisiana*, 383 U.S. 131, 141 (1966) (reversing convictions for breach of the peace where defendants peacefully demonstrated in the whites-only section of a public library); *Garner v. Louisiana*, 368 U.S. 157, 171 (1961) (reversing convictions for disturbing the peace where defendants remained at the whites-only section of a private restaurant, even though it was “feared that some disturbance may occur”); *Street v. New York*, 394 U. S. 576 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989).²

Contrary to the above case law, the lower courts in this case ruled that the arrests were proper because Defendant must have known that other event participants would respond with hostility to his message. This, however, is precisely what the above cases prohibit. “Participants in an orderly demonstration in a public place are not chargeable with danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.” *Brown*, 383 U.S. 131, 132 n.1 (citations omitted). Surely, the defendants in the sit-in cases who sat in the white’s only section of restaurants, bus depots and libraries realized that their actions could be met with hostility as the cases all involved racial tensions. But this did not stop the Supreme Court from holding that peaceful speech is not disorderly because others react to it with disorder or violence.

When others become hostile to the speaker’s message and threaten a disruption or violence, the police must arrest those who become hostile, not the peaceful speakers. “Even where the audience is so offended by the ideas being expressed that it becomes disorderly and attempts to silence the speaker, it is the

² Furthermore, because the New York Constitution is more protective of free speech rights than the U.S. Constitution, see *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557-58 (N.Y. 1986), it also protects Defendants in this case.

duty of the police to attempt to protect the speaker, not to silence his speech if it does not consist of unprotected epithets.” *Collin v. Smith*, 447 F. Supp. 676, 690 (D.C. Ill. 1978) (citing *Gooding v. Wilson*, 405 U.S. 518, 527 (1972); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Cox*, 379 U.S. at 546-48)); see *Brown*, 383 U.S. 131, 132 n.1. Sgt. Moyer did not even attempt to quell the disruptive audience at Wisner Park. She improperly arrested the peaceful speakers instead. *Compare* Transcript at 76:16-24, with *Gregory*, 394 U.S. at 121 (Black, J., concurring).

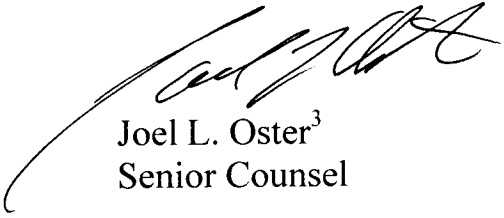
In addition, the conviction of Defendant Raven should be reversed, as the command given to him by Sgt. Moyer was vague and unclear. She did not prohibit him from going into the west side of the park. She did not prohibit him from talking with others. Rather, she prohibited him from “disturbing” the event. Consequently, his actions were as peaceful as possible. He walked in silently, and laid down so that he was not in anyone’s way. His actions were as peaceful and non-disruptive as could be. See *People v. ABOAF*, 187 Misc.2d 173, 179 (2001) (concluding that a law “subjecting the exercise of First Amendment freedoms to the prior restraint” must contain “narrow, objective and definite standards to guide the licensing authority,” and must not be “so vague that ‘men of common intelligence must necessarily guess at its meaning.’”)

Attached to this letter are:

1. The January 10, 2010 Order from the Chemung County Court;
2. The Brief of the Plaintiff-Respondent filed with the Chemung County Court;
3. The Brief of the Defendants-Appellants filed with the Chemung County Court;
4. The Return on Appeal from the City Court of Elmira, N.Y.; and
5. The Transcript from the February 29, 2008, Bench Trial.

Defendant Raven respectfully requests that an appeal in this matter be certified to the New York Court of Appeals. No other application has been made to a Justice of the Appellate Division. Oral Argument of the application is requested. There are no other co-defendants in this case, as referenced in footnote 1.

Sincerely,

A handwritten signature in black ink, appearing to read "Joel L. Oster". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Joel L. Oster³
Senior Counsel

Enclosures

cc: Robert D. Siglin, Esq., Assistant Chemung County District Attorney, (w/o
encl.)

³ Mr. Oster was admitted pro hac vice to represent Mr. Raven by the Elmira City Court in this matter, and was retained by the Defendant.