
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11062

WILLIAM O'CONNELL AND
COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFFS-APPELLANTS,

v.

CRIMINAL CLERK OF QUINCY DISTRICT COURT

AND

GEORGE W. PRESCOTT PUBLISHING COMPANY, LLC,
DEFENDANTS-APPELLEES.

RESERVED AND REPORTED BY THE SUPREME JUDICIAL COURT FOR
SUFFOLK COUNTY
No. SJ-2011-0334

INTERLOCUTORY APPEAL FROM AN ORDER OF
THE DISTRICT COURT DEPARTMENT, QUINCY DISTRICT COURT
No. 1156-CR-002501

BRIEF OF MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION,
NEW ENGLAND NEWSPAPER AND PRESS ASSOCIATION, CITIZEN MEDIA
LAW PROJECT, AND NEW ENGLAND FIRST AMENDMENT COALITION AS
AMICI CURIAE

IN SUPPORT OF DEFENDANT-APPELLEE
GEORGE W. PRESCOTT PUBLISHING COMPANY

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Dated: November 3, 2011

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STATEMENT OF THE CASE

Amici curiae hereby adopt and incorporate by reference the statement of the case as set forth in the brief of the Defendant-Appellee, George W. Prescott Publishing Company, LLC.

STATEMENT OF THE FACTS

Amici curiae hereby adopt and incorporate by reference the statement of the facts as set forth in the brief of the Defendant-Appellee, George W. Prescott Publishing Company, LLC.

INTEREST OF AMICI CURIAE

The Massachusetts Newspaper Publishers Association, New England Newspaper and Press Association, Citizen Media Law Project, and the New England First Amendment Coalition share an interest in promoting excellence in journalism and in defending the freedom of the press. Of particular interest here, *Amici* are committed to providing access to the judicial process in the Commonwealth and records relevant thereto, and their corresponding right to be fully and fairly informed about matters of significant public interest. Media coalitions like the one here have participated in this Court on numerous occasions.

The Commonwealth and the Defense have teamed-up to vigorously appeal the Disclosure Order of the District Court confirming that the records open to the public (as redacted to protect the identity of the alleged underage sexual assault victim). Both Plaintiff-Appellants request whole secrecy of these presumptively public search warrant materials.

Amici submit that the Quincy District Court applied the correct standards in authorizing the unsealing of the search warrant materials (the Commonwealth initially requested the sealing) and hereby adopt and incorporate by reference the argument as to standards recited in the brief of the *The Patriot Ledger*. The appeal before this Court presents a serious threat to the freedom of the press and the public's rights of access to judicial records. *Amici* and their members often are involved in disputes concerning public records. *Amici* therefore can bring substantial experience to bear on the issues presented here - not simply in terms of legal expertise but also in terms of describing the practical impact of negating the Disclosure Order of the District Court or applying the police department statute to prohibit newsgathering and impede the free flow of information on a wide array of judicial records.

SUMMARY OF ARGUMENT

The public has a right to view materials filed in support of search warrant applications after they have been returned to the court. This right is historical under common law, reflects First Amendment rights, and is presumptive under Massachusetts G.L. c. 276. §2B.

There is no conflict or relation between the judicial records containing returned search warrant materials under G.L. c. 276, §2B and police department record keeping under G.L. c. 41, §97D. The former is judicially based, filed in court, reviewed by a clerk and judge, and becomes part of an open proceeding or trial which is presumed open to the public. The later, a police record-keeping statute, is administrative, whose records are not stored in a court, nor reviewed by a judge, and customarily not open to the public.

Both statutes are independent and serve entirely different purposes. The Appellants' strained attempt to cross-pollinate these distinct laws is novel and without precedent, and would turn a tradition of judicial openness on its head.

The legislature has not carved out an exception to search warrants as public records; in fact, just the

opposite, by establishing they are a "public document" when returned to the court. The Appellants are asking the court to legislate out the clear language of §2B. Within the statutory framework, this law falls under "Proceedings in Criminal Cases" as judicial legislation. For contrast, §97D does not affect court proceedings but rather falls under the statutory framework of "Cities, Towns, and Districts" - "Police Officers" while narrowly controlling the maintenance of particular internal records and conversations between police officers and victims.

The affidavit filed in the Court supporting a search warrant carries knowledge by the filer that "the public has a presumptive right of access ... once the warrant is returned," *Republican Co. v. Appeals Court*, 442 Mass. 218, 222-223 (2000). It triggers an assessment by the Court whether to authorize the severe invasion of one's home, or personal life or business which would lead to criminal charges against the perpetrator, a process which the public needs to know. The legislature has plainly recognized this need.

Police department records of reports or conversations with victims involving rape and sexual assault carry knowledge by the victim that, to the extent those reports are "maintained by the police departments" they will be

stored, kept, or filed "in a manner which will assure their confidentiality," G.L. c. 41§97D. That purpose simply does not extend to judicial records like search warrants.

The Quincy District Court, dismissed the Appellants' §97D argument after several hearings and filings analyzing "good cause" and properly unsealed the search warrant affidavit, subject to appropriate redactions.

ARGUMENT

I. TOTAL SECRECY OF POST-EXECUTION SEARCH WARRANT MATERIALS VIOLATES BOTH COMMON LAW AND FIRST AMENDMENT RIGHTS ASSOCIATED WITH JUDICIAL PROCEEDINGS

The Press has a responsibility to report to the public on court proceedings and the documents relating to those proceedings - both are part and parcel of the law recognizing two qualified rights of access to judicial proceedings and records, a common law right "to inspect and copy public records and documents, including judicial records and documents," *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), and a "First Amendment right of access to criminal proceedings" and documents therein, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). See also the recently decided *United States v. Korlander*, No. 10-30222, Opinion Filed on September 30, 2011 (9th Cir). A copy is attached to the Addendum.

The public through its news organizations has an interest in the operation of the government, and the common law right to judicial records and documents is correspondingly a "general right held by all persons." *In re EyeCare Physicians*, 100 F.3^d at 517. And as a representative of the public, it is these news organizations who seek "to publish information concerning the operation of government." *Nixon*, 435, U.S. at 597-98. *Kortlander* notes that courts have applied the common law right of access to a variety of search warrant materials. See *In Re EyeCare*, at 515 (search warrant application and affidavit); *Baltimore Sun v. Goetz*, 886 F.2d at 62 (4th Cir. 1989) (search warrant affidavit); *In re N.Y. Times Co.*, 585 F. Supp 2d at 86 (search warrant applications and affidavit); *In re Newsday, Inc.*, 895b F. 2d 74, 79 (2d Cir. 1990). These decisions establish that search warrant materials are presumptively public as "judicial records." See *Nixon* at 597.

Post-execution warrant materials "have historically been available to the public." *In re N.Y. Times Co.*, at 88. "Search warrant applications ... generally are unsealed at later stages of criminal proceedings, such as upon the return of the execution of the warrant or in connection with post-indictment discovery." *Wells Fargo*, 643 F. Supp.

2d at 581. In this case not only has the warrant return been made to the court, but O'Connell has also been arraigned and indicted.

The common law right of the public to access information in this case is especially important. Mr. O'Connell is a prominent developer with ties and contributions to high ranking business and political personnel. So much so that a Special Prosecutor needed to be assigned because of political contributions made by the O'Connell family in Norfolk County. The tradition of openness to search warrant materials "serves as a check on the judiciary because the public can insure that judges are not merely serving as a rubber stamp for the police." *In re N.Y. Times Co.*, at 90.

Massachusetts has recognized that the public and press have a qualified common law right of access to search warrant material, which are in the files of the court. In *Commonwealth v. Silva*, 448 Mass. 701 (2007), the court recognized the common law right to judicial records. Search warrant material is a judicial record.

Although this Court has stated that First Amendment rights do not attach to search warrant materials, it has ruled that the controlling "good cause" analysis under the common law is "essentially the same" as that required under

the First Amendment. *Commonwealth v. Silva*, 448 Mass. 701, 707 (2007). In emphasizing this point, J. Gants in Superior Court stated that "the meaning of 'good cause' must reflect the constitutional rights at stake in closing court records to the public, and the strict standard that must be met to override those constitution rights." *Globe Newspaper Co., v. Suffolk County Superior Court*, 2002 WL 20244 (2002).

II. SEARCH WARRANT MATERIALS ARE PRESUMPTIVELY PUBLIC RECORDS

A. Search Warrant Materials are Open to the Public Under Common Law in Massachusetts

As noted above, other jurisdictions have recognized a common law right of access to search warrants as they initiate a criminal proceeding, then reviewed by, and filed with the court. In *Boston Herald, Inc. v. Sharpe*, the court noted "the presumption of access" instills confidence in the citizenry and a watchful eye on the operation of government and the courts. This Court has issued *The Supreme Judicial Court Guidelines on the Public's Right of access to Judicial Proceedings and Records* (2000). In *The Republican Co. v. Appeals Court*, 442 Mass. 218 at 222 (2004), impoundment is noted as the exception to the general rule of open judicial records. In contrast to Appellants' attempt to link §970, particular police report

keeping (which are traditionally not open), with search warrants which are judicial records with a common law right of access. Common law supports the unsealing of search warrant materials.

B. The Search Warrant Affidavit Is Open to the Public Under Massachusetts G.L. c. 276, §2B

The plain language of the Massachusetts statute on search warrant affidavits states that they "shall" be a "public document" after the "warrant is returned." Period. The public and the press have historically relied upon this reading to obtain those materials, which allow a court or justice to authorize a search of a citizen's home, business, or personal records in a criminal case. This Court has stated that "[o]n its face" the statute provides that both the warrant and the affidavit are "public documents" after they have been returned to the court files. *Newspapers of New England, Inc. v. Clerk-Magistrate of The Ware Div. of The District Court Department*, 403 Mass. 628, at 631 (1988).

Nowhere in the General Laws is a restriction, exception, or limitation of the search warrant or its materials as a "public document" as plainly stated and intended by the legislature.

III. SECTION 97D OF CHAPTER 41, POLICE REPORTS,
DOES NOT APPLY TO POST-EXECUTION
SEARCH WARRANT MATERIALS

Nowhere in Section 97D of Chapter 41 do either search warrants or search warrant affidavits appear. Section 97D does not regulate search warrants or their affidavits. Section 97D concerns reports and conversations between police officers and victims and their maintenance within the police building. These reports and conversations "shall be maintained by the police departments." The District Court properly determined that this statute does not apply to search warrants and their materials filed in District Court (not the police department offices), after the search warrant is issued and reviewed by the court. To apply a presumptive judicial public document law to a particular police administrative confidentiality filing statute; out of context; with no overlapping legislative history; cannot be reconciled. There just is no connection and no basis in law.

IV. DETAILS OF THIS CASE AND INFORMATION FROM THE
AFFIDAVIT ARE IN THE PUBLIC DOMAIN

To the extent a "good cause" standard considers the impact of disclosures already in the public domain, the following are examples relating to public disclosure of this case, which leaves little to protect through the continued impoundment of the search warrant affidavit.

The Quincy Patriot Ledger has reported on the search warrant, its return, and O'Connell's arrest and indictment on the charges against him, including the statutory rape of a 14-year-old-girl. Further, the newspaper has viewed and published information disclosed in the District Court filings. See newspaper articles attached in the Addendum.

A detailed Summary of Facts filed with the court from the State Police seeking the arrest of an alleged co-conspirator of O'Connell involved in this case outlines an interview with "the female juvenile" who alleged "that she had been having a sexual relationship with a 72 year old white male," when she was 14 years old. The interview named the alleged co-conspirator, whose name then appeared in the newspaper article. This State Police report is in the public domain. A copy is attached hereto in the Addendum.

William O'Connell, the subject of this case, finds himself and his family featured on the cover of the October issue of *Boston Magazine: Sex, Drugs & Guns, The Scandal Rocking the Powerful Family that Built Marina Bay*. "They first met in the summer of 2009. He was around 70. She was 14. She went to his condo ... invited by a girl named Kookie [the named co-conspirator in the State Police report] You just have to watch..." See attached *Boston Magazine* article in Addendum.

The press has published several new articles, a feature magazine article has been published, and the public now knows that the Plaintiff has been arrested for rape, underage-sex, and drug charges, and has been indicted by a Special Prosecutor on these charges. The substantial issues that openness would present during the pre-indictment stage of a criminal investigation are less relevant once the investigation has ended. See *Kortlander* in Addendum. The underlying criminal investigation as it affects the search warrant affidavit is effectively over. Although it remains impounded, the information contained in the Search Warrant Affidavit has been widely disseminated in the public domain. There is no compelling reason to keep it secret any

longer. The District Court Disclosure Order should be affirmed.

Respectfully submitted,



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November 3, 2011

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I further hereby certify, pursuant to Mass. R.A.P. 16(k), that the foregoing Brief of *Amici Curiae* complies with the rules of court pertaining to the filing of briefs.



Peter J. Caruso