Commonwealth of Massachusetts
Appeals Court

No. 2008-P-1294

COMMONWEALTH,

Plaintiff-Appellee,

vs.

MICHAEL A. MARCAVAGE,

Defendant-Appellant.

.

On Appeal from the Order, Judgment, and Fine following a Bench Trial dated March 10, 2008 by the Honorable Michael A. Uhlarik, Salem District Court of the Commonwealth of Massachusetts
No. 0736CR003506

BRIEF AND APPENDIX FOR DEFENDANT/APPELLANT MICHAEL A. MARCAVAGE

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STATEMENT OF THE ISSUES

1. Whether the trial court erred in finding that Defendant's temporary refusal to release his megaphone used for public preaching constituted disorderly conduct under Massachusetts law.

2. Whether the variance between the scope of the bill of particulars and the different theory of the case relied upon by the trial court below prejudiced the Defendant in his defense and denied him due process of law.

3. Whether the Salem police officers' confiscation of Defendant's amplification device, but not others', violated Defendant's rights to freedom of speech, freedom of religion, and equal protection of the laws under the Massachusetts and United States constitutions.

STATEMENT OF THE CASE

This case involves a Christian evangelist who was charged with a noise ordinance violation and charged and convicted of disorderly conduct for preaching the Christian gospel message with a megaphone at 8:30 p.m. on the evening of Halloween 2007 in Salem, Massachusetts, even though the local noise ordinance permitted such amplification until 10:00 p.m. The Commonwealth later dropped the noise ordinance charge but argued at a March 10, 2008 bench trial before the Honorable Michael A. Uhlarik, Salem District Court, that Marcavage's evangelism methods occurring before the confiscation amounted to tumultuous and disorderly

conduct. Marcavage argued at trial that his behavior throughout the evening never became disorderly and that the police officers' decision to target his use of the megaphone with the pretext of a noise ordinance violation infringed his constitutional rights of speech, religion, and equal protection. Marcavage was found guilty of disorderly conduct for his delay in surrendering the megaphone and was assessed a $200.00 fine plus $50 for the Victim/Witness Fund. Marcavage now appeals to this Court for a reversal of his conviction and fine.

STATEMENT OF THE FACTS

As a Christian evangelist and the director of Repent America, Michael A. Marcavage believes he is called to peacefully but effectively communicate the message of the Christian gospel through open-air preaching to people around the country. (Transcript pp. 155-56, 185.) As he has done for several years past (Tr. p. 24), Marcavage and his evangelism group Repent America visited downtown Salem, Massachusetts, on October 31, 2007, to publicly preach about their religious beliefs to the many Halloween revelers gathered on the public thoroughfares of the city. (Tr. p. 158-59.) To this end, Marcavage and other

members of Repent America will preach to passersby, sometimes with the assistance of a megaphone, hold signs containing scriptures from the Holy Bible and religious messages, and offer religious literature and tracts to passersby. This is what Marcavage does every year in Salem and this is what he was doing when he was arrested in Salem on Halloween night of 2007.

Because of the many people that gather in Salem on Halloween night for "Haunted Happenings"——as many as 60,000-80,000 people were estimated to be in the city in 2007 (Tr. p. 207)——Salem hired police officers from neighboring departments to help its own police force on the evening in question. (Tr. p. 20.) Despite the fact that the Salem noise ordinance permits the use of amplification "for any noncommercial purposes" other than during "the hours of 10:00 p.m. and 8:00 a.m." (see Addendum, Salem Code Art. I, § 22-2(2)(a)), the police department instructed officers working that evening to stop all megaphones at 8:00 p.m. (Exhibit 2-B (DVD no. 2) at 8:00 p.m.; Tr. p. 39-40, 56, 141.)

Marcavage, James Deferio, Deferio's son and wife, and other evangelists associated with Repent America began their ministry work in Salem on October 31,

2007, at approximately 1:20 p.m. (Tr. p. 147.) Another evangelist, Brandan Little, joined them at around 5:00 p.m. (Tr. p. 174.)

Marcavage first preached with a megaphone on the night in question from about 6:20 p.m. to 6:26 p.m. (Ex. 2-B at 6:06 p.m.-6:26 p.m.; Tr. pp. 123-133, 148). At 8:00 p.m. Salem Police Lt. Paul Lemelin ordered another member of Marcavage's group who was then preaching to turn off the megaphone, and then stated to Marcavage that the order was "based on our city ordinances," and that he had been "instructed this afternoon by my captains and my superiors to turn off bullhorns at 8:00 p.m." (Ex. 2-B at 8:00-8:04 p.m.; Tr. pp. 138-142.) Marcavage tried to discuss the matter with Lt. Lemelin, pointing out that other people and groups were using amplification at that time, and inquiring about which city ordinance required bullhorns turned off at 8:00 p.m. (Id.) Lemelin repeated his order, specifically mentioning the city's noise ordinance, and threatened to confiscate the megaphone before walking away. (Id.) During this conversation, music can be heard blaring in the streets through outdoor speakers (Id.).

Shortly thereafter, video evidence[1] (Trial Exhibits 2-A, 2-B, and 2-C (three (3) DVDs)) showed that a street performance was taking place with the use of loud amplification; at a nearby outdoor table music was playing loudly through speakers; and on a street corner music was playing loudly through amplification—all in the midst of a large and noisy crowd of Halloween revelers. (Ex. 2-B at 8:05-8:12 p.m.)

As his friends attempted to preach to the crowd with their bare voices, Marcavage walked through the crowd at around 8:18 p.m. to find a supervising officer to talk to. (Ex. 2-C (DVD no. 3) at 8:18 p.m.; Tr. pp. 144-45.) He returned without success and picked up the megaphone to resume the amplified

[1] At trial, 3 DVDs containing video recorded before, during, and after Marcavage's arrest were admitted into evidence as Exhibits 2-A, 2-B, and 2-C. (Tr. pp. 172-73.) (Note, however, that defense counsel's prior marking of the same as Defense Exhibits 1, 2, and 3, respectively, may also appear on the 3 disks in the record.) Portions of each disk showing Marcavage throughout the evening of October 31, 2008, and particularly the portion on the third disk showing his arrest, were played in open court for the trial court and, where audible, the audio portions are transcribed in the record. (See Tr. pp. 116-46.) A timeline of sorts was also included with the DVDs to sketch out the times that Marcavage appears in the video recordings. The court stated in its oral ruling that it relied upon the video evidence in this case. (Tr. pp. 216-21.)

preaching himself shortly before 8:30 p.m. (Ex. 2-C at 8:27 p.m.)

Marcavage stood at the top step at the edge of a dried-out fountain situated in Townhouse Square, a public walkway area at the intersection of Washington and Essex streets, which elevated him two or three feet above the crowd. (Ex. 2-C at 8:27 p.m.; Tr. pp. 32.) It was from this stationary position that the users of the megaphone preached that evening and it was again at this spot that Marcavage stood. Other people, including many not with Marcavage and Repent America, also stood up on the edge of the fountain and around it, close to Marcavage to listen, argue, or simply stand there. (Ex. 2-C at 8:27 p.m.; Tr. pp. 33-34.)

At 8:28 p.m., according to the video recording and Officer Brian Butler's testimony, Butler stood behind Marcavage inside the dried-out fountain and told Marcavage to turn off the megaphone. (Ex. 2-C at 8:28 p.m.; Tr. pp. 102-103) Marcavage responded that he was "not violating the law, Officer," and continued preaching with the megaphone. (Ex. 2-C at 8:28 p.m.; Tr. pp. 103.) Less than a minute later, Lt. Lemelin and several other officers approached Marcavage and

grabbed the megaphone and its shoulder strap to take it from Marcavage's possession. (Ex. 2-C at 8:28:55 p.m.) Marcavage protested, insisted he was not breaking the law, and attempted to point toward nearby instances of amplification being used at the same time by others, all while trying to hold onto the megaphone and its strap that was wrapped around his shoulder. (Ex. 2-C at 8:29 p.m.) Lt. Lemelin at this point shoved away a nearby video camera. (Id. at 8:29:30 p.m.) A few seconds thereafter, and with several officers now physically grabbing at him and the megaphone, Marcavage fell into the fountain and released his hold on the megaphone. (Id. at 8:29:35 p.m.) The officers immediately stood Marcavage up, handcuffed him, and led him away, all while Marcavage continued to plead his case and tried to point out other amplification devices in the near vicinity. (Id. at 8:29:45 p.m.) Marcavage never resisted arrest. (Id.; Tr. p. 42, 43.) From the time that Lt. Lemelin and the other officers approached to confiscate the megaphone until the time that Marcavage was led away in handcuffs, exactly one minute expired.

Marcavage was subsequently charged with disorderly conduct under Mass. Gen. Laws Ch. 272 § 53,

and with a violation of Salem's noise control ordinance, Salem Code Art. I, § 22-1. (Crim. Compl., App. p. A1.) The Commonwealth agreed to dismiss the noise ordinance charge in January 2008 (Letter from DuPré to Prince, App. p. A6) and the charge was duly dismissed at trial. (Docket p. 2, App. p. A4).

The Commonwealth proceeded with its prosecution of the disorderly conduct charge, but not for the conduct surrounding the confiscation of the megaphone. Instead, in its Bill of Particulars, the Commonwealth alleged that Marcavage

> (1) "is a disorderly person due to his conduct on October 31, 2007, between 4:00 PM and 8:35 P.M.," and
>
> (2) "involved himself in tumultuous behavior by forcing literature in the faces of attendees, yelling, screaming, taunting, and recklessly waving a crucifix in and about the faces of attendees as they past [sic] by the public pulpit set up by the group Repent America." (App. p. A7.)

The remaining allegations were that "this activity affected the public, those attending the Halloween Happenings," and "that this behavior caused public inconvenience, annoyance and alarm." (Id.) At the beginning of trial, the Commonwealth made sure "the record reflects" that it

> "was moving on the first prong of disorderly, which is alleging——citing threatening or tumultuous behavior as opposed to the second prongs [sic], which is creating a hazardous or physically offensive condition by an act that served no legitimate purpose. We are proceeding on the first prong." (Tr. p. 8-9.)

Moments later, the Commonwealth reiterated:

> "I just want to make the point, Your Honor, that it was——we're alleging tumultuous and threatening behavior as opposed to a freedom of speech issue." (Tr. p. 10-11.)

During trial, the Commonwealth called four officers of the Salem Police Department to testify: Paul Lemelin, Lawrence Puleo, Ryan Davis, and Brian Butler.[2] All officers testified as to the behavior of Marcavage and members of Repent America throughout the evening——preaching with the megaphone, carrying a Bible, passing out literature, etc.——but all officers also testified that, until 8:00 p.m., they never approached Marcavage or members of his group to warn them that their behavior was ever becoming disorderly or otherwise illegal. (Tr. pp. 46-47, 64, 93, 102, 105-106.)

Lt. Lemelin testified that during the evening Marcavage was preaching with a Bible in hand to

[2] A restaurant owner also testified but on cross-examination acknowledged that he had never seen the Defendant and did not recognize him. (Tr. pp. 17-18.)

passersby, "telling them that they were sinners, and they would have to repent or they were all going to Hell" (Tr. p. 34-35), but that "as long as they are not going over the edge, they have a right to preach." (Tr. p. 38.) Lemelin testified that he did not see Marcavage with a crucifix or a cross. (Tr. pp. 48. At 8:00 p.m., Lemelin testified, he indicated to the man preaching with a megaphone (not Marcavage) "that it was 8:00. And per our briefing, they [the police department] indicated to us they wanted the megaphones stopped at 8:00." (Tr. pp. 39-40.) Lemelin returned to find Marcavage using the megaphone afterwards and "tried to take it away from him." (Tr. p. 41.) He testified on direct examination as to what happened thereafter:

> A. [Marcavage] said, that's my megaphone. You can't have this, and we started pushing a little bit, tugging a little bit. We all fell off the wall.
>
> Q. When you say "we all," who are you referring to?
>
> A. Myself and then two officers came behind me as we went over the wall.
>
> Q. What other two officers was that?
>
> A. Officer Davis and Officer Butler.
>
> Q. Okay.
>
> A. As a result of that, we went down. And at that point, I said, you are under arrest. Because at that point, he had drawn a crowd. The crowd was becoming hostile. They had people with

> cameras right in our faces. And at that point, it became -- it was getting out of control. At that point, I placed him under arrest. Nobody got hurt. I picked him up. We cuffed him. There was no assaults. There was no resistance from him. He was very cooperative at that point.
>
> * * *
>
> A. He was cooperative at that point. He really didn't put up a fight, per se, it was more of a resistance to giving—to relinquishing the megaphone. And that was the only expressed intent that we had at that point was to prevent him from that particular behavior because that was becoming a menace at that point. Complaints, and the department requesting that we terminate that at 8:00. So, after that... (Tr. pp. 41-44, emphasis added.)

On cross-examination, Lemelin was asked:

> Q. But at that point, the reason you walked up to him [Marcavage], isn't it correct, is that you believed he was violating your 8:00 cutoff for megaphones?
>
> A. That's correct. (Tr. p. 56.)

The other officers likewise testified that they approached Marcavage solely because of his use of the megaphone and that "he did not" fight them, but was rather trying to argue "why Lieutenant Lemelin . . . was trying to seize the megaphone." (Tr. p. 93, 97, 102, 105-106.)

The trial court denied the Defendant's written and orally-argued motion for a directed verdict of not guilty. (Tr. p. 107-116.)

For the defense, James Deferio testified that Marcavage was mostly "stamping tracts with [a] Repent America logo"——tracts being "printed gospel messages in booklet form"——offering them to people passing by, and supervising the group's activities:

> A. [Marcavage] would come close to where we were ministering and oversee things, look around and see how things were going, give directions to others in the groups concerning the distribution of tracts and where they should be. And he was handing out tracts himself and talking occasionally to some people."
>
> Q. What was his behavior toward other people walking around?
>
> A. Michael's demeanor, I've known him almost three years, has always been very low key, very mannerly, very docile. . . . (Tr. pp. 150-51.)

Brandan Little also testified that as to Marcavage's demeanor as the latter was "preaching, observing, passing out literature." (Tr. p. 188.) Little testified:

> [Marcavage] is kind. He's a loving man. He's always apt to listen to what the cops have to say and try to work with them. Overall, he's a pretty mellow guy. (Tr. p. 175.)

The entire video recorded and entered into evidence likewise shows Marcavage calmly distributing literature to passersby and, when he preached, doing

so in a calm demeanor from a stationary position on the steps of the fountain, without any shouting or "getting in the faces" of those nearby. (Ex. 2-A, 2-B, 2-C.)

In closing, the Commonwealth agreed that Marcavage did not violate the noise ordinance (Tr. p. 207), but focused on the allegations of "tumultuous behavior" by Marcavage, that "they defied the order and continued to use the megaphone," and that the police "were trying to prevent a problem with public order." (Tr. p. 207-209.) The Commonwealth did not focus on or even mention the confiscation of the megaphone by the police or Marcavage's conduct during that incident.

The court, however, found Marcavage guilty of disorderly conduct, not based upon the theory advanced by the prosecution, but because of the court's perception of the megaphone confiscation:

> "I did not see any violent behavior on the part of your client at 8:35 on the videotape, but what I did see was defiance and basically passive aggressiveness in which he refused the police officer's request to surrender the bullhorn causing the police officers to have to physically take the bullhorn from him causing, not only your client, but also two uniformed police officers with the police department to fall." (Tr. p. 219-220.)

The court emphasized that "Halloween in Salem is a unique day of the year," and "we have to be very concerned about controlling crowds." (Tr. p. 217.) The court found that "the content of the crowd begins to change from a family atmosphere" at 8:00, and "that if your client continued using the bullhorn and the tactics they described, it could create a very tumultuous situation." (Tr. p. 219.) The court concluded it was not an issue of "freedom of speech" but rather "a question of public safety." (Tr. pp. 220-221.) Marcavage was assessed a $200 fine plus a $50 fee.[3]

STANDARD OF REVIEW

To sustain a trial judge's denial of a motion for a required verdict of not guilty, this Court "must determine whether 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Commonwealth v. Feigenbaum, 404 Mass. 471, 474 (1989) (quoting Commonwealth v. Barry, 397 Mass. 718 (1986));

[3] Defendant-Appellant would note, however, that the fine invoice given him by the court assesses a $90 fee, not a $50 fee. (App. p. A12.)

Commonwealth v. Latimore, 378 Mass. 671, 676-77 (1979). "The question of guilt must not be left to conjecture or surmise." Commonwealth v. Lodge, 431 Mass. 461, 465 (2000) (quotations omitted).

Questions of law in this case, however, are reviewed "de novo." Commonwealth v. Dasilva, 56 Mass. App. Ct. 220, 223 (2002). Thus, "ultimate findings and conclusions of law, particularly those of constitutional dimensions, are open for [this Court's] independent review in this appeal." Commonwealth v. Cruz, 373 Mass. 676, 683 (1977) (quotations omitted). In cases specifically raising First Amendment issues, for instance, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Murphy v. I.S.K. Con. of New England, Inc., 409 Mass. 842, 849 (1991) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)), cert. denied, 502 U.S. 865 (1991).

SUMMARY OF ARGUMENT

Michael Marcavage is guilty of nothing more than exercising his right to effectively preach the Christian gospel to a crowd of Halloween revelers in

Salem, Massachusetts. Despite the Salem Police officer's selective confiscation of his megaphone, at no time during that evening did Marcavage's mild-mannered behavior ever constitute disorderly conduct under Massachusetts law, even when he temporarily but passively retained his grip on the megaphone in the dashed hopes of getting an explanation for the officer's interference. The potential of a crowd getting tumultuous later in the evening should not have been used as to quiet Marcavage. (Br. 17-24.)

In its bill of particulars and during the prosecution of the disorderly conduct, the Commonwealth maintained its theory of the case that alleged Marcavage's behavior in evangelizing that evening was the disorderly conduct, not his failing to immediately relinquish the megaphone. For the trial court to rely on the latter incident for its ruling instead of behavior the Commonwealth focused on worked a prejudice against the Defendant in his defense and denied him due process of law. (Br. 25-31.)

Finally, the Salem Police officer's unilateral and unpublished 8:00-p.m. deadline for megaphone use (when the noise ordinance permitted it until 10:00 p.m.), and its selective application of such an ultra

vires policy against Marcavage and his fellow evangelists (but almost no one else), violated Marcavage's rights of free speech (31-37), free exercise (37-46), and equal protection of the laws (46-50) under the state and federal constitutions.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S TEMPORARY REFUSAL TO RELEASE HIS MEGAPHONE USED FOR PUBLIC PREACHING CONSTITUTED DISORDERLY CONDUCT.

Based on the evidence provided at trial, no trier of fact could have found that Michael Marcavage's actions on the night of October 31, 2008, constituted disorderly conduct under Mass. Gen. Laws Ch. 272, § 53. The disorderly conduct statute has been "saved from constitutional infirmity" by the courts, leaving the following definition under the Model Penal Code to control:

> "A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening, or in violent or tumultuous behavior; or . . . (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."

Commonwealth v. Lopiano, 60 Mass. App. Ct. 723, 725 n.1 (2004); Commonwealth v. Sholley, 432 Mass. 721,

728 n.7 (2000). In this context, this Court has defined "tumultuous" as:

> "marked by tumult: full of commotion and uproar: riotous, stormy, boisterous . . . tending or disposed to cause or incite a tumult . . . marked by violent or overwhelming turbulence or upheaval."

Commonwealth v. Zettel, 46 Mass. App. Ct. 471, 474 (1999) (quoting Webster's Third New International Dictionary 2462 (1993)). "Tumultuous" conduct, "'while perhaps not physically violent, may nevertheless be characterized as involving riotous commotion and excessively unreasonable noise so as to constitute a public nuisance.'" Sholley, 432 Mass. At 729 (quoting Commonwealth v. A Juvenile, 368 Mass. 580, 597 (1975)). Disorderly conduct "must disturb through acts other than speech; neither a provocative nor a foul mouth transgresses the statute." Lopiano, 60 Mass. App. Ct. at 725 (quoting Commonwealth v. LePore, 40 Mass. App. Ct. 543, 546 (1996)).

In the present case, the Commonwealth proffered testimony by police officers——none of which was seen in the hours of video evidence——that Marcavage occasionally got "in the faces" of passersby (Tr. p. 35-36), "waved" the Bible (Tr. p. 48), was "yelling" (Tr. p. 62), "approached people" (Tr. p. 63), held

signs (Tr. p. 80), caused some complaints (Tr. pp. 77-78), and that some people "were giving him backtalk" (Tr. p. 101), but that at no point before 8:00 p.m. did the officers warn or stop Marcavage. (Tr. pp. 46-47, 64, 93, 102, 105-106.) The officers testified that Marcavage was preaching and talking about his religious beliefs, sin, hell, Halloween, repentance, God, the Bible, and "spreading the Word." (Tr. pp. 33, 75.) When the officers approached Marcavage and began to confiscate the megaphone, they testified that he showed an initial "resistance to giving" it to them (Tr. p. 43), "put his hand on Lieutenant Lemelin and pulled his hand either off of his hand or off of the megaphone" (Tr. p. 88), and then "his body just went limp [and] [h]e fell into the fountain" as well as another officer or two. (Tr. p. 89.) "He was very cooperative at that point." (Tr. p. 42.)

On a night as raucous as Halloween in Salem, the conduct of Marcavage is remarkable for his entire lack of "tumult." Even when viewed in the light most favorable to the Commonwealth, Marcavage demonstrated, first, no "purpose to cause public inconvenience, annoyance or alarm." Lopiano, 60 Mass. App. Ct. at 725. He was there to try to preach to a noisy and

busy crowd, and no evidence proffered showed he had any intent to stir up or annoy the people or that anything he had done for hours prior to the confiscation of the megaphone demonstrated recklessness or otherwise prompted the police to step in.

Massachusetts courts have held much more alarming conduct than Marcavage's to be insufficiently tumultuous for a disorderly conduct conviction. In Zettel, this Court held it was not tumultuous conduct when a woman refused to park her car properly while waiting to pick up her child from school, was asked repeatedly by an officer to move her double-parked vehicle that was causing a traffic obstruction and a safety hazard, and then when placed under arrest "attempted to resist, . . . struggled with [the officer] and . . . kicked him." 46 Mass. App. Ct. at 472. In Lopiano, this Court held it was not tumultuous conduct when the defendant was asked to leave the scene of an argument but instead yelled at the officer and another party, flailed his arms, and ignored a second order to leave. 60 Mass. App. Ct. at 724. (The Defendant referred the trial court to both Zettel and Lopiano during trial. (Tr. p. 199-202).)

In Sholley, however, the Supreme Judicial Court held that it was tumultuous for the defendant to scream obscenities and threats for two or three minutes and run through a court house corridor, such "extreme" conduct giving rise "to a sense of emergency on the part of those who heard it." 432 Mass. at 729. The defendant's outburst in Sholley "went far beyond the level of noise and commotion ordinarily encountered in court house hallways." Id.

Marcavage's behavior on the public sidewalk of Salem on Halloween night was drastically tamer than the defendants in Zettel, Lopiano, and especially Sholley, not to mention other similar cases. See Commonwealth v. Mulero, 38 Mass. App. Ct. 963 (1995) (flailing hands, belligerent and profane manner toward officer, and shoving hands in baggy shorts constitute tumultuous or threatening behavior); Commonwealth v. Carson, 10 Mass. App. Ct. 920 (1980) (tumultuous behavior where drunk, belligerent college student who cursed at police officers drew crowd of fifty people who likewise abused police); and Commonwealth v. Richards, 369 Mass. 443 (1976) (tumultuous behavior by defendants drinking alcohol in crowded mall, resisting arrest, punching and cursing at police, and drawing

crowd of two hundred who abused police). No officer testified, nor did the court find, he was violent, abusive, or obscene, or that his behavior involved "riotous commotion" or excessive noise.

The crowd in Salem was itself loud, large, dynamic, and boisterous on Halloween night, much more so than Marcavage himself. Yet there was no evidence that the people listening to or standing near Marcavage ever engaged in tumultuous behavior either. In fact, the most exercised and angry the crowd got was when the officers interfered with Marcavage's preaching and arrested him.[4] (Tr. p. 42, 89-90.) At the most, the trial court held that he did not see "any violent behavior" by Marcavage, but that because of the potential, future dynamics of the crowd after 8:00, "a concern for drunkenness, violent behavior and so forth, the police were concerned that if [Marcavage] continued using the bullhorn and the tactics that they described, it could create a very

[4] Indeed, the novel application of "tumultuous" applied to Marcavage's behavior in this case would have more readily swept in the behavior of those some others near to or responding to Marcavage throughout the evening, such as the costumed man waving a butcher's knife inches from Marcavage's face as the latter continued to calmly preach his message. (Ex. 2- at p.m.)

tumultuous situation." (Tr. p. 219, emphasis added.) Hypothetical fears of how other people in a crowd "could" begin acting in the future may be a convenient specter of an unproven and improvable threat, but it is hardly tumultuous or disorderly conduct, at least not by Marcavage.

Even the officers' premature confiscation of the megaphone was met by Marcavage with no more than "passive aggressiveness," according to the court (Tr. p. 220), a temporary resistance to relinquishing the device as he tried to get an explanation for why he and not other nearby users of amplification was being shut down. Lt. Lemelin even had the time and energy to shove a nearby video camera down and away from him with one hand while pulling at the megaphone with the other. (Ex. 2-C at 8:29 p.m.) He then fell like a nonviolent protestor (or was pushed) into the fountain, ceased his hold on the megaphone, and continued to calmly argue his position to the officers handcuffing him, all within a minute's time. Marcavage was obviously looking for an explanation, not a fight. There was no hint of violence, threats, obscenity, yelling, or even a raised voice by Marcavage toward anyone. Marcavage's brief attempt to

obtain an explanation while delaying the megaphone confiscation may not have been "a good decision" in the court's eyes (Tr. p. 220), but it never developed into the type of tumultuous, riotous, or belligerent conduct sufficient to prove disorderly conduct. Indeed, the court made no such finding of tumultuousness.

The only thing Marcavage may be guilty of is preaching with a megaphone past an 8:00 p.m. cutoff policy unilaterally imposed and enforced by the Salem Police but entirely contrary to the Salem Code. All evidence shows that this arbitrary deadline is the only reason Marcavage was approached by the police and had his megaphone confiscated. None of his conduct before, during, and after the confiscation constituted disorderly conduct. Under any reading of the evidence in this case the Commonwealth's after-the-fact attempt to justify the megaphone confiscation and arrest——and for alleged behavior before the police ever approached Marcavage——is untenable under Massachusetts law.

II. THE TRIAL COURT'S FINDING THAT THE MEGAPHONE CONFISCATION INCIDENT WAS DISORDERLY CONDUCT WAS NEVER THE THEORY ADVANCED BY THE COMMONWEALTH, THUS WORKING A VARIANCE BETWEEN THE PROSECUTION AND THE HOLDING THAT WAS PREJUDICIAL TO THE DEFENDANT AND A DENIAL OF DUE PROCESS OF LAW.

Through its bill of particulars and at trial the Commonwealth proceeded on only the first prong of the disorderly conduct rule——tumultuous conduct——and did so based only on evidence of Marcavage's alleged conduct of preaching and evangelizing throughout the evening, but not based on the conduct surrounding the police confiscation of the megaphone. (App. p. A7; Tr. pp. 8-11, 207-210.) The trial court, however, relied upon the confiscation of the megaphone to find Marcavage guilty, a variance that not only prejudiced the Defendant's defense but denied him due process of law.

A defendant may be acquitted "on the ground of variance between the allegations and proof if . . . he is thereby prejudiced in his defence [sic]." Mass. Gen. Laws Ch. 277, § 35. The function of the bill of particulars "'is to give a defendant reasonable knowledge of the nature and character of the crime charged,'" Commonwealth v. Pillai, 445 Mass. 175, 188 (2005) (quoting Commonwealth v. Crawford, 429 Mass.

60, 69 (1999), abrogated on other grounds by Commonwealth v. Carlino, 449 Mass. 71 (2007)), and the effect of a filed bill of particulars "'is to bind and restrict the Commonwealth as to the scope of the indictment and to the proof to be offered in support of it.'" Crawford, 429 Mass. at 69 (quoting Rogan v. Commonwealth, 415 Mass. 376, 378 (1993)).

Before trial, Assistant District Attorney Jane Prince represented to defense counsel by phone that the Commonwealth would not be prosecuting the disorderly conduct based on Marcavage's alleged conduct on the night in question before the brief resistance to the megaphone confiscation, and accordingly sent the defense a brief bill of particulars on March 4, 2008, that alleged "tumultuous behavior" toward attendees of the Halloween Happenings "as they past [sic] by the public pulpit set up by the group Repent America."[5] (App. p. A7.) Questions on

[5] In response to defense counsel's receipt of the Bill of Particulars on March 4, 2008, counsel sent ADA Prince additional video footage with a cover letter on March 7, 2008, noting that it was necessary

> "[d]ue to the fact that the Bill of Particulars . . . refers to matters allegedly occurring in the hours before the time of Michael Marcavage's arrest (approx. 8:30 p.m.), and therefore outside the scope

direct examination by the Commonwealth's witnesses focused heavily on the behavior of the defendant toward passersby throughout the evening of October 31, 2008. (Tr. pp. 11-105.) Perhaps most telling is that, at the close of the Commonwealth's principal case, the Commonwealth, arguing in opposition to Defendant's motion for a verdict of not guilty, argued only that Marcavage's behavior of preaching about hell and repentance after 8:00 p.m. to a large crowd was "tumultuous behavior and not permissible according to the disorderly statute." (Tr. p. 108-112.)

It was at this point in the trial that the court first asked defense counsel about Marcavage's "resisting the officer from confiscating the megaphone." (Tr. p. 113.) Nevertheless, again in final arguments, the Commonwealth stuck with the scope of the bill of particulars and focused on the

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> of the video clip that we have already sent you." (App. p. A9.)

Defense counsel also wrote, "We intend to show this video . . . to the trial judge if necessary to clearly demonstrate that Mr. Marcavage's preaching and literature distribution involve none of the 'tumultuous' activity to which the Commonwealth's witnesses intend to testify." (Id.) The Commonwealth had made it plain which conduct of Marcavage's would be on trial and the defense adjusted its case and marshaling of evidence accordingly.

testimony of the four officers who saw that other people "felt scared of [Repent America]," (Tr. 206.), that they were "going up to people with pamphlets" and "stepp[ing] in front of their way," (Tr. p. 208) and that it was a "loud situation" that could have spun "out of control" (Tr. p. 209). The prosecutor also mentioned that "they defied the order" about the megaphone and "continued to use" it," but conspicuously still did not expand its theory to mention the incident involving the megaphone confiscation. (Id.)

From beginning to end, the prosecution's case rested upon the alleged behavior of Marcavage's and Repent America's evangelization methods. Whether at the close of its principal case or in closing arguments, the prosecutor never referred to the megaphone confiscation to show that the Commonwealth had met its burden of proving disorderly conduct beyond a reasonable doubt.

The trial court's decision to find disorderly conduct based upon the megaphone confiscation, therefore, as opposed to the alleged evangelization tactics argued by the prosecution, was a variance even more prejudicial to the defense than a mid-trial

change in strategy by the prosecution would have been. In this case, defense counsel was consistently led to believe that the prosecution was for alleged behavior involving Marcavage's evangelism methods and religious speech throughout the evening in question. For instance, defense counsel chose not to call the Defendant to the witness stand in the belief that the testimony of defense witnesses and the video evidence would sufficiently show no disorderly conduct by Marcavage through his literature distribution, preaching, and behavior in the crowd. Had the defense known that the trial court would replace the prosecution's theory of the case (evangelism tactics) with its own (megaphone confiscation), Marcavage would have likely taken the stand to provide more detailed and personal evidence of his intent and behavior in holding onto the megaphone and his questions as to why he was being selectively quieted by the police.

Moreover, in attempting to counter the Commonwealth's theory, the defense's brief oral arguments in support of its motion for directed verdict discussed only the evangelism behavior. (Tr. pp. 107-108.) In closing, defense arguments again pointed to the limited scope of both the bill of

particulars (Tr. pp. 195-195) and specifically pointed to "the fact that the Commonwealth has staked their case on [Marcavage's] behavior prior to his being confronted by Officer Lemelin." (Tr. p. 199.) If the defense had known that the court was going to shift the focus to the megaphone confiscation, the defense's arguments would have shifted accordingly.

The prejudice, therefore, went directly to the evidence being proffered for the only alleged offense prosecuted. The trial court's significant shift in focus and the theory of the case made it such that the bill of particulars not only failed to provide the defense with "notice to prepare his defense," Pillai, 445 Mass. at 188 (quotations omitted), but essentially changed the prosecutorial theory after the defense and prosecution had rested and given closing arguments. The Commonwealth had expressly and consistently locked itself into one theory of proof to the exclusion of another; for the trial judge to unilaterally circumvent the prosecution's proof offered in support of that theory "violated the defendant's due process right to notice of the nature and grounds of the charges to be tried and, by unfair surprise, hampered

the preparation of the defense." Commonwealth v. Garner, 59 Mass. App. Ct. 350, 362-63 (2003).

III. THE DISCRIMINATORY CONFISCATION OF DEFENDANT'S MEGAPHONE VIOLATED HIS RIGHTS TO FREEDOM OF SPEECH, FREEDOM OF RELIGION, AND EQUAL PROTECTION OF THE LAWS UNDER THE MASSACHUSETTS AND UNITED STATES CONSTITUTIONS.

The Salem police officers' interference with Marcavage's use of the megaphone for preaching, when the Salem noise ordinance permitted his use of it for another hour-and-a-half and when others nearby continued to use amplification after 8:30 p.m., was an infringement of his rights of free exercise of religion, free speech, and equal protection of the laws under the Massachusetts Constitution and, according to federal courts, the United States Constitution. But for the police officers' unconstitutional interference based on the noise ordinance pretext, Marcavage would not have been arrested and charged with disorderly conduct. The trial court erred in dismissing or not even addressing Marcavage's constitutional claims in this case. (Tr. pp. 217, 220.)

A. Marcavage's free speech rights were abridged by the Salem police officers' discriminatory confiscation of his megaphone.

The Salem police officers' act of silencing Marcavage's megaphone when the law still permitted its use burdened his free speech rights under the Massachusetts Constitution and, according to the courts, the United States Constitution. Part 1, Article 1 of the Declaration of the Rights of the Massachusetts Constitution declares that "All people are born free and equal and have certain natural, essential and unalienable rights, . . . [including] the right of enjoying and defending their . . . liberties." Part 1, Article 16 also specifies that "The right of free speech shall not be abridged." (Emphasis added.) As for the First Amendment to the U.S. Constitution, its injunction against "abridging the freedom of speech" has been held to be applicable to the states through the 14th Amendment. U.S. Const. amend. I.; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Under free speech analysis, the Supreme Judicial Court of Massachusetts has held:

> "'[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech,

> provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. . . . Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.'"

City of Boston v. Back Bay Cultural Ass'n, Inc., 418 Mass. 175, 178-79 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

The Salem city noise ordinance allowed all communicants of noncommercial speech to use amplification devices until 10:00 p.m., even on Halloween, and differentiated only between speech that was commercial and speech that was not in its time, place, and matter restrictions of megaphone use. Salem Code Art. I, § 22-2. On the night in question, Marcavage was engaged in a classic form of free speech on a public sidewalk, a traditional public forum. Benefit v. City of Cambridge, 424 Mass. 918, 925 (1997). With the megaphone or without, he spoke about his religious beliefs and his views on the Bible, sin, repentance, and the evils of Halloween, and also distributed religious literature, "just spreading the Word." (Tr. p. 75; see also pp. 33-35, 62, 75, 122-

133, 150-151.) The officers testified as to the religious content and viewpoint of Marcavage's speech, and that other people in the area were "approaching them, listening to them" (Tr. p. 33.), some were "retorting statements to them" (Tr. p. 34.) and "voicing their opinions back and forth" (Tr. p. 96). Marcavage and Repent America were, in short, exercising their "right to preach" in a traditional public forum. (Tr. p. 38.)

The large crowds of people had assembled in Salem that night because of Halloween—Marcavage and Repent America, too, but they were there to speak out against it, which made Marcavage's speech unwanted to many there to celebrate the occasion. (Tr. p. 158-59; 185-186.) By unilaterally moving the megaphone cutoff time up to 8:00 p.m., and then applying that policy essentially to Marcavage and Repent America only, the police unconstitutionally "select[ed] for disfavored treatment" Marcavage's religious, anti-Halloween viewpoints. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 831 (1995); Good News Club v. Milford Central School, 533 U.S. 98, 109-110 (2001). The police did not silence all or even most amplification at 8:00 p.m. in the same area in

which Marcavage's megaphone was seized, including a circus/street show, music vendors, and bars (Ex. 2-B at 8:05-8:12 p.m.), each ironically more likely to be commercial speech than Marcavage's and therefore subject to a 6:00 p.m. cutoff time under the noise ordinance. Salem Code Art. I, § 22-2(2)(b).

The fact is that Salem on that date and at that time gets "pretty loud" (Tr. p. 181) and, as can be seen on the video, even Marcavage's amplified speech was nearly overwhelmed by the noise of the large crowd. (Ex. 2-C at 8:27-8:28 p.m.) But it was the distinguishing factor of Marcavage's religious viewpoints and the religious content of his speech on Halloween night of 2007, and not the mere use of amplification, that drew the police restriction and confiscation.

Moreover, such discrimination may not be justified by a mere concern for the hearers' reaction to speech. The trial court made much of the fact that on Halloween "from 60,000 to 80,000 people cram into a very tight space," that at 8:00 p.m. "the crowd begins to change," causing "a concern for a drunkenness, violent behavior and so forth," and that Marcavage's use of the megaphone and preaching "tactics . . .

could create a very tumultuous situation." (Tr. p. 217.) But the U.S. Supreme Court long ago rejected the suppression of speech with a "heckler's veto":

> "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . [F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Accordingly, the Court in Terminiello held unconstitutional a conviction of disorderly conduct under a statute that "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest." Id. at 5. Any public unrest that does arise from speech should prompt police to quash the tumult of the crowd instead of the speech itself. National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

No evidence in this case shows that Marcavage himself engaged in "any violent behavior" and nor did the crowd around him get violent or even threaten to do so. (Tr. p. 219.) Instead, the court justified

the shutting down of Marcavage's megaphone by raising the future threat to "public safety" posed by a later, more inebriated crowd and how it might react to Marcavage's amplified religious speech.[6] (Tr. 219-220.) If the government cannot suppress free speech with a heckler's veto then it certainly may not veto Marcavage's free speech for an imagined heckler, no matter what "unique" night it may be in Salem, Massachusetts. Free speech rights do not expire at 8:00 p.m. on Halloween in Salem, Massachusetts.

B. Marcavage's rights to the free exercise and profession of his religion were infringed by the discriminatory confiscation of his megaphone.

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." (Emphasis added.)

The Massachusetts Constitution provides broad protection for religious freedom:

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe.

[6] Ironically, the louder the crowd in Salem gets, the greater the need for amplification to assist a public speaker trying to communicate to said crowd. (Tr. p. 181.)

> And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[7]

Mass. Const. Pt. 1, Art. 2 (emphasis added). Mass. Const. Amend. Art. 46 § 1 also provides that "No law shall be passed prohibiting the free exercise of religion."

Article 2 "protects both religious beliefs and religious practices," American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 243 (2006) (emphasis added), and guarantees "absolute freedom as to religious belief and liberty unrestrained as to religious practices," Attorney General v. Desilets, 418 Mass. 316, 332 (1994) (emphasis added).

The U.S. Supreme Court in Wisconsin v. Yoder, 406 U.S. 205, 215-229 (1972), fashioned a three-part

[7] In the present case, Marcavage was exhorting the crowd in Salem to remember and honor this "duty" to "worship the Supreme Being, the great Creator and Preserver of the universe" recognized by the Massachusetts Constitution. It is ironic then that Marcavage, one of the very few among that large, loud crowd who was honoring this constitutional provision, should be the one singled out for arrest and prosecution as a disorderly person.

compelling interest test for free exercise clause cases that the U.S. Supreme Court followed in free exercise cases until 1990 and which the Massachusetts Supreme Court continues to follow today.[8] First, the individual must establish that he holds a sincere religious belief. Second, he must establish that state action substantially burdens the exercise of that sincere religious belief. Third, if the individual satisfies these two prongs of the test, the burden shifts to the State to prove that it has a compelling interest that cannot be achieved by less restrictive means. Id.

First, Michael Marcavage holds a sincere religious belief. James Deferio testified about the purposes of Marcavage's organization, Repent America, stating that members of Repent America come to Salem every Halloween because the occultism celebrated every year is evil and condemned in the Bible. (T. 157-62.) Repent America and Marcavage do not come to Salem to sell or solicit for any commercial purpose. (Tr. pp. 49-50.) There is absolutely no reason to doubt that

[8] That test was modified in Employment Division v. Smith, 494 U.S. 872 (1990), but the Massachusetts Supreme Court, as evidence by has continued to follow the compelling interest/less restrictive means test of Yoder. Desilets, 418 Mass. at 321-22.

Marcavage and his associates preached because of a sincere religious conviction, and the Commonwealth has not argued otherwise.

Second, Marcavage's arrest and prosecution imposed a substantial burden upon the exercise of his sincere religious belief. On October 31, 2007, Marcavage was exercising his basic right of "religious profession" under Article 1 as he preached about his religious "sentiments" to the crowds gathered for Halloween in Salem. (Ex. 2-C at 8:27 p.m.) Marcavage neither "breach[ed] the peace" nor obstructed others in their religious worship, but was professing his own beliefs calmly and, until 10:00 p.m., had a right under Salem law to use a megaphone to assist his religious expression and practice. Salem Code Art. I, § 22-2(2)(a). The use of amplification was particularly important to Marcavage's religious expression on Halloween night because the crowd is so noisy. (Tr. p. 189.) In fact, as can be seen on the video, to be heard above the din one must either use artificial amplification of one's normal speaking voice or simply shout at the crowd, which is very trying on the voice, as Deferio testified (Tr. p. 152), and also probably more likely to raise emotions

and tumult than speaking calmly with amplification.[9] Given the noise and cacophony of Halloween night in Salem, prematurely prohibiting the use of a megaphone cannot be considered a reasonable time, place, or manner restriction. Under these circumstances, to confiscate Marcavage's megaphone was to effectively silence him and, therefore, substantially burden the exercise of his sincere religious beliefs.

Third, under the Yoder test, once a person has established that he has a sincere religious belief and that the government regulation substantially burdens the exercise of that belief, the burden shifts to the State to prove that it has a compelling interest that cannot be achieved by less restrictive means.

Even under the Smith rationale, the compelling interest/less restrictive means test applies to state action that is directly aimed at religion, and the U.S. Supreme Court applies the compelling interest/less restrictive means test even to state action that is neutral on its face if that action in its motivation or application is aimed directly at

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[9] Ironically, if Marcavage had been shouting at the top of his lungs rather than speaking calmly through a megaphone, he would not have been in violation of the police order. (Tr. p. 189.)

religion. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In this case, the police policy that amplification be shut off at 8:00 p.m. was not, on its face, directly aimed at Marcavage or Repent America, but in practice the evangelists were singled out for arrest and prosecution. Other people and groups besides Marcavage and Repent America were using amplification past 8:00 p.m., as unrebutted video evidence (Ex. 2-C at 8:18-8:30 p.m.) and testimony by both Lt. Lemelin and Officer Puleo confirmed. (Tr. p. 52-54, 69.) Indeed, Marcavage's expressed purpose for holding onto the megaphone when the police tried to snatch it from him was to point out nearby uses of amplification that the police were not shutting down. (Ex. 2-C at 8:28-8:29 p.m.) The Commonwealth conceded at trial that the police were not justified under the noise ordinance to confiscate Marcavage's megaphone at 8:30 p.m. (Tr. p. 207.) But even if the police department could unilaterally change the cutoff time for megaphone use, such a code variance would then have to be applied equally to include those engaged in religious speech as well as amplification in street shows, outdoor bar music, and vendors. Instead, the

police officers enforced its megaphone policy against an "anti-abortion" group (Tr. p. 45) and Repent America evangelists. Such a skewed and selective enforcement of a unilateral and unpublished police policy unequally burdened Marcavage's religious expression, causing him to be "molested, or restrained, in his person, liberty, or estate . . . for his religious profession or sentiments," in violation of Part 1, Article 2 of the Massachusetts Constitution.

The trial court was unavailing in its attempt to justify the officers' decision to target Marcavage and Repent America by stressing the fact that "Halloween in Salem is a unique day of the year" (Tr. p. 217) and "at 8:00 . . . the content of the crowd begins to change . . . to one of, again, a concern for a drunkenness, violent behavior and so forth" (Tr. p. 219). Given the fact that other amplification was allowed to proceed, the concern by police was not the noise level caused by amplification in general, but it was Marcavage's amplified evangelism and religious speech that made it a "question of public safety." (Tr. p. 221.) Marcavage's amplified religious expression, particularly that which speaks against

Halloween, may indeed be less popular in Salem on Halloween night than the music of a street show or a bar, but under the noise ordinance and the state constitution, he had just as much of a right to add his voice to the cacophony and spread the gospel without being singled out for police interference because of his religious expression.

The State has failed to establish that it had a compelling interest that required the police to effectively silence Marcavage. The crowd was loud, but the record is utterly devoid of any evidence that anyone had become violent, had seemed likely to become violent, or had in any remote way threatened violence. The State has also failed to establish that, whatever interest it may have had, it could not have fulfilled that interest by means that were less restrictive of Marcavage's constitutional right to preach to this crowd.

The suppression of Marcavage's religious expression violated not only the Free Exercise Clause of the First Amendment to the U .S. Constitution, but also violated Amend. Art. 46 § 1 under the compelling interest test retained in Desilets. The language of Art. 46 § 1 is much stronger than the language of the

First Amendment and Massachusetts courts give Art. 46 § 1 a stronger interpretation than the federal courts give to the First Amendment, following the compelling interest test even where the federal courts do not. In this case, the police officer's application of its 8:00 p.m. megaphone cutoff policy "substantially burden[ed] [Marcavage's] free exercise of religion," 418 Mass. at 322, that is, his ability to effectively communicate the gospel message. Thus, the Commonwealth must prove that "it has an interest sufficiently compelling to justify that burden" on Marcavage's religious freedom. Id.

Again, the State has failed to establish that it had a compelling interest in effectively silencing Marcavage that night. The crowd was not violent and had shown no signs of becoming violent, and no one had even remotely suggested or threatened violence. If anyone had shown any signs of becoming violent, there is no reason to believe a disturbance within hearing distance of Marcavage could not have been handled by the more than 200 police officers assigned to the area for those very purposes. The police could have used less restrictive means than simply grabbing his megaphone.

The Salem police officers' 8:00 p.m. policy diverged from a neutral and generally-applicable 10:00 p.m. standard under the city code and transformed instead into a policy subject to the whim of officers who applied their own megaphone cutoff time to Marcavage and his religious expression and not most other users of amplification. The arbitrary enforcement of the 8:00 p.m. deadline was the antithesis of "generally applicable" government action and therefore violated Marcavage's rights to free exercise and profession of his religion.

C. Marcavage's rights to equal protection of the laws of Salem and of the Commonwealth were infringed by the discriminatory confiscation of his megaphone.

The Massachusetts and Unites States constitutions require that equal protection of the laws not be denied on the basis of a person's religion. According to Part 1, Art. 1, "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const. Pt. 1, Art. 1, as amended by Amend. Art. 106 (emphasis added.) Article 10 also provides, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according

to standing laws." Mass. Const. Pt. 1, Art. 10 (emphasis added). Likewise, the 14th Amendment to the U.S. Constitution requires that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 2.

"It is well established that '[t]he equal protection principles of the Fourteenth Amendment . . . and arts. 1 and 10 . . . prohibit discriminatory application of impartial laws.'" Commonwealth v. Lora, 451 Mass. 425, 436 (2008) (quoting Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 229-230, 446 N.E.2d 63 (1983)); see also LaCava v. Lucander, 58 Mass. App. Ct. 527, 531 (2003) (review of an equal protection claim under the Massachusetts state constitution "is the same as it is under the Fourteenth Amendment"). There is no facial challenge mounted here to the impartial noise ordinance and disorderly conduct statute at issue; only a challenge to the application of the police department's unilateral 8:00-cutoff policy and the resulting megaphone confiscation and arrest. Thus, according to LaCava, state action is reviewed under "strict scrutiny" if Marcavage "was treated differently because of his membership in a suspect class" or if

his interference by police "trammeled on one of his fundamental rights." Id. at 532. Suspect classes for equal protection analysis "include classifications based on . . . religion." Id.

The Salem Code, regardless of which day of the year, gives all persons engaged in noncommercial speech the equal right to use amplification devices until 10:00 p.m., a right that was denied to Marcavage and his associates because of their expressed Christian beliefs. Salem Code Art. I, § 22-2(2)(a). Not only did the Salem police unilaterally ignore the 10:00 p.m. cutoff time in the code, it created its own 8:00 p.m. deadline ultra vires and then doubled the inequality by applying its 8:00 p.m. policy against street preachers like Marcavage but not others (Tr. p. 52-54, 69.), with one exception for anti-abortion speakers (Tr. p. 45). (See Ex. 2-B at 8:00-8:04 p.m.; Ex. 2-C at 8:18-8:30 p.m.) It was this singling-out of Repent America speakers that prompted Marcavage to ask the officers for an explanation for their confiscation of his megaphone while other amplification continued to fill the public square at the same time. (Ex. 2-C at 8:28-8:30 p.m.) Other "secular" but otherwise similarly-situated users of

amplification devices were allowed to continue past the police officers' 8:00 p.m. deadline. (See Ex. 2-B at 8:05-8:12 p.m.)

The only distinction between Marcavage's group of evangelists and other groups using amplification that night, is that Marcavage and Repent America are evangelical Protestant Christians expressing evangelical Protestant Christian beliefs. (Tr. p. 191.) A nearby Catholic group, the only ones that were waiving crucifixes that evening (Tr. pp. 178-179), was also using amplification but was not told to shut off their devices. Thus, not only was Marcavage targeted as a member of a suspect class but he was stopped for enjoying fundamental rights of free speech and free exercise of religion. His arrest and prosecution, therefore, manage to offend both parts of the equal protection analysis and, in turn, requires strict scrutiny. See LaCava, 58 Mass. App. Ct. at 532.

The Commonwealth's actions here fail the strict scrutiny test. See Commonwealth v. Chou, 433 Mass. 229, 237 n.6 (2001) (describing strict scrutiny analysis) Public safety is a compelling interest, but the Commonwealth has not proven that public safety was

in any way threatened by Marcavage's preaching, and certainly not to the extent that the police needed to shut off his megaphone after 8:00 p.m. Even if the Commonwealth could prove that public safety was threatened, it has failed to prove that the police could not have preserved public safety by a content-neutral and viewpoint-neutral policy of shutting down all amplification for all individuals, groups, and businesses——instead of discriminating against Marcavage and Repent America. By singling out Marcavage for discrimination and cutting off his amplification and few others', the police applied the "unequal enforcement" of valid standing laws (and an arguably invalid 8:00 p.m cutoff policy) against a religious person's liberty and property which the equal protection and equal rights amendments of the state and federal constitutions forbid. See id. at 238.

CONCLUSION

For these reasons, this Court should reverse the district court's verdict, judgment, and fine entered against the Defendant-Appellant.

Respectfully submitted,

By: _____

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Dated: October 30, 2008.

CERTIFICATION UNDER RULE 16 OF MASS. R. App. P.

Comes now Benjamin D. DuPré, Esq., counsel pro hac vice for the Defendant-Appellant, and hereby certifies that the Appellant's Brief submitted herewith complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

I further attest that this brief is being filed under Rule 13(a), and that the day of mailing is within the time fixed for filing by the court.

_____
Benjamin D. DuPré, Esq.

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PROOF OF SERVICE

The undersigned hereby certifies, under the penalties of perjury, that two (2) copies of this Brief and Appendix for Defendant-Appellant have been served on the party below by U.S. first-class mail on this the 30th day of October, 2008.

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