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ACLU of New Jersey

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY,

Plaintiffs,

v.

RUBIN CARTER and
JOHN ARTIS,

Defendants,

ACLU OF NEW JERSEY, INC.,

Intervenor-
Appellant.

No. AM-618-75

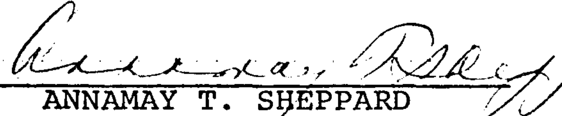
MOTION FOR LEAVE TO INTERVENE

The ACLU of New Jersey, Inc. moves this Honorable Court for leave to intervene as a party-appellant in this case, challenging the order entered in the Superior Court, Law Division which barred the defendants and attorneys in this cause from speaking about the case in public.

The ACLU of New Jersey, Inc. makes this motion because its constitutional right and the constitutional rights of its members to hear the defendants and their attorneys speak have been abridged by the aforementioned order. It relies in support of this motion on the affidavit, memorandum and

the brief setting forth its claims, all filed herewith.

Respectfully submitted,



ANNAMAY T. SHEPPARD
One of the Attorneys for the ACLU of N.J., Inc.

Dated: June , 1976

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.

STATE OF NEW JERSEY,

v.

RUBIN CARTER and
JOHN ARTIS,

Defendants.

AFFIDAVIT OF STEPHEN NAGLER
IN SUPPORT OF MOTION OF
ACLU OF NEW JERSEY, INC.
TO INTERVENE

STATE OF NEW JERSEY)
: SS.:
COUNTY OF E S S E X)

STEPHEN NAGLER, being first duly sworn on oath, deposes and states:

1. I am the executive director of the ACLU of New Jersey, Inc. The ACLU of New Jersey, Inc. is a statewide, non-partisan New Jersey non-profit membership corporation with approximately 9,000 members. It is dedicated solely to defending the safeguards of the Bill of Rights.

2. The issues presented in these cases go to the heart of the Bill of Rights. They concern the right to speak freely and the right of a defendant in a criminal case to be tried fairly. ACLU of New Jersey, Inc.

has been deeply concerned with the preservation of both rights. The American Civil Liberties Union, with which ACLU of New Jersey, Inc. is affiliated, after much deliberation, adopted a policy statement in 1971 regarding prejudicial pretrial publicity. A copy of this policy statement is attached to this affidavit. In addition, the American Civil Liberties Union has appeared as amicus curiae in Nebraska Press Association v. Stuart, No. 75-817, now pending in the United States Supreme Court, which raises issues similar to those presented here.

3. The ACLU of New Jersey, Inc. has been deeply concerned with the implications of this case for the Bill of Rights. It appeared in the Supreme Court as amicus curiae and was permitted to argue in the proceeding which reversed the conviction of these defendants and ordered a new trial. State v. Carter, N.J. (1976).

4. The ACLU of New Jersey, Inc. (hereafter "intervenor") and its members have been precluded from hearing the defendants by the order entered in this cause which bars the defendants and their attorneys from speaking about the case (hereafter, the "order").

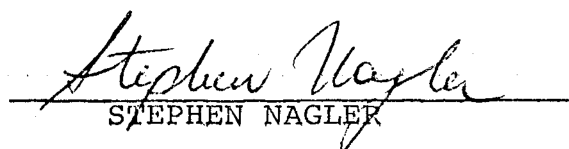
a. The intervenor invited Rubin Carter, one of the defendants in this case, to speak at a meeting on April 9, 1976. The audience included intervenors' members.

b. Mr. Carter declined to appear at the meeting because of the order which barred him from speaking about his case.

c. The intervenor is still interested in hearing from Mr. Carter. If the order were reversed, it would arrange another meeting or some similar opportunity for Mr. Carter to make his views known to intervenor and its members.

5. The intervenor often conducts meetings, discussions and other opportunities for an exchange of views on topics affecting the Bill of Rights, for the benefit of its members and the general public. The affirmance of the order in this case would limit the intervenors' ability to engage in such practices in the future.

6. The order deprives the intervenor and its members of their right to hear, in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Paragraph 6 of the Constitution of the State of New Jersey.



STEPHEN NAGLER

SWORN TO and SUBSCRIBED
before me this 7th day
of June, 1976.

Attorney at Law, State of New Jersey

American Civil Liberties Union
Policy Statement

POLICY #212

Prejudicial Pre-Trial Publicity

One of the most difficult problems the Union has been called upon to resolve is that raised by the publicizing of pending criminal trails. On the one hand, the Union has steadfastly held as its core principle the inviolability of First Amendment freedoms, including freedom of the newspapers and electronic media to report all matters that they hold to be newsworthy. On the other hand, it has consistently urged even more rigorous standards of due process in criminal proceedings, including methods of ensuring impartial judges and juries.

Any attempt to suggest proper guidelines in this area doubtlessly will offend what many regard as a virtually absolute right to report events that qualify as news. Yet it is equally certain that the release or reporting of information relating to a criminal prosecution can, in a significant number of instances, effectively destroy the right of an individual to a fair trial. For, in a widely publicized case, that defendant often must either take his chances with a jury whose members he knows have been exposed on numerous occasions to the press' version of the crime, or forego the constitutional right and protection of a jury trial, trusting to the supposedly greater objectivity of a judge.

The general recognition of the need to assure a fair trial has resulted in the adoption, by the American Bar Association and other professional, legal and journalistic organizations, of new standards for this area.

The ACLU concurs in many of these new standards aimed at preserving the historic right to a fair trial without unduly limiting public discussion and public understanding of the machinery of justice.

Regarding specific standards, the ACLU recommends that all officials involved in the enforcement of law and prosecution of criminal defendants under the local, state, and federal laws abide by the following guidelines which apply to the release of information to news media from the time of a prosecutor's focus on the particular defendant until the proceeding has been terminated by trial or otherwise:

1) No statement of information should be released for the purpose of influencing the outcome of a trial.

2) Subject to specific limitations imposed by law or court order, officials may make public the following:

   (a) Defendant's name, age, residence and similar background other than race, religion, employment, and marital status;
   (b) Substance or text of charge;
   (c) Identity of investigating and arresting agency and length of investigation.

(d) Time and place of arrest.
(e) But none of the above information should be disclosed where such disclosure would be prejudicial comment on the case or circumstances of arrest.

3) No information should be released concerning the criminal or arrest record or confession of a person accused of crime.

4) No information should be released by officials concerning:

(a) Observations about a defendant's character.
(b) Statements, admissions, confessions, or alibis attributable to a defendant.
(c) References to investigative procedures (fingerprints, polygraph tests, etc.)
(d) Statements concerning identity, credibility, or testimony of prospective witnesses.
(e) Statements concerning evidence or argument in the case.
(f) Circumstances surrounding arrest (residence, use of weapons, etc.)

5) Officials in charge of custody of a defendant must protect him from being photographed or televised while in custody. No photographs of defendant should be released unless they serve a proper investigative function.

6) None of these restrictions are intended to apply to release of information concerning a person accused of crime when such release is deemed necessary to apprehend him.

The most troublesome issue has been the question of how best to enforce these informational standards in order to ensure the defendant's right to a fair trial. The Union has taken note of the cooperation between the bar and the press which has resulted in the formulation of voluntary press guidelines. Such voluntary press codes have apparently been adopted in almost half of the states. They are premised on the theory of self-regulation by the press and ultimately rely on the discretion of news editors.

The main difficulty is whether the voluntary compliance approach is effective in preserving the defendant's right to a fair trial. Until it is shown that the voluntary approach is effective in safeguarding the defendant's right to a fair trial, we favor the direct application of sanctions against the public officials who release prejudicial information. If, in addition to these restrictions, news media want to refrain voluntarily from publishing any prejudicial information they do obtain, the ACLU would of course support such self-restraint. But we cannot support voluntary codes in lieu of sanctions against law enforcement officials.

Regarding the use of sanctions, the ACLU favors directing sanctions against law en-

forcement officers and prosecuting attorneys responsible for presenting a case to the press instead of to the court. One simple method of control is the adoption of specific administrative measures and policy statements by police departments and presecuting attorneys' officers to guide the conduct of employees. Improper release of information would thereby be grounds for disciplinary action.

In addition, a procedure should be adopted by rule or statute in all courts, allowing judges to admonish publicly law enforcement officers and prosecution attorneys responsible for aiding or creating prejudicial publicity. The court could also refer the matter to the appropriate bar association committee on ethics. Aside from the advantages of its deterrent effect, the proposal would enable a judge to act immediately after the release of prejudicial publicity, rather than wait, as is now done, until the trial to exercise his limited power of instructing a jury to disregard newspaper comment - when it is generally too late to dissipate the effects of prejudicial reporting.

The ACLU believes that a defense attorney in criminal proceedings should not be subject to judicial sanction for pre-trial statements to the press concerning his client or the circumstances to which the pending litigation relates. There are several reasons for treating defense counsel in criminal prosecutions differently from prosecution attorneys:

1) Public prosecutors are apt not to

prosecute cases that are against the general public sentiment, while defense counsel often have the burden of representing an interest or person that is disfavored by the majority of the community;

2) There is a generally held presumption that the prosecutor has acted in the public interest in proceeding against the defendant, and therefore statements by the prosecutor are more readily believed. On the other hand, there is no such presumption that the defense counsel is acting in the public interest; his remarks will be received by the public with the thought that they are made on behalf of his client whom "the people," through the prosecutor, have charged with a crime;

3) Defense counsel often faces a community sentiment already well-marshalled against the defense.

4) The concept of "fair trial" in the present context is essentially to guarantee the accused individual a trial by a jury that is free of prejudice. Absent this premise there would be little reason for adding judicial sanctions to enforce the nearly universally accepted professional self-restraint counsel have traditionally imposed on themselves to assure that the judicial process is a fair one.

The present narrow scope of the traditional challenge for cause should be expanded to permit challenge of any juror who has gained a substantial degree of knowledge about a case from pre-trial publicity, whether or not the juror thinks he is impartial. This method would also be a further discouragement to police and prosecuting attorneys who might instigate prejudicial publicity in the hope of making convictions easier to obtain, because it would disqualify many prospective jurors and thus delay trial. When pre-trial publicity, despite all precautions, reaches virtually all members of a community, a change of venue is usually possible. In appropriate cases where extensive pre-trial publicity, prejudicial to the defendant, has emanated from the government, the defendant shall be entitled to a dismissal of the charges. In any event, difficulty in securing an impartial jury is a reasonable price to pay for ensuring that the right to a fair trial will not be destroyed by intentional efforts to sway the community through publicity.

The Union feels that at the present time it would be a mistake to enact sanctions directly against the press. Unless experience under the new rules regulating conduct of officials who are more intimately a part of the judicial process shows them to be inadequate, the press should not be subjected to controls that may well violate fundamental constitutional rights.

The ACLU suggests that the Judicial Conference of the United States explore the

problem of the potential bias that inflammatory publicity may create in judges, with a view to adopting standards governing the conduct of judges in sensational, well-publicized cases. [Board Minutes, February 6-7, 1971; Press release, April 22, 1971.]

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SUPERIOR COURT OF NEW JERSEY
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STATE OF NEW JERSEY,

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v.

RUBIN CARTER and
JOHN ARTIS,

Defendants,

ACLU OF NEW JERSEY, INC.,

Intervenor-
Appellant.

No. AM-618-75

MEMORANDUM IN SUPPORT OF MOTION OF ACLU OF NEW JERSEY, TO INTERVENE

INTRODUCTION

This is an interlocutory appeal by two defendants in a criminal case from an order entered by the trial court prohibiting them and their attorneys from discussing the case in public. The ACLU of New Jersey, Inc. (hereafter ACLU), wishing to hear the defendants speak, has moved for leave to intervene in this appeal. This memorandum is submitted in support of the motion for intervention.

I. THE ACLU OF NEW JERSEY, INC. HAS STANDING TO CHALLENGE THE ORDER BECAUSE ITS RIGHT TO HEAR AND THAT OF ITS MEMBERS HAS BEEN HARMED

The intervenor, ACLU, is an organization that often conducts meetings for an exchange of views on topics affecting the Bill of Rights. It asked Mr. Carter to speak at one of its meetings scheduled for April 9, 1976, but because of the court order barring the defendants and their attorneys from speaking about their case, Mr. Carter declined to appear at the meeting. ACLU is still interested in arranging another meeting so that Mr. Carter can make his views known to ACLU and its members.

The ACLU and its members have a constitutional right to hear Mr. Carter speak. The right to hear is a fundamental right, guaranteed to the ACLU and its members by the First Amendment to the United States Constitution and by Article I, ¶ 6 of the New Jersey Constitution. In Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, 44 L.W. 4686 (May 24, 1976), the United States Supreme Court held that consumers of prescription drugs could assert their right to receive drug price information. "[W]here a speaker exists, ... the [first amendment] protection afforded is to the communication, to its source and its recipients both.... If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these

appellees." 44 L.W. at 4688 (footnote omitted). See Lamont v. Postmaster General, 381 U.S. 301 (1965) (citizens have a right to receive political publications sent from abroad); Kleindienst v. Mandel, 408 U.S. 753 (1972) (citizens have a right to hear and debate with Marxist alien they invited to speak at their meetings, although he may be denied entry into the country for other reasons); Toms River Pub. Co. v. Manasquan, 127 N.J. Super. 176 (Ch. Div. 1974) (antilitter ordinance that prohibited delivery of any printed material at any residence was facially unconstitutional because it interfered with free communication guaranteed to those who circulate and receive printed material).

The gag order has deprived the ACLU of its right to hear Mr. Carter speak, so the ACLU has standing to claim the deprivation of its rights. Furthermore, the members of the ACLU have been deprived of their right to hear. Since they have been harmed, the ACLU has standing to sue to vindicate their rights. United States v. SCRAP, 412 U.S. 669 (1973); NAACP v. Alabama, 357 U.S. 449 (1958) (standing to a group to assert the rights of its members); Crescent Pk. Tenants Assoc. v. Realty Corp. of N.Y., 58 N.J. 98 (1971) (standing of a group to bring suit on behalf of its members).

II. THE ACLU SHOULD BE PERMITTED TO INTERVENE IN THIS APPEAL BECAUSE ITS CLAIM PRESENTS ISSUES OF LAW AND FACT IDENTICAL TO THOSE PENDING IN THIS CASE, INTERVENTION WOULD PROMOTE AN EFFICIENT DISPOSITION OF THE MATTER AND IT WOULD NOT PREJUDICE THE EXISTING PARTIES

For intervention to be permitted the intervenor's claim should present questions of law or fact in common with the pending

claim. See N.J. Court Rules, 1969, R. 4:33-2. The trial court's gag order here creates questions of law and fact that are identical for the defendants, the State and the ACLU. The same order that deprives the defendants of their right to speak deprives the ACLU of its right to hear that speech. If the United States and New Jersey Constitutions prohibit the imposition of the gag order on the defendants, they similarly prohibit barring the ACLU's right to hear. Whatever facts may be relevant to the order apply equally to the defendants and the ACLU; if the facts are insufficient to justify the order as to either, they are insufficient as to each.

It will promote efficiency to allow ACLU's rights to be adjudicated at the same time as the defendants' rights. In granting intervention, an important consideration is whether the grant will eliminate the probability of subsequent litigation. *Looman Realty Corp*. v. *Broad St. National Bank*, 74 N.J. Super. 71 (App. Div. 1962); *Monsanto* v. *Leeds*, 130 N.J. Super. 254 (Law Div. 1974). If intervention were not permitted, the ACLU would have to go elsewhere to litigate the common questions of law and fact, causing increased expense and duplicated effort.

The ACLU's intervention is timely and would not prejudice the interests of the parties. The defendants' appeal of the gag order has not been adjudicated. No decided claims would have to be reconsidered and no new facts would have to be proved or new evidence introduced. The interests of the defendants and the ACLU in vacat[illegible] the gag order are virtually

the same. The State's interest in upholding the gag order is similarly the same as to the defendants and the ACLU. See State Farm Mutual Automobile Ins. Co. v. Zurich American Ins. Co., 64 N.J. 155, 165 (1973). See also Looman, supra.

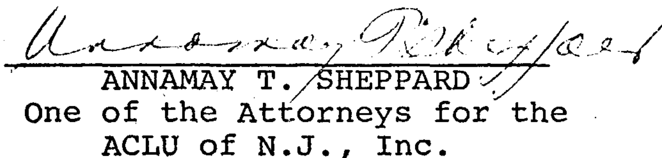
Intervention is particularly appropriate in this court because the free speech issue has been separated by this appeal from the defendants' pending criminal trial. The ACLU is not involved in the criminal charges against the defendants, but is deeply implicated in the free speech issue created by the gag order. Intervention in the criminal action at the trial court level might produce some complexities, since the ACLU is harmed by only one aspect of the trial court proceedings. But this entire appeal is now devoted to the free speech issue and the ACLU's interest in it is as extensive as the interests of the original parties.

CONCLUSION

The ACLU should be permitted to intervene in this appeal because it has standing to assert its right to hear and meets all the requirements for intervention.

Respectfully submitted,

June , 1976



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