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CASE NO. 27423

DEC 15 1973

Richard D. Turilli

Defendant-Appellant.

HONORABLE CHARLES E. BENNETT
JUDGE

DEFENDANT-APPELLANT'S OPENING BRIEF

818 17th Street, Suite 812
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DECEMBER 14, 1976

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IN THE SUPREME COURT OF THE STATE OF COLORADO

CASE NO. 27423

CITY AND COUNTY OF DENVER,)	APPEAL FROM THE
)	SUPERIOR COURT IN AND FOR THE
Plaintiff-Appellee,)	CITY AND COUNTY OF DENVER
)	STATE OF COLORADO
-v-)	
)	Action No. S-80573
LOIS MAE NIELSON,)	
)	HONORABLE CHARLES E. BENNETT
Defendant-Appellant.)	JUDGE

DEFENDANT-APPELLANT'S OPENING BRIEF

COMES NOW the Defendant-Appellant and submits her Opening Brief as follows:

I. INTRODUCTION.

The Defendant-Appellant is aggrieved by the verdict of September 8, 1975 in the County Court of the City and County of Denver finding her guilty of violating Denver City Ordinance §971.2-14, and the decision of the Superior Court affirming such judgment on July 29, 1976. The Defendant-Appellant will be referred to as Defendant or by proper name; the Plaintiff-Appellee will be referred to as Plaintiff or "Denver".

II. STATEMENT OF FACTS.

On June 5, 1975 and July 10, 1975, Daniel Schreiner, a detective assigned to the Vice and Drug Control Bureau of the Denver Police Department (ff. 00006-00007) went to 2025 East 18th Street, Denver, Colorado (ff. 00007-00008), which is a licensed health service

establishment known as Massage Health Center (ff. 00032-00033), for the purpose of obtaining a massage. On both occasions the officer was massaged by the Defendant. There was no massage of or offer to massage the officer's genital area on either visit (ff. 00014-00016). The Defendant was a licensed health service operator apprentice. (f. 00066).

As a result of the massage of the police officer by the Defendant, the Defendant was charged with two violations of Denver City Ordinance §971.2-14 and erroneously convicted by the County Court sitting without a jury.

III. SUMMARY OF THE ARGUMENT.

- A. THE SUPERIOR COURT ERRED IN AFFIRMING THE FINDING OF THE COUNTY COURT OF THE CITY AND COUNTY OF DENVER THAT DENVER CITY ORDINANCE §971.2-14 WAS CONSTITUTIONAL, WHEN IT IS IN FACT AND LAW UNCONSTITUTIONAL BECAUSE:
1. THIS ORDINANCE VIOLATES ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES IN THAT SAID ORDINANCE DEPRIVES THE DEFENDANT OF LIFE, LIBERTY AND/OR PROPERTY WITHOUT DUE PROCESS OF LAW;
 2. THIS ORDINANCE VIOLATES ARTICLE XIV OF THE CONSTITUTION OF THE UNITED STATES IN THAT SAID ORDINANCE DEPRIVES THE DEFENDANT OF LIFE, LIBERTY AND/OR PROPERTY WITHOUT DUE PROCESS OF LAW, AND FURTHER DEPRIVES THE DEFENDANT OF EQUAL PROTECTION UNDER THE LAW;

3. THIS ORDINANCE VIOLATES ARTICLE II,
SECTION 3 OF THE CONSTITUTION OF THE
STATE OF COLORADO IN THAT SAID ORDI-
NANCE DEPRIVES THE DEFENDANT OF HER
INALIENABLE RIGHTS;
4. THIS ORDINANCE VIOLATES ARTICLE II,
SECTION 25 OF THE CONSTITUTION OF THE
STATE OF COLORADO IN THAT SAID ORDI-
NANCE DEPRIVES THE DEFENDANT OF LIFE,
LIBERTY AND/OR PROPERTY WITHOUT DUE
PROCESS OF LAW; AND,
5. THIS ORDINANCE VIOLATES ARTICLE II,
SECTION 29 OF THE CONSTITUTION OF THE
STATE OF COLORADO IN THAT SAID ORDI-
NANCE DENIES EQUALITY OF RIGHTS ON
ACCOUNT OF SEX.

IV. ARGUMENT.

A. THE SUPERIOR COURT ERRED IN AFFIRMING
THE FINDING OF THE COUNTY COURT OF THE
CITY AND COUNTY OF DENVER THAT DENVER
CITY ORDINANCE §971.2-14 WAS CONSTITU-
TIONAL, WHEN IT IS IN FACT AND LAW UN-
CONSTITUTIONAL BECAUSE:

1. THIS ORDINANCE VIOLATES ARTICLE V
OF THE CONSTITUTION OF THE UNITED
STATES IN THAT SAID ORDINANCE DE-
PRIVES THE DEFENDANT OF LIFE, LI-
BERTY AND/OR PROPERTY WITHOUT DUE
PROCESS OF LAW:

2. THIS ORDINANCE VIOLATES ARTICLE XIV OF THE CONSTITUTION OF THE UNITED STATES IN THAT SAID ORDINANCE DEPRIVES THE DEFENDANT OF LIFE, LIBERTY AND/OR PROPERTY WITHOUT DUE PROCESS OF LAW, AND FURTHER DEPRIVES THE DEFENDANT OF EQUAL PROTECTION UNDER THE LAW;
3. THIS ORDINANCE VIOLATES ARTICLE II, SECTION 3 OF THE CONSTITUTION OF THE STATE OF COLORADO IN THAT SAID ORDINANCE DEPRIVES THE DEFENDANT OF HER INALIENABLE RIGHTS;
4. THIS ORDINANCE VIOLATES ARTICLE II, SECTION 25 OF THE CONSTITUTION OF THE STATE OF COLORADO IN THAT SAID ORDINANCE DEPRIVES THE DEFENDANT OF LIFE, LIBERTY AND/OR PROPERTY WITHOUT DUE PROCESS OF LAW; AND,
5. THIS ORDINANCE VIOLATES ARTICLE II, SECTION 29 OF THE CONSTITUTION OF THE STATE OF COLORADO IN THAT SAID ORDINANCE DENIES EQUALITY OF RIGHTS ON ACCOUNT OF SEX.

The Ordinance in question reads:

"971.2-14. UNLAWFUL TO PRACTICE MASSAGE UPON PERSONS OF THE OPPOSITE SEX. It shall be unlawful for any licensee hereunder to practice or administer massage as defined herein upon a person of the opposite sex, unless said licensee shall be in possession of a written authorization or prescription signed by a physician or an osteopath registered in the state of Colorado which shall state the date of issue, the name of the licensee, the person upon whom such massage shall be administered and the duration of the period, not to exceed ninety (90) days, for which the licensee may practice or administer massage upon the person designated. (Ord. 57, Series 1962)."

Article V of the Constitution of the United States
reads in part:

"GRAND JURY - INDICTMENT - JEOPARDY -
PROCESS OF LAW - TAKING PROPERTY FOR
PUBLIC USE. No person shall be . . .
deprived of life, liberty, or property
without due process of law . . ."

Article XIV of the Constitution of the United States
reads in part:

"§1. CITIZENSHIP DEFINED - PRIVILEGES
OF CITIZENS . . . No state shall make
or enforce any law which shall abridge
the privileges or immunities of citi-
zens of the United States; nor shall
any state deprive any person of life,
liberty or property without due pro-
cess of law, nor deny to any person
within its jurisdiction the equal
protection of the laws."

The said Ordinance (§971.2-14) hereinbefore quoted,
violates both Articles V and XIV of the United States Constitution.

The classification promulgated by the Ordinance does
not rationally further any legitimate state or municipal interest,
and therefore violates the equal protection clause. HARDING -v-
INDUSTRIAL COMMISSION, 183 Colo. 52, 515 P.2d 95 (1973); PEOPLE
-v- TAYLOR, _____ Colo. _____, 540 P.2d 320 (1975).

Furthermore, the Ordinance in question violates the
due process clause of the United States Constitution in that the
Ordinance does not have any relationship to legitimate goals.
PEOPLE -v- TAYLOR, supra.

For the same reasons, the Ordinance violates the
Constitution of Colorado, Article II, Section 3, which reads:

"SECTION 3. INALIENABLE RIGHTS. All
persons have certain natural, essen-
tial and inalienable rights, among
which may be reckoned the right of
enjoying and defending their lives
and liberties; of acquiring, posses-
sing and protecting property; and of
seeking and obtaining their safety
and happiness."

and Article II, Section 25, which reads:

"SECTION 25. DUE PROCESS OF LAW.
No person shall be deprived of
life, liberty or property, with-
out due process of law."

Similar ordinances have been held violative of Federal law, or likely to be so found upon request for preliminary injunction, in all four of the cases discovered dealing with this subject. COREY -v- CITY OF DALLAS, 352 F.Supp. 977 (ND Tex. 1972), reversed on issue of standing 492 F.2d 496; VALLEY HEALTH SYSTEMS, INC. -v- CITY OF RACINE, 369 F.Supp. 97 (ED Wis. 1973), preliminary injunction granted; JOSEPH -v- HOUSE, 353 F.Supp. 367 (ED Va. 1973), preliminary injunction granted; CIANCIOLO -v- MEMBERS OF CITY COUNSEL, KNOXVILLE, 376 F.Supp. 719 (ED Tenn. 1974). In each of these cases it was found that the ordinances challenged were in essence prohibitions on bisexual massage. In two of the cases, CIANCIOLO, supra. and COREY, supra., the ordinances were declared unconstitutional. In the others, JOSEPH, supra. and VALLEY HEALTH SYSTEMS, supra., preliminary injunctions on the continued enforcement of the ordinances were granted, the courts finding the plaintiffs were likely to succeed on the merits of their challenges to the ordinances.

Article II, Section 29 of the Colorado Constitution states:

"SECTION 29. EQUALITY OF THE SEXES.
Equality of rights under the law
shall not be denied or abridged
by the state of Colorado or any
of its political subdivisions on
account of sex."

The Ordinance under scrutiny herein violates this provision because it denies equal rights on account of sex. As in CIANCIOLO, supra., the instant Ordinance must fall because of its failure:

". . . to recognize that not all
female masseuses will abuse a his-
torically legitimate occupation

when permitted to massage clients
of the opposite sex, nor will male
masseurs commit lewd acts when they
massage patrons of the opposite sex."

The sex classification here also fails to recognize that different individuals of the same sex behave differently, and instead imposes upon all massagists of the same sex the presumption of illicit conduct, which presumption is improperly based on an individual's sex.

Plaintiffs have argued that if this Ordinance fails illicit activities will be encouraged. The Defendant feels that this contention is best answered by the following quote from Ralph Waldo Emerson:

"Some of your hurts you have cured,
And the sharpest you still have survived,
But what torments of grief you endured
From evils which never arrived!"

Therefore, Ordinance §971.2-14 creates a classification based upon sex which infringes upon the Defendant's fundamental right to carry on a legitimate occupation, in violation of the equal protection clause. REED -v- REED, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 257. The City has acted in this manner without a compelling interest which outweighs the damage done to the Defendant's fundamental rights, and therefore the Ordinance is unconstitutional. COREY, supra.; CIANCIOLO, supra.

V. CONCLUSION.

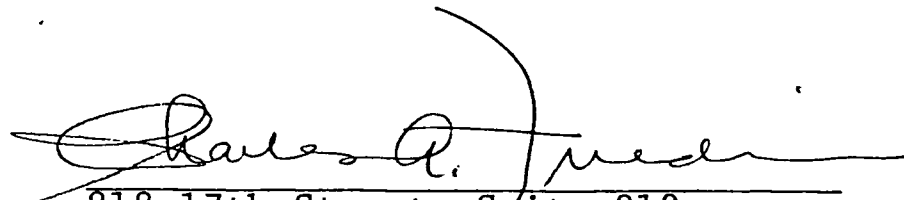
Wherefore, the Defendant-Appellant prays this Court to reverse the County Court and order that the Defendant-Appellant be found not guilty, for the reasons that the Ordinance in question is unconstitutional due to its violation of the equal protection and due process clauses, and equal rights amendment.

Respectfully submitted,

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CERTIFICATE OF MAILING

This will certify that two true copies of DEFENDANT-
APPELLANT'S OPENING BRIEF were properly mailed to opposing counsel
of record, addressed as shown below, this 14th day of December, 1976.

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