

9 June 2012, New York City

MOTION TO SEAL CRIMINAL RECORDS ON THE GROUNDS OF ACTUAL INNOCENCE
MEMORANDUM

CASE: Gg Re vs. District of Columbia

VERDICT: Case dismissed

DEFENDANT: Gg Re

LAWYER FOR DEFENDANT: Ann Wilcox

PLAINTIFS: Melanie O'Keefe and Melinda Ziina from Melbourne, Australia

ARRESTING AGENTS: United States Secret Service Uniformed Division,
Officers Daniel Tomczak (badge #1367) and Michael Shalton (badge #1006)

CHARGE: Disorderly Conduct

ARREST DATE and TIMES: September 16, 2007, 8:30 PM

ARREST LOCATION: "Zero Milestone Marker", near Blue Spruce Christmas tree,
between Ellipse and White House

ARREST/PROSECUTION REPORT

STATEMENT OF FACTS

While assigned to a footbeat in the 1600 block of E Street, NW, AO (Tomczak) was approached by W1 and W2 who stated "there is a guy in the park harassing people". AO was able to have W1 and W2 point out S1 (RE). As AO approached S1, S1 could be heard [sic] screaming profanities from twenty yards away. As AO approached S1, AO observed approximately six pedestrians having to walk around S1 who was in the center of the side walk. These pedestrians had to either climb over a short fence to avoid S1 or they turned around and ran away from S1. S1's verbal profanity was causing alarm and dismay to the general public. When asked why he was screaming profanities S1 stated "If I do this people stay away from me".

DEFENDANTS VERSION/REMARKS

"If I do this people stay away from me"

OUTLINE OF DEFENDANT'S STATEMENT

- (1) Brief personal background
- (2) Conduct on the time and date of my arrest for disorderly conduct
- (3) Interaction with two tourists from Australia
- (4) Interaction with two Secret Service Uniformed Division officers
- (5) Dispute of misrepresentations in the Arrest/Prosecution Report
- (6) After the arrest I continued on as before
- (7) Conclusion

DEFENDANT'S STATEMENT

BRIEF PERSONAL BACKGROUND

I first came to Washington in the spring of 1988 for A Presidential Classroom for Young Americans (a crash course in our federal government and Washington, D.C. culture for high school students). I have a BA in English from Brown University and an MFA in Creative Writing from New College of California. I am a poet, artist, activist, pacifist, humanitarian, scholar, and teacher. I had not been arrested for disorderly conduct before this incident, and I have not been arrested since.

CONDUCT ON TIME AND DATE OF MY ARREST FOR DISORDERLY CONDUCT

Before I was arrested, I was recording a video reading poems addressing political problems, and petitioning the government for redress, in the heart of our nation's capital, where our freedom of speech should be most protected. Between 2004 and 2009, These same poems were widely performed in a variety of venues all across the United States, from San Francisco to New York to Austin to Boulder, from coffee shops to University classrooms to City Halls to music festivals to the steps of the Library of Congress to outside the US Capitol.

The poems contained a few words, like "fuck", that some people (mainly social conservatives and religious fundamentalists) still consider to be controversial, profane, or taboo (even though they are omnipresent: bookstores, magazines, cable TV, the internet, popular music, etc.). Those words made up less than 1% of the words in the poems I was reading. The language I was using was easily within Washington, D.C. community standards and certainly not obscene per *The Miller Test* (Miller v. California, 1973), given that much of the D.C. population is made up of working class, African-American, and LGBT people who liberally use such language privately and publicly.

Even so, I wanted to be careful not to offend, so I chose the sparsely populated location of the Zero Mile marker, instead of the much more populated area across the street (where the tourists gather to take photographs in front of the White House). I did a sound check when I first arrived at my location – to make sure that I would not be disturbing the peace. When I arrived at the Zero Mile marker I shouted "Can You Hear Me?" at the top of my voice to the Secret Service Officers and the people across the street. The people across the street did not give me any sign that they could hear me, but the Secret Service officers responded "Yes we can! Please keep it down." After making sure there were no children around, I then shouted out "Fuck Fuck Fuck" in a lower voice and not a single officer or person in the vicinity gave the slightest bit of indication that they heard me. I repeated this check one more time with the same results. There were people walking and jogging by my spot at a rate of approximately one person every five minutes; many of these people had headphones on or did not speak much English.

I then set up my tripod and spent approximately 90 minutes recording my poems in *an even lower voice*, attracting no attention from tourists, passers by, or any Secret Service Uniformed Division officers, until two tourists from Australia decided to take over my spot.

INTERACTION WITH TWO TOURISTS FROM AUSTRALIA

Melinda Ziina and Melanie O'Keefe from Australia walked up to the spot that I was occupying, standing less than three feet away from my tripod, and proceeded to have a long chat, occasionally taking snapshots, seemingly oblivious to what I was doing. Clearly, they were not offended by any of the poems I was reading or they would have left. They continued to chat for about fifteen minutes without any indication that they were about to leave, so I politely informed them that they were crowding me and interrupting my project, and asked them if they would be good enough to find another spot. One of them replied: "Well, we're shooting a video also." I then said something like "That may be so, but there are plenty of other places to stand around here. Would you please move to left or the right and give me some space." I would have continued with something like "Look, I was here first, and if you had asked me to yield this spot, I would have considered it, but interrupting me in the middle of what I'm doing is not okay" but I didn't get the chance.

One of them shouted "Well You're Spouting Swear Words!" None of the Secret Service officers turned around when they shouted this. I replied "Listen, all the words I'm reading are in the dictionary," reading *dic'tionary* with extra emphasis on the first syllable, to see if they understood puns and poetry, or just swear words. Passing the test with flying colors, one of them then shouted "You're Harassing Us!" and, just as I was realizing that I would need to pack up and leave my spot and possibly report them, both of them immediately sprinted at top speed toward the Secret Service officers.

INTERACTION WITH TWO SECRET SERVICE UNIFORMED DIVISION OFFICERS

As the two women were sprinting toward the Secret Service officers, I figured I had better run over to the Secret Service officers, too (just like we used to do on the playground in elementary school.) While I was crossing the street, one officer told me not to approach, and to go back to where I was standing earlier. Right after that, another officer told me to move forward onto the grass and get down on my knees with my hands behind my back. Several pedestrians walked by cautiously eyeing the spectacle. An officer came over and asked me why I was in the grass. I told him I was on the grass now because an officer had just ordered me to get down on the grass. The officer asked me if I was aware that I was in an area that was off limits. I told him that if I was in an area that was off-limits it was because the Secret Service had ordered me to go into that area. Yes, it really was that ridiculous. He conferred with another officer. Then an officer yelled out for me to get up and go back to the sidewalk where I was and get down on my knees and look at the ground.

After the officers were done taking the report from the two women from Australia, they came over to me. I tried to tell them that the two women who just reported me were actually bothering me, but they would not listen or take my report. They told me to shut up and stop talking. Officers of the Uniformed Division of the Secret Service listened to two tourists from Australia, a country originally populated by criminals, that doesn't even have Freedom of Speech written into their constitution, instead of an American Citizen. Had the officers listened to my side of the story, it would have been clear that the two tourists from Australia violated two sections of the Disorderly Conduct Statute / Definition (22-1321. Disorderly conduct [Formerly §22-1121]) by annoying me and interfering with my project [section 1] and crowding me [section 4]. It is tough to sell that I was acting disorderly, as it was these two tourists who took over my spot and stayed there voluntarily for fifteen minutes.

As the sun was setting, I needed to inform the officers that I was HIV positive, cold, and needed to warm up soon. The officers got very nervous and backed away from me, asking me if I was contagious. I told them that *I* was the one in danger of catching something from *them* that could hurt me, not the other way around. I also told them that I could not spend the night in jail without access to my medication. Instead of asking sensitive questions, they made a few more ignorant statements concerning HIV/AIDS, and I stopped communicating with them.

DISPUTE OF MISREPRESENTATIONS IN THE ARREST/PROSECUTION REPORT

I can say with absolutely certainty – and attempted to do so under oath when I brought the case to court – that the police report, including the quote attributed to me under “Defendants Version/Remarks” – is such a profound misrepresentation of the facts that it amounts to a complete fabrication. I have only read fiction like this in dystopian novels.

Contrary to what is written in the police report, the arresting officers did not approach me while I was speaking / recording the video in a declamatory voice. When they first approached me, it was after they had ordered me to get down on my knees on the sidewalk and stare at the ground. If there were any pedestrians walking around me, having to climb over a landscape fence, or running away, it would have only been because of the scene that the Secret Service officers themselves caused. The Secret Service officers created the only disturbance of the peace by not acting professionally: shouting at me to shut up, ordering me down on my knees in the middle of the sidewalk, leaving my tripod lying in the middle of the sidewalk, and not allowing me to fold it up and neatly stow it away. Finally, even though I was made to stare at the sidewalk, I could tell from my peripheral vision that no one was running past me or away from me.

I do not recall whether or not any of the officers asked me “why I was screaming profanities”, but with a BA in English from Brown University, and an MFA in Poetics it would have been highly unlikely for me to answer “If I do this people stay away from me.” That is something that only an idiot, hell bent on disturbing the peace, would actually say – or something that only officers trying to cover their [censored] would say that somebody said. I did not say anything of the kind. That a Secret Service officer would transcribe my remarks thusly is incompetent at best, and falsification at worst. Lying on a police report is much worse than anything I did.

What the Arrest/Prosecution report leaves out is as significant as the misrepresentations contained therein: There was no mention of my tripod, camera, or sheet of poems in the police report – for that would suggest that they arrested a professional poet, a citizen petitioning the government for a redress of grievances poetically, instead of the crazy shouter and scoundrel they made me out to be.

The fact that the prosecution did not produce either of the arresting officers, who according to their police report, were the primary witnesses in this case, is a perversion of the justice system. As everyone knows, this is the status quo in Washington, D.C. When a disabled American Citizen takes a train all the way to Washington, D.C. and can't get a fair hearing in court, something is profoundly wrong with the system. Everybody knows that this system is not serving the people, and that it is this system, not the people that needs to be arrested and corrected.

AFTER THE ARREST I CONTINUED ON AS BEFORE

I returned to that exact spot two more times, without incident, until I finally got the video I wanted in November 2007, with the help of Jay Marx from the Washington Peace Center, whose statement is attached to this memorandum. In the spring of 2008, I shot the same video with Jay's help in back of the US Capitol, also without incident. Jay was willing and fully prepared to testify in court on my behalf in 2008. In the Spring of 2008, I continued to read the same poems in front of the Gandhi sculpture in Union Square in New York and in front of the State Capitol building in Austin, Texas, also without incident.

CONCLUSION

The conclusion to the "Disorderly Conduct Arrests made by Metropolitan Police Officers Report and Recommendations of the Citizen Complaint Review Board to Mayor Anthony A. Williams, The Council of the District of Columbia, and Chief of Police Charles H. Ramsey November 19, 2003" [see page 7] shows that D.C. police have little credibility when it comes to Disorderly Conduct arrests.

After the prostitution scandal in Columbia this spring, the Secret Service, still under the same leadership as they were the day of my false arrest, have been exposed as the careless brutes that they are. Yes, I think their intelligence, honor, and credibility is in question.

My conduct was orderly. I did not disturb the peace. I did not harass the tourists from Australia. I did not commit any crime and harmed no one. Rather, the two officers from the Uniformed Division of The Secret Service arrested me without cause, under color of the law, and violated my 1st Amendment Rights.

When I made every effort to settle the matter in court, the Prosecution / District Attorney failed to produce a single witness, of the four at their disposal, to face me in a respectful manner and dispute my word in a court of law.

Therefore, I respectfully request that the judge seal my records on the grounds of actual innocence.

Sincerely,

Grey Space
(formerly Gg Re)

Attachments:

(1) Character reference letters:

- Jay Marx, former Coordinator of The Washington Peace Center
- Antler, former Poet Laureate of Wisconsin
- Jon Curley, PhD, Professor of English

(2) Legal Name change document reflecting name change from Gg Re to Grey Space.

LEGAL REFERENCES

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

“COMTEMPORARY COMMUNITY STANDARDS” and THE MILLER TEST

The Miller test was developed in the 1973 case *Miller v. California*.^[1] It has three parts: Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; Whether the work depicts/describes, in a patently offensive way, sexual conduct or excretory functions^[2] specifically defined by applicable state law; Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. (This is also known as the (S)LAPS test- [Serious] Literary, Artistic, Political, Scientific). The work is considered obscene only if all three conditions are satisfied.

WASHINGTON, D.C. DISORDERLY CONDUCT STATUTE / DEFINITION

22-1321. Disorderly conduct [Formerly §22-1121].

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (4) interferes with any person in any place by jostling against such person or unnecessarily crowding such person or by placing a hand in the proximity of such person's pocketbook, or handbag; or (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than \$250 or imprisoned not more than 90 days, or both. (June 29, 1953, 67 Stat. 98, ch. 159, § 211a; 1973 Ed., § 22-1121; 1981 Ed., § 22-1121; May 21, 1994, D.C. Law 10-119, § 9(a), 41 DCR 1639.)

COLOR OF THE LAW

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color of' state law." United States v. Classic, 313 U.S. 299, 326 (1941)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. S 1983 (1988)

REPORT ON DISORDERLY CONDUCT ARRESTS MADE BY D.C. POLICE

Disorderly Conduct Arrests made by Metropolitan Police Officers Report and Recommendations of the Citizen Complaint Review Board to Mayor Anthony A. Williams, The Council of the District of Columbia, and Chief of Police Charles H. Ramsey November 19, 2003
http://policecomplaints.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/disorderly_conduct_policy_recommmendation.pdf

From the introduction and overview:

"Since the Office of Citizen Complaint Review (OCCR) opened in January 2001, the office has regularly received police misconduct complaints that involve arrests for disorderly conduct. Four of OCCR's first 19 decisions, or over 20% of the decisions, dealt with allegations of an improper disorderly conduct arrest, and the allegations were sustained in all four cases. In each of these decisions, the complaint examiner concluded that the officer harassed the citizen by arresting him for disorderly conduct because the facts developed in investigation did not justify the citizen's arrest. The officer either did not understand or ignored the law regarding disorderly conduct in each of these situations, and appeared to be retaliating against the citizen for his behavior during the encounter with the officer..."

Conclusion:

"Based on its examination of disorderly conduct arrests made by MPD officers and a comparison with arrest rates in other jurisdictions, CCRB believes that the Department should take steps to ensure that officers are fully trained about, and adhering to, the law and procedure governing disorderly conduct arrests. Because of the large number of disorderly conduct arrests made by MPD officers compared to other large cities, and because the majority of these are resolved by paying \$25 at the police station with little or no review after the arrest is completed, CCRB believes that there is the potential for a significant number of improper or unlawful disorderly conduct arrests in the District that could go unnoticed. The Mayor, the Council, and MPD should take steps to ensure that disorderly conduct arrests are made only when authorized under the law, and consistent with MPD's procedures."

In his concluding statement to the *Howl* trial, lawyer Jake Erlich argued in *Howl*'s defense:

“Any book can be declared unsafe since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue. Not even the Bible would be exempt; Annie Besant once compiled a list of 150 passages in Scripture that might fairly be considered obscene – it is enough to cite the story of Lot and his daughters, Genesis 19: 30-38. Portions of Shakespeare would also be offensive and of Chaucer, to say nothing of Aristophanes, Juvenal, Ovid, Swift, Defoe, Fielding, Smollett, Rousseau, Maupassant, Voltaire, Balzac, Baudelaire...

It is generally established that the intention of a book as a whole, rather than the language of any particular passage, is the criterion of judging obscenity. There is not now, nor has there ever been, a workable definition of obscenity...

The desire to censor, however, is not limited to crackpots and bigots. There is in most of us a strong desire to make the world conform to our own ideas, and it takes all the force of our reason and our legal institutions to defy so human an urge. The courts have long wandered in a maze, and in their efforts to apply the concept of “contemporary community standards” have often appeared to be deciding matters of law by the watery dripping of public opinion...

The battle of censorship will not be finally settled by your Honor's decision, but you will either add to liberal educated thinking or by your decision add fuel to the fire of ignorance.

I have seen the efforts of the prosecution to build up a case by counting four-letter words. I have seen the honest confusion of honest men trying to determine what is obscene with no real background of information to help them. I have seen the struggle with the semantic nonsense that is written into the law books as definitions of obscenity.

Let there be light. Let there be honesty. Let there be no running from non-existent destroyers of morals. Let there be honest understanding. In the end the four-letter words will not appear draped in glaring headlights, but will be submerged in the decentralization of small thinking in small minds.”

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When U.S. Customs officials seized his printing of Allen Ginsberg's *Howl* – Lawrence Ferlinghetti wrote:

“It is not the poet but what he observes which is revealed as obscene.”

MOTION TO TREAT AS CONCEDED

On 13 November 2012, Grey Space, respectfully moves this Honorable Court to grant the previous filed Motion to Seal, filed on 13 June 2012, on the grounds that the court ordered the Office of The Attorney General to respond within 60 days of the Order date, 25 June 2012, and no response has been filed.

The movant respectfully requests that the Office of The Attorney General's silence be treated as Concession on the issue and that the movant's Motion to Seal be granted.

Respectfully submitted,

Grey Space
Filing *Pro Se*

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