

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2024-0018
Cambridge District Court

TRUSTEES OF BOSTON UNIVERSITY AND
BOSTON GLOBE MEDIA PARTNERSHIP LLC

v.

CLERK-MAGISTRATE OF THE CAMBRIDGE DISTRICT COURT

**MOTION FOR LEAVE TO FILE AMICUS MEMORANDUM ON BEHALF OF
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT
OF 13 JOHN DOES, REQUESTING BRIEFING AND ARGUMENT BEFORE THE
FULL COURT**

There can be no clearer example of an unwarranted invasion of privacy than to release to the public that another individual was the subject of a criminal investigation.

Globe Newspaper Co. v. Police Comm'r of Boston, 419 Mass. 852, 867 (1995) (cleaned up).

Request to File Amicus Memorandum

The Massachusetts Association of Criminal Defense Lawyers (MACDL) seeks permission, pursuant to Mass. R. App. P. 17(a)(1), to file this short amicus memorandum in support of the 13 John Doe petitioners. In support of that request, this is a matter of intense public interest and could have potentially far reaching effects on the constitutional rights of any person subject to an

application for criminal complaint in any District Court of Massachusetts.

Argument

The 13 John Doe petitioners ask this Court to refer this matter to the Full Bench of the SJC for full briefing and argument, and then to reverse the decision of the Cambridge District Court Clerk-Magistrate to permit the media to attend all presumptively private show cause hearings addressing charges of Sex for a Fee in violation of G.L. Ch. 272 § 53A. MACDL writes to support the constitutional rights of these petitioners to procedural due process which entitle each of them to an opportunity to be heard to articulate their individual privacy interests and why those interests outweigh any legitimate public interest in these presumptively private show cause hearings.

The Clerk-Magistrate made this decision in violation of both the Rules Governing Show Cause Hearings and the John Does' state and federal constitutional right to procedural due process. Specifically, the Clerk-Magistrate did not give any of them an opportunity to be heard to articulate their individual "right of privacy", which the Clerk-Magistrate was required to balance against any "legitimate public interest" before making "an exception to the rule" that show cause hearings are "private and closed to the public." *See Standard, 3:15, Public Access to Show Cause Hearings. See generally Eagle Tribune Pub. Co. v. Clerk-*

Magistrate of the Lawrence Div. of the Dist. Ct. Dep't, 448 Mass. 647, 656-57 (2007). After briefing and argument before the Full Bench, the SJC should vacate the Clerk-Magistrate's ruling and remand these cases to the Clerk-Magistrate for individualized hearings to permit each complaint recipient to demonstrate why their individual privacy rights outweigh any legitimate public interest in the show cause hearing.

A. The Clerk-Magistrate's Decision Violated the Standards Governing Show Cause Hearings

Section 3:15 of the 2008 Standards provides that show cause hearings are presumptively "private and closed to the public." If there is a request that the public be able to attend a show cause hearing, "the magistrate should require that the person or organization making the request show a legitimate reason for access that justifies an exception to the rule." *Id.* Where "the application is one of special public significance and the magistrate concludes that legitimate public interests outweigh the accused's right of privacy, the hearing may be open to the public" *Id.*

The Commentary to *Standard, 3:15, Public Access to Show Cause Hearings* provides in part that "There is no tradition of public access to show cause hearings, which are similar to grand jury proceedings. Secrecy protects individuals against whom complaints

are denied from *undeserved notoriety, embarrassment and disgrace.*" (Emphasis added).

Accordingly, the Standards recognize that individual targets of criminal accusations have important privacy interests that must be considered at the preliminary stage before a finding of probable cause has been made. The Clerk-Magistrate must consider these important *individual* privacy interests and weigh them against any "legitimate public interest" before deciding whether to open an individual show cause hearing to the public.

The Standards' recognized concern for individual privacy interests would seem to be especially important in this case, where, "*none of the Intervenor Petitioners is a person seeking or holding political office or in other key government positions, or in any other position as a public figure.*" *John Doe Nos. 1 through 13 Memorandum of Law In support of Their Request for Relief*, at 6. This fact would seem to undermine any notion that opening *all* of the show cause hearings to the public would serve a "legitimate public interest."¹

¹ As both the Attorney General and the John Does have noted, the identities of the John Does have not yet been made public. Therefore, the fact that there has already been extensive publicity of this matter "weigh[s] in favor of the non-disclosure of the names of suspects". *Response of the Clerk-Magistrate of the Cambridge District Court to the Petition for Relief Pursuant to G.L. Ch. 211 § 3*, n.12. For the same reason, it also weighs in favor of maintaining the presumption of privacy and closing the hearings to the public.

Despite the requirement of the Standards and the lack of any apparent public interest in the charges against at least some of the John Does, the Clerk-Magistrate made the determination to open *all* of the show cause hearings to the public before any of the John Does had received notice of applications for complaint, much less an opportunity to be heard about their individual privacy interests. Therefore, the Clerk-Magistrate could not possibly have satisfied the requirements in the Standards to consider and weigh individual "right of privacy" against any "legitimate public interest" in making the show cause hearings public.

Finally, as the Attorney General notes, if the Clerk-Magistrate finds that there is not probable cause to issue a complaint against any individual, the Application for a Complaint against that individual will not be made public and typically is destroyed one year after the date the application was filed. G.L. Ch. 218, § 35; Standard 5:01 ("If a complaint is denied, the application form and any attachments, must be . . . destroyed after one year."). This requirement is obviously designed to protect targets of unsupported criminal complaints from reputational damage. Yet, the purpose of that statutory requirement would be defeated improperly if any show cause hearings in this matter were open to the public in the absence of "legitimate public interest."

B. The Clerk-Magistrate's Decision Violated the Petitioners Rights to Procedural Due Process.

The John Doe Petitioners are entitled to the protections of procedural due process under both the 14th Amendment to the United States Constitution and Article 10 of the Massachusetts Declaration of Rights. In *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), the Supreme Court held that a person who is protected by due process is entitled to a hearing "at a meaningful time and in a meaningful manner." 424 U.S. at 333 (internal citations omitted). The Clerk-Magistrate's blanket decision to open all show cause hearings to the public without permitting the John Does to be heard about their individual privacy interests clearly violated their constitutional rights to due process.

Again, as noted above, the Clerk-Magistrate made the determination to open the show cause hearings to the public before any of the John Does had received notice of applications for complaint, much less an opportunity to be heard about their individual privacy interests. Thus, the Clerk-Magistrate's decision obviously violated the petitioners' state and federal constitutional right to procedural due process.

Conclusion

For all of the foregoing reasons, MACDL requests permission to submit this amicus memorandum on this important issue of public interest. MACDL urges the Single Justice to refer this matter to the Full Bench of the SJC for briefing and argument, and then vacate the Clerk-Magistrate's ruling opening all of the show cause hearings in this matter to the public, and remand the cases to the Clerk-Magistrate for individualized hearings, giving each subject of an application for a complaint an opportunity to be heard on whether their individual privacy interests outweigh any legitimate public interest in the show cause hearing.

Date: January 22, 2024

Respectfully Submitted,

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I certify that a copy of this document has been served on counsel for the parties electronically through the Tyler E-File system on this date.

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