COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS: **SUPERIOR COURT**
DOCKET No. _____

IN RE: BAIL REVIEW FROM THE STOUGHTON DISTRICT COURT

COMMONWEALTH

V.

AIDAN KEARNEY

PETITION FOR REVIEW OF DISTRICT COURT BAIL DETERMINATION

MASSACHUSETTS DECLARATION OF RIGHTS: "Article XVI. The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged."

UNITED STATES CONSTITUTION, BILL OF RIGHTS, FIRST AMENDMENT, Dec. 15, 1791: "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 the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Now comes the petitioner, Aidan Kearney, a professional member of the press, and hereby requests that the Superior Court review and vacate the release determination of the Stoughton District Court in nine criminal actions brought against him on First Amendment and overbreadth grounds. (See Order of Pretrial Conditions of Release, filed herewith, listing nine docket numbers.) Mr. Kearney has the right to a new determination of bail by a Superior Court Judge ("bail review") under G.L. chapter 276 section 58, in pertinent part:

> The superior court shall in accordance with the standards set forth in the first paragraph of this section, hear the petition for review as speedily as practicable and except for unusual circumstances, on the same day the petition is filed; provided, however, that the court may continue the hearing to the next business day if the required records and other necessary information are not available. The justice of the superior

> court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, in his discretion, to reasonably assure the effective administration of justice, make any other order of bail or recognizance or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.

Mr. Kearney was released on personal recognizance but was subjected to eight orders ("the stayaway orders") restricting his future speech and ability to be present at locations where the eight listed "victims" may be found, and warned that he may be sentenced to up to ninety days in jail for direct or (undefined/unspecified) "indirect" contact with these individuals. The Superior Court has the authority to address these conditions of release as well as cash bail or section 58A conditions. See *Commonwealth v. Madden,* 458 Mass. 607, (2010) (Conditions of release may be reviewed by Superior Court Judge).

The eight individuals are people Mr. Kearney is reporting on in connection with a pending Norfolk County murder case out of Canton, Massachusetts. Each and every one is either directly involved in the matter or has inserted themselves into the case making them fair subjects of inquiry. Mr. Kearney is an award-winning muckraking investigative journalist, operating his own news network, "Turtleboy Daily News", and social media accounts wherein he prolifically reports on items of public interest and public concern. He repeatedly "scoops" major news outlets and provides the public and hundreds of thousands of followers with original, hard-hitting, fact-based reporting. He is an extremely talented investigative journalist performing a vital function in the midst of unprecedented political division and destructive warfare/lawfare between the Nation's political camps. He relentlessly follows leads and gathers evidence to expose corruption and find the truth.

The gravamen of the district court complaints concerns Mr. Kearney's acts of indisputable journalism—showing up at the individuals' houses and sports events for the purpose

of questioning them, calling and following them seeking comment, and speaking out directly to them on his show, all to question them about a currently pending Norfolk County murder case. There is no doubt that he is addressing matters of public concern as a professional journalist. Grotesquely, the Norfolk County District Attorney has sought to transform these time-honored journalistic tactics for newsgathering into felonious "witness intimidation." He hired a special prosecutor and brought nine cases against Mr. Kearney, authorized search warrants to seize the tools of Mr. Kearney's trade, and arbitrarily and capriciously characterizes journalism as threats and intimidation. As referenced in his affidavit, filed herewith, Mr. Kearney is experiencing a pronounced chilling effect on his ability to continue to cover the story (he has submitted over 180 stories on the murder prosecution referenced above) and is trying to function as a professional investigative reporter under a prior restraint on his speech.

The District Court has essentially given these eight individuals veto power over Mr. Kearney's reporting by allowing them to simply show up at any venue, any public place, any Courthouse relevant to Mr. Kearney's reporting, and flush him out, evicting him at will under risk of ninety days' incarceration. Mr. Kearney is not sure if even referring to the individuals could be construed as indirect contact in light of the Court's comments to him. The District Court advised Mr. Kearney that the [stay away] order was "broad on purpose" and that should Kearney violate it in any way then he would be subject to being held without bail. See, e.g., Boston Herald, October 11, 2023, 'Turtleboy' blogger charged with witness intimidation, conspiracy", By Flint McColgan and Todd Prussman, (Directly quoting the Court).

The fact that the Court engineered an order "broad on purpose" is an unlawful mandate in violation of the First Amendment and Article Sixteen of the Declaration of Rights. In

Commonwealth v. Brangan, 477 Mass. 691, 702-703, (2017) Justice Lenk summarized the framework under which such state action restraining liberty must be reviewed:

> The Fourteenth Amendment to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights establish a fundamental right to liberty and freedom from physical restraint that cannot be curtailed without due process of law. See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 234 (2004); Querubin, 440 Mass. at 112; Mendonza, 423 Mass. at 778-779; Aime v. Commonwealth, 414 Mass. 667, 676-677 (1993).
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> Pretrial detention encroaches on that fundamental right insofar as it subjects a defendant to governmental restraint without having received the full measure of due process to which the defendant is entitled before he or she can be punished under the criminal law. See Mendonza, 423 Mass. at 778-779.
>
> In our previous decisions analyzing the constitutionality of pretrial detention, we have considered two aspects of due process -- substantive and procedural -- following Supreme Court precedents. Under the test of substantive due process, "[w]here a right deemed to be 'fundamental' is involved, courts 'must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation,' Moore v. East Cleveland, 431 U.S. 494, 499 (1977), and typically will uphold only those statutes that are narrowly tailored to further a legitimate and compelling governmental interest." Querubin, 440 Mass. at 112, quoting Aime, 414 Mass. at 673. "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This requirement traditionally has been referred to as 'procedural' due process." Querubin, 440 Mass. at 116, quoting United States v. Salerno, 481 U.S. 739, 746 (1987).

Here, as stated by the District Court Judge, the order is "broad on purpose" where it must instead be the polar opposite where fundamental rights are at stake- "narrowly tailored to further a legitimate and compelling governmental interest." *Querubin*, 440 Mass. at 112, quoting *Aime,* 414 Mass. at 673. Thus, unequivocally, the order must be vacated for substantive due process violations.

Courts allow even domestic abusers under restraining orders and their victims to appear in Court together. Here, Mr. Kearney has no criminal record, never threatened violence, never

assaulted anyone, and repeatedly implores his fans who show up at speeches and rallies to be peaceful or stay away. He must gain access to Courthouses and witnesses to continue his protected activity. He should be granted the ability to exercise his press freedom to seek to question anyone relevant to the cause at hand within the boundaries of the law.

This raises the question: What are those boundaries? In a related context, the Supreme Judicial Court has addressed what is harassment and what is protected speech in *O'Brien v. Borowski.* The Court limited the reach of harassment to exclude constitutionally protected speech, confining the meaning of harassment to either fighting words or true threats, and interpreted the meaning of "fear" under the act to mean fear of physical harm or fear of physical damage to property. *See O'Brien v. Borowski,* 461 Mass. 415. 425-428. (2012).

Also, allegedly instilling subjective "fear" in a person does not give a Court *carte blanche* to impose restrictions on a defendant. The *Borowski* court addressed this as well:

> "An intent to cause fear, however, is less certain to be consistent with a true threat unless we narrow what it is that must be feared. As the United States Court of Appeals for the Seventh Circuit noted, there are types of threats that may "contain ideas or advocacy, such as a 'threat' to picket an organization if it does not yield to a demand to take some social or political action." United States v. Velasquez, 772 F.2d 1348, 1357 (7th Cir. 1985), cert. denied, 475 U.S. 1021 (1986). Such a threat may cause a fear of economic loss, of unfavorable publicity, or of defeat at the ballot box, but such fears cannot be enough to make the threat a "true threat" that may be prohibited as civil harassment under the First Amendment and art. 16. There is nothing in the language of the act or in its legislative history to suggest that the Legislature intended "fear" to mean more than fear of physical harm or property damage, and such a limiting interpretation would effectuate the legislative intent to confine the prohibited speech in the act to constitutionally unprotected speech. Therefore, we narrow the meaning of "fear" under the act to fear of physical harm or fear of physical damage to property. [P. 427].

Here, it cannot be reasonably disputed that Mr. Kearney's alleged threats concern ideas and advocacy protected by the First Amendment and Article 16. The individuals' alleged fear must yield to Article Sixteen and the First Amendment. In fact, it has already found to be

lacking in probative force by two District Court Judges. Two of the individuals sought harassment protection orders and were denied on first amendment grounds and due to a lack of threats of bodily harm or property damage and an absence of fighting words. One was denied by the same judge issuing the orders herein and one was another District Court Judge. See Kearney affidavit, filed herewith, para. 13.

For all of the foregoing reasons, the Court should vacate the stay away orders as a matter of discretion in the circumstances upon a statutory review of bail, and/or as a matter of law under Article Sixteen and the First Amendment.

WHEREFORE, defendant respectfully requests that the Court issue appropriate orders in the interest of justice as set forth above, and any such other relief as it deems proper.

Dated: October 25, 2023

Respectfully submitted,

AIDAN KEARNEY
By his attorney,

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AFFIDAVIT OF COUNSEL

I, Timothy J. Bradl, on oath do hereby depose and state under the pains and penalties of perjury, that the foregoing facts stated and documents proffered are true and accurate to the best of my knowledge, information and belief.

Signed on the foregoing date under pains and penalties of perjury:

/S/ TIMOTHY J. BRADL
Timothy J. Bradl

CERTIFICATE OF SERVICE

I, Timothy J. Bradl, hereby certify that the foregoing document was served on all counsel of record by email on the foregoing date.

/S/ TIMOTHY J. BRADL
Timothy J. Bradl

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS: **SUPERIOR COURT**
DOCKET No.

IN RE: BAIL APPEAL FROM THE STOUGHTON DISTRICT COURT

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AFFIDAVIT OF AIDAN KEARNEY

I, Aidan Kearney, on oath, do hereby depose and state under the pains and penalties of perjury:

1. The stay away orders in this case act as a prior restraint on my right to report on the Karen Read murder case, and ask questions of subjects I am reporting on. It has created a chilling effect where I am afraid to report news and investigate leads due to fear of being incarcerated for 90 days.
2. I am afraid to mention the names of 8 of the most important subjects of my reporting during my shows or in my publications out of fear that it could be perceived as a violation of the "intentionally over broad" stay away order put in place by Judge O'Malley. This causes a chilling effect where I am afraid to report new information, or discuss any matters pertaining to these 8 individuals.
3. I am unable to attend court hearings in the Karen Read case because it would be a violation of the order. My reporting has been at the forefront of uncovering facts in this

case, and as a result I have been invited on Court TV and other media outlets to discuss the results of my findings.

4. I am unable to question the "witnesses" in this case about inconsistencies in their stories that have led members of the public, and Karen Read's attorneys, to accuse them of being involved in the coverup of John O'Keefe's murder.
5. I am unable to attend Canton Select Board meetings, such as tonight's meeting at 7 PM, due to the fact that one of the members has a stay away order on me.
6. I am afraid to step foot in Town Hall to question public servants and obtain information for stories because I know there is a chance Chris Albert will be there.
7. I am unable to attend a trial in Boston for a case I have been covering due to the fact that the defendant in the case will likely bring one of the 8 individuals with her in order to prevent me from questioning the defendant outside of court.
8. I am unable to go anywhere near downtown Canton due to the fact that Chris Albert's pizza shop is located there. I am afraid to do research at the two bars where Karen Read went the night O'Keefe was murdered because they are located next to the pizza shop.
9. I am unable to go to the Norfolk County District Attorney's Office as part of my reporting because one of the 8 individuals with a stay away order is a State Police Detective who works out of the Canton office.
10. I am unable to ask questions of the lead investigator in the murder case I am investigating.
11. I am forced to leave restaurants and public events if any of these 8 people comes inside.
12. I have not threatened or intimidated any of these people. I have never been accused of a violent crime or charged with any crime. I have repeatedly stated that I mean these people

no harm, and simply wish to ask them questions. There are no grounds for this order, and they act only as a way for the government to silence a well-known, award winning journalist.

13. Further, two of the individuals, Jennifer McCabe and Christopher Albert, were denied harassment protection orders against me on first amendment grounds. In early June 2023, Judge Walsh denied the request from McCabe that I cease blogging about her. In September 2023, Judge O'Malley denied Christopher Albert an order sought days after I protested him at a Select Board meeting. Again, no threats or fighting words were found and the order was denied on first amendment grounds.
14. The foregoing statements above an in the accompanying motion are true and accurate to the best of my knowledge, information and belief.

Signed under penalties of perjury:

Date:_____ _____

Aidan Kearney