

# **In the Supreme Court of Pennsylvania**

No. \_\_\_\_\_

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COMMONWEALTH

V.

MICHAEL MARCAVAGE

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## **PETITION FOR ALLOWANCE OF APPEAL**

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Petition for Allowance of Appeal from the judgment of the Superior Court of Pennsylvania at No. 1776 EDA 2010, filed June 24, 2011, affirming the judgment of the Court of Common Pleas of Philadelphia County at Nos. CP-51-SA-0001515-2010 MC-51-SU-0003925-2010, dated May 26, 2010

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Michael Marcavage

Pro Se Petitioner

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**REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW**

- On May 26, 2010, in a trial *de novo*, the Court of Common Pleas, Philadelphia County, found Michael Marcavage Not Guilty of violating a Philadelphia Municipal noise ordinance, but Guilty of violating the “Unreasonable Noise” section of Pennsylvania’s Disorderly Conduct statute. Judge Palumbo released a written opinion on August 25, 2010, which is attached as Appendix A.

In an appeal ruling from the Superior Court of Pennsylvania, a divided, non-presidential opinion was issued on June 24, 2011, affirming the conviction. The affirming opinion is attached as Appendix B, and the dissenting opinion is attached as Appendix C.

**THE ORDER IN QUESTION**

This Petition for Allowance of Appeal is submitted with regard to the June 24, 2011 opinion of the Superior Court of Pennsylvania, affirming the May 26, 2010 ruling and August 25, 2010 written opinion of the Court of Common Pleas, Philadelphia County. See Appendix B for the Superior Court's Opinion.

## **QUESTIONS PRESENTED**

1. Did the Superior Court abuse its discretion in their determination of the necessary *mens rea* and/or *actus reus* of Defendant, which led them to find Defendant guilty of Disorderly Conduct?
2. Under the United States and Pennsylvania State Constitutions, were Defendant's rights to engage in amplified free speech activity in a public forum violated, and what are the clear legal boundaries of these rights in light of the "Unreasonable Noise" section of Pennsylvania's Disorderly Conduct statute?

## STATEMENT OF THE CASE

The matter before this Court involves one of the fundamental rights under the United States and Pennsylvania State Constitutions regarding freedom of speech and freedom of religion. Disturbingly, the profound abuse of the “Unreasonable Noise” section of Pennsylvania’s Disorderly Conduct statute is adversely affecting this right. This statute has been, and will continue to be, abused by police departments, prosecutors, and courtrooms across the state, and will continue to criminalize the guaranteed constitutional rights of citizens if there is not intervention by Pennsylvania’s highest court.

The Defendant in this case, Michael Marcavage, is an open-air evangelist who has been involved in public ministry for over a decade. Marcavage regularly speaks on streets and sidewalks, in public parks and outside of public events to preach the Word of God and the Gospel of Jesus Christ. He does this in accordance with the model presented by Jesus and many other Biblical examples that went out into the public square to preach about the Kingdom of God. Many times, Marcavage uses amplification in order to communicate sufficiently, especially in commercial zones and city areas that have much background noise, such as traffic.

Marcavage’s use of amplification was the subject of criminal offenses, one of which was the violation of a municipal noise ordinance, of which he was found Not Guilty, but was simultaneously convicted of the Unreasonable Noise section of the Pennsylvania Disorderly Conduct statute. At trial, the court rejected Marcavage’s testimony which outlined the intent element of the matter, thus overlooking the need to establish the *mensrea* and used subjectivity to

determine guilt. The court also released an opinion that entailed a multitude of statements that were not based on evidence in the record.

Upon appeal, the Superior Court so abused its discretion in establishing the necessary *mensrea* and *actusreus* based upon profound and fatally flawed error that goes to the heart of the case, creating a significant miscarriage of justice that presents major constitutional issues.

### **PROCEDURAL HISTORY**

On April 3, 2010, the Defendant, Michael Marcavage, was arrested in the City of Philadelphia while standing on a public sidewalk adjacent to a public park that was across the street from the Basilica of Saints Peter and Paul. (R. 87a, R. 97a). Defendant was preaching the Word of God and the Gospel of Jesus Christ to those coming and going from a service inside the Basilica, which moved outside for a portion of the time. (R. 88a). Defendant stopped speaking 10 minutes after the service began and waited until the outdoor service was over to resume preaching. (R. 35a -37a). Police arrived on the scene and informed Marcavage that using amplification in the City was unlawful, and that he would be arrested if he continued to use his small, battery-operated device. (R. 68a, R. 86a). Since he had used amplification in the city for over a decade and knew that no such law existed, he attempted to speak, but was stopped and arrested (R. 62a- R. 63a). Marcavage was originally informed that he was arrested for failure to obey a police order, but was later charged with violating the municipal noise ordinance and “Creat[ing] a hazardous or physically offensive condition by [an] act which serves no legitimate purpose of its actor,” C.S. §5503 (a) (4), under Pennsylvania’s Disorderly Conduct statute.



During the initial trial before Judge Joseph C. Waters on April 15, 2010, the “Hazardous Condition” charge was dropped by the Commonwealth, who then added the charge of “Unreasonable Noise,” 18 Pa. C.S. §5503 (a) (2) also under Pennsylvania’s Disorderly Conduct statute. Judge Waters convicted Marcavage of violating the city noise ordinance and unreasonable noise. However, a trial *de novo* ensued as the noise ordinance that Marcavage was convicted of had been repealed several years prior.

After a *trial de novo* before Judge Frank Palumbo on May 26, 2010, Marcavage was found not guilty of violating the municipal noise ordinance, of which the Commonwealth attempted to argue another section of the city code but was unsuccessful, but was declared guilty of Disorderly Conduct for engaging in speech that the court deemed to be “unreasonable noise.” Marcavage was sentenced to pay a \$300.00 fine and to pay costs of prosecution. Judge Palumbo later released an opinion on August 25, 2010. A timely appeal followed, and on June 24, 2011, the Superior Court of Pennsylvania filed a divided opinion upholding the verdict, in which one judge dissented, citing the affirmation of the Defendant’s First Amendment rights and a lack of proof of intent beyond a reasonable doubt.

**THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED**

This case presents three substantially important and extremely crucial matters: the constitutional right to utilize amplification for free speech purposes in a traditional public forum without fear of being charged with “Unreasonable Noise” under Pennsylvania’s Disorderly Conduct statute, the severe abuse of discretion exercised by the Superior Court in the instant case, and the critical need for definitive resolution by the Superior Court as to delineating the correct use from the abuse of the “Unreasonable Noise” section of Pennsylvania’s Disorderly

Conduct statute, especially toward those that are involved in amplified free speech activity. If this Court leaves this matter unaddressed, the “Unreasonable Noise” statute will continue to be wrongfully used across the Commonwealth to criminalize free speech activity, and will continue to be abused by police officers and courts throughout Pennsylvania, not only depriving citizens of their First Amendment rights, but expending the time and resources of the court system on unnecessary criminal trials.

Moreover, this case cries out for resolution from this Court to prevent manifest injustice. This judgment cannot be sustained as the severe abuses in this case turn the fundamental constitutional rights of Defendant upside down, and causes him to be in jeopardy and fear of being convicted under this statute in the future. Additionally, as judicial dissent was made in this case on constitutional grounds, the need for resolution has strong merit. There is no other remedy available to Defendant to right this wrong other than the Supreme Court of Pennsylvania.

### **REASONS SUPPORTING THE ALLOWANCE OF APPEAL**

#### **I. THE SUPERIOR COURT SEVERLY ABUSED ITS DISCRETION**

This Court has stated that serious abuses of discretion are among the special and important reasons for a case to be granted appeal by the Supreme Court. Additionally, this Court recently outlined: “Our standard of review is ‘limited to determining whether the trial court’s findings are supported by competent evidence, whether errors of law have been committed, or whether the trial court’s determinations demonstrate a manifest abuse of discretion.’” *McShea v. City of Philadelphia*, 995 A.2d 334,338 (Pa. 2010) (quoting *Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Tarnopolski* 626 A.2<sup>nd</sup> 138, 140 (Pa. 1993))

**A. The Superior Court made fatally-flawed errors in determining the necessary mensrea, which affected the entire outcome of the case**

On June 24, 2011, the Superior Court, comprised of a three-judge panel of Judges Stevens, Shogan and Allen, released a divided opinion, with Judge Shogan dissenting (See Appendix C for dissenting opinion), citing Marcavage's First Amendment right to preach with amplification in a public forum, and failure of proof beyond a reasonable doubt. Among other profound abuses of discretion, the two affirming judges of the Superior Court made a grave error that largely affected the outcome of this case. Without this significant error, the case would have had a much different outcome, and would not have put Marcavage in jeopardy of losing his constitutional rights again in the future.

On page 14 of the panel's decision, the judges stated in their determination of the necessary *mensrea* that "Appellant admitted that his speech was directed at the Church's parishioners ... and they should hear the word of God 'without a preacher.' This quote was also written incorrectly on page 6, where the court copied the transcript of Marcavage's trial testimony as stating, "The Bible says that faith cometh by hearing and hearing by the word of God and how we hear without a preacher." (See Appendix B.)

In actuality, the transcript stated the exact opposite: "The Bible says that faith comes by hearing and hearing by the Word of God, and how will he hear without a preacher?" (R. 89a). This quote comes from Romans 10:14, which is an anthem Scripture for many Christians. It asks in other words, how will the Word of God be heard by a person if someone does not share it with them? Marcavage was using this Scripture during trial while he was explaining his intent for being present to state that his only motivation was to share the Gospel with others, because how



will people hear about it if they are not told? This statement, along with nearly all of Marcavage's explanation of his intent, was discarded by the Common Pleas Court as being sustained by Judge Palumbo, but was utilized by the Superior Court, although wrongly. (R. 89a).

The Court, in incorrectly copying the transcript to mean the exact opposite, then so severely twisted and distorted Marcavage's words as to say that his *mensrea* was that he did not want the people to hear the preacher (the cardinal at the Basilica) and that he was thus attempting to drown him out. The court then went on to use this course-altering error to claim that Marcavage "routinely uses this strategy to target other faiths while they are engaged in religious services." Thus, the court was thus sorely mistaken in thinking that Marcavage travels around the country trying to drown various religious speakers. The court also took this misquote, which they tried to use as evidence against Marcavage, and attempted to build upon it with other evidence that is not substantiated in the record. This error, which cannot be overstated, turned the entire case upside down.

Judge Shogan dissented from the finding of his two colleagues, stating: "In my opinion, the evidence was insufficient to prove beyond a reasonable doubt that the Appellant exercised the necessary *mensrea* and that his preaching constituted unreasonable noise under the statute." (Appendix C).

**B. The Superior Court distorted testimony and created facts that are not in the record**

The Superior Court claimed on page 14 of Appendix B, as a furtherance of its establishment of a *mensrea*, that "Liuetenant O'Brien testified that he observed Appellant using his amplification system to yell at the congregation as they walked up the steps into the Church." In addition to the fact that the court used no citation to where they were claiming such a

statement was made, this information is not supported anywhere in the record. Instead,

Lieutenant O'Brien testified:

Q: You saw Mr. Marcavage using this amplification talking to people as they were going back into the church?

A: That is correct.

Q: And you agree it was like a religious message?

...

A: I have no idea.

Q: You don't recall anything?

A: ... You have to understand, when I came around the corner, he was not talking. Immediately, simultaneous when I came around the corner, he was talking, but then he stopped because the sergeant approached him. (R. 66a-67a).

As is noted, nowhere did Lieutenant O'Brien state that Marcavage was yelling at the congregation, but rather "talking." Although the court noted in its facts that O'Brien stated at trial, as he did on April 3, 2010, that his personal opinion was that an individual shouldn't use amplification at 8p.m., specifically "that time of night," (P. 5, Appendix B) it should have been noted by the court that there is no statute against doing so and that Marcavage had a right to use amplification under the law.

In this, the Court also failed to address the important constitutional issue of permitting police officers to use their unfettered discretion to shut down an individual's protected free speech activity. Police officers must not be permitted to use subjective opinion in determining an individual's innocence or guilt, as it severely infringes upon one's Constitutional right to Due Process under the law. This matter has been addressed in both the federal and circuit.

In Grayned v. City of Rockford, 408 U.S. 104, 108, 109 (1972), the Supreme Court stated that it is unconstitutional to leave standards up to "policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." These officers' actions, which the Superior Court upheld, were a blatant a violation



of the United States Constitution, and by affirming their actions, the Court treads into dangerous and unconstitutional territory that will be repeated if not addressed by this Honorable Court.

Additionally, as the Court had cited evidence early in its opinion that Marcavage stopped speaking during the service and waited until it was over to begin speaking again (P. 2, Appendix B), the Superior Court should have come to the case-altering conclusion that Marcavage was not disrupting the service, which was the entire thrust of the Court's ruling.

The Court claimed that "the police informed Appellant that he was disrupting the church's services," but it completely failed to note that there is absolutely no such discussion anywhere in the video evidence which shows the real time proof of what took place. Instead, the video evidence showed that the entire discussion was focused on the officers' belief that the use of amplification was prohibited in the City of Philadelphia. Marcavage was not arrested due to a disruption of the service as the Superior Court would like to assert, as the service had ended well before his arrest, but was told that he was being arrested for "failure to obey a police order" for using amplification because police believed that doing so was illegal.

**C. The Superior Court misapplied *Alpha Epsilon Pi* and *Commonwealth v. Wiener* in determining the *actus reus***

The Superior Court compared the instant case with Alpha Epsilon Pi, supra, 540 A.2d 580 (Pa. Super. 1988) and Commonwealth v. Wiener, 326 A. 2<sup>nd</sup> 896 (Pa. Super. 1974) to determine the necessary *actus reus*. (P. 13, Appendix B). However, to compare the free speech activities of Mr. Marcavage with these cases is a significant error, which again, affected the course of this case, thus causing Defendant's constitutional rights to engage in amplified free speech in a traditional public forum to be unjustly violated.

The Court explained that in Alpha Epsilon Pi, the case dealt with music that emanated from a fraternity house in a residential section of town at 11:20p.m. Understandably, at this hour of night, most municipalities create stronger regulations regarding sound as the public is generally sleeping. However, Mr. Marcavage's activities occurred at 7 and 8 p.m., while the evening was still young, and many people were passing through on the sidewalks. Secondly, Mr. Marcavage was in a commercial area of the city, not a residential one. Additionally, Mr. Marcavage was engaged in free speech activity that was meant to address the public as they passed through, as opposed to the Alpha Epsilon Pi case, where students in a frat house were simply playing raucous music for themselves. It is a well-established principal under case law that free speech that is protected under the First Amendment, such as religious speech, is entitled to greater protection than entertainment in a residence.

In Commonwealth v. Weiner, the court explained that the case dealt with a group that used a portable public address system to protest in a residential area. Again, Mr. Marcavage was speaking in a commercial area upon a public thoroughfare adjacent to a public park, not in residential zone. This vital information regarding *Weiner* was clearly pointed out in the trial transcript (R.96a-97a).

These cases were used by the Superior Court to establish whether Marcavage's speech constituted unreasonable noise. It is clear that these cases are not relevant, and therefore, they are fatally-flawed errors in determining the *actusreus* of Defendant, which controlled the outcome of this case.

**D. The Superior Court failed to analyze the ruling of the lower court**

In its June 24<sup>th</sup> opinion, the Superior Court failed to analyze the ruling of the lower court and/or discern the numerous egregious fact-finding errors that had been made by Judge Palumbo which were entirely unsupported by the record. Nowhere in the opinion does the court even refer to the fact-finding of the lower court that also may have significantly altered the outcome of this case, thus preventing manifest injustice and protecting Marcavage's fundamental First Amendment rights.

For instance, Judge Palumbo, in citing his reasons for finding Defendant Guilty of "Unreasonable Noise" stated (See Appendix A):

- That the Monsignor called the police to claim that someone was "disrupting an outdoor service at the Basilica." However, this is not supported in the record as evidence shows that the Monsignor called the police captain on his private number 15 minutes before the service started to state that someone was playing music across the street. (R. 21a).
- That "[t]he officers observed Marcavage about 25 feet away from the service." However, this is also not supported in the record, which states that Marcavage was across the street next to a public park approximately 100 feet away. (R. 17a).
- That "the officers asked Marcavage to lower the volume of his amplification equipment." The record shows that Marcavage was never given an opportunity to lower the volume as he was told that the usage of amplification in and of itself was illegal. (R. 44a, 45a, 68a, 96a).
- That "[d]uring this conversation (with police) the Basilica moved indoors because the Easter service could not be heard over Marcavage's demonstration." To the



contrary, the testimony in the record reflects that Marcavage stopped speaking during the service and that the congregation moved inside when the service was completed. Marcavage did not start speaking again until the service was over.

(R.23a)

- That “Marcavage was arrested for disorderly conduct.” However, the video evidence shows that Marcavage was arrested for “failure to obey a police order” for using amplification, which the officers insisted was illegal (although it was not).

Instead, the Superior Court, further mangled the evidence in this case to create such a severe abuse of discretion that resulted in a significant miscarriage of justice that must not be sustained by this Court.

**E. The Superior Court erred as a matter of law in setting aside the *raison d’etre* for Defendant’s arrest, which goes to the heart of the case**

In the footnote of the Superior Court’s opinion on page 7 of Appendix B, the court sets aside the fact that counsel for Marcavage had pointed out that the case was not about disruption of the service, but rather the legality of the usage of amplification. The court does so by citing that because Marcavage was acquitted of violating Philadelphia’s municipal noise ordinance, and that therefore, the reason behind Marcavage’s arrest was no longer applicable. This action was a critical and fundamentally-flawed error that seriously affected the entire course of the court’s ruling and would most certainly have resulted in a completely different outcome in their opinion.

As is shown in the record, Marcavage was arrested because the officers believed that using amplification in the city of Philadelphia was illegal, not because of any disruption, especially

since he was arrested a while after the service had ended. The video evidence demonstrated the officer's issue with Marcavage – which never once mentions disruption – but rather their belief that Marcavage must stop engaging in amplified free speech because doing so was unlawful.

Michael Marcavage: Sir, I've been preaching in the city for years.

Lieutenant Nudd: Yes.

Michael Marcavage: And I've looked at all the ordinances. There is no ordinance –

Lieutenant Nudd: Yes, there is – for amplified voice on the street. Yes, there is. ...

Michael Marcavage: I've used amplification on South Street; I've been arrested; I've been taken before judges; I've been before the federal courts; I've been before the third circuit. All have affirmed that what I'm doing is constitutional, so I understand that –

Lieutenant Nudd: I think that the Constitution ends with the amplification. You could stand here and yell at the top of your lungs and I'd agree with you. However, the amplification is an issue.

Lieutenant O'Brien: The lieutenant's right, Michael.

Michael Marcavage: What statute are you speaking of?

Lieutenant Nudd: I ... Well, I'm gonna have to look it up.

(See Appendix F).

Furthermore, Sergeant DeCarlo also explained at trial, “[Lieutenants Nudd and O'Brien told Marcavage that] using an amplification device was in violation of the city ordinance and at that point he was ordered to cease his actions.” (R. 44a). Likewise, Lieutenant O'Brien testified that he believed “you are not allowed to use amplification.” (R. 68a).

If the concern of the officers truly was the disruption of the cardinal's service, then the video evidence, which shows the officers pressuring Marcavage to cease using amplification because of their perception that its use was illegal in the city and that using amplification in and of itself made someone too loud, undercuts that argument as officers continued to press Marcavage for quite some time after the service had ended. There is also nothing in the video evidence or



transcript that even mentions a disruption. Contrary to Sergeant DeCarlo's testimony, who was found to be incorrect during the trial about another matter (R. 58a), Lieutenants Nudd and O'Brien never mentioned the word "disruption" to Marcavage as is clearly seen in the video evidence.

The Superior Court in basically setting aside this vital evidence showing why Marcavage was arrested in the first place, completely transforms the situation that took place on the night of April 3, 2010 into something that it never was, resulting in an extremely skewed decision. The facts show that the officers mistakenly believed that the use of amplification in and of itself was "too loud" and against the law, and that it therefore must be stopped completely. It was a fundamental failure of the Court to not take this information into consideration before trying to make a "Unreasonable Noise" judgment, and before it starts getting off into making other claims that "the Appellant's exercise of free speech went beyond the constitutionally protected boundaries of the realm of criminal and prohibited conduct." (p.15, Appendix B) Thus, the Superior Court created a gross miscarriage of justice.

The court rather should have noted that the orders of the police were rather unlawful and an infringement of Marcavage's First Amendment rights as outlined by *Saia v. New York*, which is discussed below. If this matter is not addressed by this court, it will continue to create serious violations of constitutional rights that are guaranteed to all citizens.

**II. THE SUPERIOR COURT'S RULING PRESENTS SERIOUS CONSTITUTIONAL CONCERNS THAT INFRINGE UPON THE FUNDAMENTAL FIRST AMENDMENT RIGHTS OF CITIZENS**

The right to engage in free speech, especially in a traditional public forum such as a public sidewalk or park, has been a fundamental right since the inclusion of the First Amendment of the United States Constitution. The Supreme Court and numerous federal circuit courts have solidly declared that the First Amendment of the United States Constitution includes the right to utilize amplification for free speech purposes. To take away these rights when one is not involved in “criminal or prohibitive behavior” is one of the most gross and intolerable injustices, and must be struck down swiftly lest the rights of citizens be encroached and ultimately destroyed.

**A. The Superior Court infers that police should enforce a complete prohibition of amplification when one is engaged in free speech, which contradicts the United States Supreme Court Ruling in *Saia v. New York***

On page 15 of the opinion of the Superior Court (Appendix B), the court uses the reasoning that because Marcavage did not “discontinue use of the amplification system” that he therefore intended to create unreasonable noise, and infers that the police had a right to completely shut down Marcavage’s amplified speech. Again, the court failed to see that the discontinuance was not about disruption of the Basilica’s service, since it was over when the three officers began to pressure Mr. Marcavage, but over the legality of the use of amplification.

Judge Shogan dissented from his colleagues, stating: “Using sound amplification, Appellant was exercising his First Amendment right to preach from a public park across the street from a church, which also using amplification, chose to hold part of its religious service outside.”

(Appendix C)

The complete prohibition by a police officer or other government official of the usage of amplification for free speech purposes has been well-established as being unconstitutional for almost 70 years in our nation's judicial system. The United States Supreme Court ruling in *Saia v. New York*, which established the right to use amplification for free speech purposes, declared that the usage of amplification is a first Amendment right, that "it is the way people are reached" and that municipalities must only use narrowly-tailored regulations to ensure proper volume.

*"Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. ... Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. ... Annoyance at ideas can be cloaked in annoyance of sound."* (334 U.S. at 562)

In this case, the narrowly-tailored action that could have been taken by the police, if they indeed perceived that Mr. Marcavage's speech was too loud, would have been to ask him to simply adjust the volume, or to have followed the City's noise ordinance, which Marcavage was found not guilty of violating. However, the officers placed an outright ban on his usage of amplification, which is blatantly impermissible and unconstitutional. As was delivered in the evidence, which was reviewed by the Superior Court, Lieutenant Nudd stated to Marcavage: "I think that the Constitution ends with the amplification. You could stand here and yell at the top of your lungs and I'd agree with you. However, the amplification is an issue." (Appendix F).



The Superior Court's inference that officers are permitted to completely ban an individual's usage of amplification, rather than asking them to lower the volume if there was truly an issue, is not only a bad example to set for the state's judicial system, but it will result in the ongoing infringement of the free speech rights of many other citizens under the guise of "Unreasonable Noise." As dissenting Judge Shogan stated: "If we as a society are to be tolerant of diverse viewpoints, we must be tolerant of the unseemly or annoying was in which they are sometimes communicated." (Appendix C)

Furthermore, the City of Philadelphia has enshrined what is considered as "unreasonable noise," and it protects the usage of amplification under specific statutes. Section 10-403 (7) states:

"Sound Created in the Right of Way: No person shall create or cause, or permit the creation of sound in the public right of way:

- (a) Abutting a residential property by amplification from a radio, tape player or similar device between the hours of 9 p.m. and 8 a.m. ...
- (b) That exceeds the levels permissible for sound emanating from property directly abutting such portion of the right of way.

Section (1) states:

"Sound Near Protected Facilities: No person shall create or cause, or permit the creation of sound that exceeds 3 decibels above background level measured the property boundary of any hospital, nursing home, house of worship, courthouse, school, library or day care facility. This provision shall apply notwithstanding the potential applicability of a less restrictive standard in this chapter."

(See Appendix E)

Therefore, the City of Philadelphia does not place an outright ban on the usage of amplification as the officers asserted, but requires a precise measurement. Since the officers did not follow the law in proving any allegations of unreasonable noise, then there is no proof that Marcavage was unreasonable.

Contrary to what the Superior Court asserts, police officers may not arbitrarily shut down constitutionally-protected activity based upon their own personal opinion. If municipalities are allowed to do so, then not only will citizens across the Commonwealth be deprived of Due Process under the United States Constitution, but will also be stripped of their First Amendment rights as declared by *Saia v. New York*, which states: "Loud-speakers are today indispensable instruments of effective public speech. ... It is the way people are reached," and that to squelch these rights "would be a dangerous weapon if it were allowed to get ahold on our public life." ( 334 U.S. at 561, 562)

The right to engage in amplified free speech under reasonable time, place and manner boundaries set by narrowly-tailored municipal statutes must not be destroyed, and must not be criminalized. These issues cry out for this Court to address this vital constitutional matter, as the rights of citizens to freedom of speech and freedom of religion under both the federal and state constitutions have been and will continue to be unjustly violated, and will create a chilling affect on the citizens of the Commonwealth.

It is thereby requested that this Court bring definitive resolution to the proper application of the "Unreasonable Noise" section of Pennsylvania's Disorderly Conduct statute. Without it, there remains much confusion among law enforcement, prosecutors and the various levels of the Pennsylvania court system.

## **CONCLUSION**

For the foregoing reasons, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,