

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

**SUPERIOR COURT DEPARTMENT
DOCKET NOS. 2382BP00116**

COMMONWEALTH)
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v.)
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AIDAN KEARNEY)

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2382BP00123
2382BP00124
2382BP00125
2382BP00126**

**COMMONWEALTH’S REPLY AND OPPOSITION TO DEFENDANT’S
PETITION FOR REVIEW OF DISTRICT COURT BAIL DETERMINATION**

Now comes the Commonwealth and respectfully replies and states its opposition to the Petition for Review of the Bail Determination of the Stoughton District Court in the nine (9) criminal complaints now pending against the Defendant.

The Commonwealth acknowledges the jurisdiction and authority of the Superior Court to issue a new bail determination pursuant to G.L. Chapter 276 Section 58.

STATEMENT OF THE FACTS

On October 11, 2023, the Defendant, Aidan Kearney, an internet “blogger” and self-described “award winning journalist,” as well as a self-described “activist,” was arraigned in the Stoughton District Court on nine (9) separate criminal complaints which included counts of Intimidation of a Witness, Picketing of a Witness, and Conspiracy to Intimidate Witnesses.

The subject witnesses and named victims in said criminal complaints are all witnesses in the pending matter of Commonwealth v. Karen Read, Docket No. 2282CR00117, in which Read was charged, inter alia, with murder.

Commencing on or about April of 2023, the Defendant, Kearney, began to blog about the Read case on various internet websites. The Defendant's blogs became more and more vitriolic in nature and his actions soon crossed the line of journalism and thereafter involved criminal activity in the form of intimidation and/or picketing of witnesses including Elizabeth Proctor, Juliana Nagel, Juliana Albert, Christopher Albert, Michael Proctor, Colin Albert, Jennifer McCabe, and Matthew McCabe as well as conspiring with one Jannell Webb (a former Avon Police dispatcher) to intimidate Jennifer McCabe and Elizabeth Proctor.

The Defendant has visited the homes of witnesses, videotaped the interior of witnesses homes without their permission, led motor vehicle caravans past the homes of witnesses, shown up and harassed witnesses at sporting events in which children of witnesses were participating, harassed witnesses at their places of business, attempted to cause witnesses financial harm, and followed witnesses while yelling at them through bullhorns.

A summary report of these incidents is contained in a report submitted to the Stoughton District Court by Detective Lieutenant Brian Tully of the Massachusetts State Police, a copy of which has been submitted to the Superior Court via separate fax transmission today and is incorporated into this reply and opposition by reference.

STATEMENT OF THE LAW

The Commonwealth contends that First Amendment to the United States Constitution is not a license to violate state or federal law and does not confer any special dispensation to journalists, so called, should they violate criminal statutes.

The evidence is clear that the Defendant's actions, as described above, have repeatedly violated the Commonwealth's criminal statutes including, but not limited to, the following:

M.G.L. Section 13A: *Picketing court, judge, juror, witness or court officer*

Section 13A. Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the commonwealth, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the commonwealth of its power to punish for contempt.

M.G.L. Chapter 268 Section 13B: *Intimidation of witnesses, jurors and persons furnishing information in connection with criminal proceedings:*

Section 13B. (a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:—

"Investigator", an individual or group of individuals lawfully authorized by a department or agency of the federal government or any political subdivision thereof or a department or agency of the commonwealth or any political subdivision thereof to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of such individual's or group's official duties.

"Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, a device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.

(b) Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a: (A) witness or potential witness; (B) person who is or was aware of information, records, documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order; (C)

judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; (D) person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or (E) family member of a person described in this section, with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment. If the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment, such person shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of corrections for not more than 2 1/2 years or by a fine of not more than \$10,000 or by both such fine and imprisonment.

(c) A prosecution under this section may be brought in the county in which the criminal investigation, trial or other proceeding was being conducted or took place or in the county in which the alleged conduct constituting the offense occurred.

ARGUMENT

A. The Actions for which the Defendant is Charged are not Protected Speech and Neither the First Amendment to the United States Constitution nor Article XVI of the Massachusetts Declaration give the Defendant the right to break the law

It is well settled, and not in dispute here, that freedom of speech and freedom of the press, which are protected by the First Amendment and Fourteenth Amendment against infringement by Congress and the states, are among the most fundamental

personal rights and liberties of the people. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938). First Amendment protection, however, has never been permitted by the courts to be used as a shield to protect persons where speech has been used as an integral part of criminal conduct. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572, (1942). Specifically, the constitutional guarantees of free speech and free press will protect advocacy from the force of law or criminal violation except where such advocacy is directed to inciting or producing imminent lawless action and/or is likely to incite or produce such action. United States v. Rundo, 990 F.3d 709, 713 (9th Cir. 2021) Accordingly, a State may forbid or proscribe advocacy where such speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447(1969) (*per curiam*). Specifically the police power of a state, may lawfully punish words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Watts v. U.S. 394 U.S. 705, 707 (1969). The test of the constitutionality of any statute which in any way criminalizes conduct which contains speech as a component is whether protection of speech in such instances is clearly outweighed by the “social interest in order and morality.” Chaplinsky, supra at 572.

Massachusetts has enacted G.L. 268 sec. 13B to protect the sanctity of the judicial system and guarantee that any witness or potential witness may testify in the courts of the Commonwealth without fear of harassment, intimidation or bodily harm to either them or their families. Under this statute an action need not be overtly threatening to fall within the meaning of intimidation. Commonwealth v. Gordon, 44 mass. App. 233, 235-236 (1998). Neither does the statute require that the intimidation

actions be successful in causing fear. Commonwealth v. Robinson, 444 Mass. 102, 109 (2005). As an example, in the Casiano case, a defendant was convicted of witness intimidation under the statute when he saw an undercover officer in the courthouse corridor, took out his cell phone and pointed it at the officer as if he were taking his picture. Commonwealth v. Casiano, 70 Mass. App. 705, 706 (2007). In that case, there was no evidence that any picture was actually taken nor was there any evidence that the officer actually felt intimidation. Id.

In the age of social media ,where the ease in which unmediated content may be widely disseminated, has greatly increased the potential for sparking criminal disorder. Professor Lyrissa Lidsky of the University of Florida Law School has succinctly pointed out the dangers as she wrote:

Social media increase the number of individuals who can engage in unmediated communication, which inherently increases the probability of incendiary speech. Moreover, the sheer size of prospective audiences also increases the potential for violent audience reactions, Audience size matters: the bigger the audience, the greater the chance that at least one audience member will respond with violence to speech. Lidsky, L. Incendiary Speech and Social Media, 44 Tex. Tech Law Rev. 147, 149 (2011)

The use of social media for the purpose of witness intimidation has been described at being at a “near epidemic level” by the Philadelphia D.A.’s Office. Kevin McCorry, Witness Intimidation as “Near Epidemic Level. NewsWorks.org (April 11, 2013). The following examples are indicative of the problem in Massachusetts and nationwide:

In Grafton, Massachusetts, seven teenagers were arrested in January 2014 on felony witness intimidation charges for allegedly cyber bullying the 15-year-old victim of a violent crime. The teenagers were friends of the person charged with committing the crime, and they allegedly harassed the victim on Facebook and

Twitter over a period of several months, making threats and demeaning comments

In Santa Fe, New Mexico, a 19-year-old man was charged with using comments on his Facebook page to intimidate a witness in a counterfeiting case pending against his father, a former police officer;

In Brooklyn, New York, four supporters of an Orthodox Jewish counselor charged with child molestation took a photo of his accuser while she was on the witness stand and posted it on Twitter. They were ordered to leave the courtroom and were later charged with witness intimidation;

In Napa County, California, 19-year-old Manuel Ramirez was arrested in September 2012 on charges of witness intimidation. Ramirez, a known gang member, posted information on a social media site about the alleged victim in an alleged gang-related fight after the victim testified in a court hearing;

In Baton Rouge, Louisiana, Anthony Williams and Bobby Riley were indicted in July 2013 on federal witness intimidation charges after they posted threats on Instagram to harm a witness. The witness had testified during the April 2013 trial of Angela Myers, who was convicted of filing false claims for tax refunds using the names and Social Security number of identity theft victims;

In Virginia, U.S. Attorney Timothy Heaphy successfully prosecuted John Conner and Whitney Roberts on witness intimidation charges after they set up and used a Facebook account to expose and intimidate witnesses preparing to testify against Conner on charges that he burned two houses to punish a girlfriend and collect the insurance. Among the offending posts was one that read, "How the hell can u b a gangsta when u snitchin and lien"

Upstate New York has witnessed more than its share of witness intimidation through social media. In October 2013, drug defendant David McKithen was convicted in Buffalo of intimidating a witness and witness tampering. McKithen received grand jury testimony and witness statements from his defense attorney, but then sent the material to his then-girlfriend (and later wife) Deyanna Daniels to post on Facebook on the eve of trial. After the grand jury testimony and statements were posted to Facebook, two witnesses received threats to themselves and members of their families. It was unclear how long the material had been on Facebook, but it was removed soon after one of the witnesses' mothers discovered it. In addition, McKithen's intentions appeared clear in a phone call recorded in jail while he was awaiting trial, in which he said "Nobody talks, everybody walks." Erie County District Attorney Frank A. Sedita III noted that criminals' use of social media for intimidation was "very troubling," saying that, "[t]hey're using technology to intimidate people. They used to show up at your door or leave a threatening note. Technology makes it easier to intimidate witnesses. All you have to do is have a keyboard." Sedita also called such witness intimidation "the No. 1 impediment to me doing my job as a prosecutor";

Meanwhile, in Albany, New York, in April 2014, Rahkiem Johnson pled guilty to felony charges of intimidating a witness. The 19-year-old Johnson had posted on his Facebook page the photo and name of another young man who was a witness in a botched robbery/shooting case pending against another teen, El-Khalim Myrick. Johnson also included the words, “WANTED,” “Reward \$1,000,” “He's a [[expletive] RAT!” and “I Got a Bounty on His Lil [expletive] Head”;³³

In Steubenville, Ohio, the case of an alleged rape of a 16-year-old girl by two star Steubenville High School football players gained national exposure, in part because social media permeated the case. Evidence of the assault was posted to social media sites like Twitter and You Tube, and it was a backlash on social media to law enforcement's initial hesitation to bring charges that put the case in the national spotlight. Prior to the conviction of the two defendants, two teenaged girls were charged with felony witness intimidation for tweets in which they harassed and threatened to kill the rape victim. In addition, a number of other Twitter users posted messages condemning the victim's character. Ohio Attorney General Mike DeWine stated, “People who want to continue to victimize this victim, to threaten her, we're going to deal with them and we're going after them.” Browning J., *Snitches Get Snitches: Witness Intimidation in the Age of Facebook and Twitter*, 35 Pace L. Rev. 192, 197-200 (2014)

One of the most insidious forms of intimidation prevalent on the internet today is the practice of “doxing.” Doxing (sometimes written as Doxxing) is the act of revealing identifying information about someone online, such as their real name, home address, workplace, phone, financial, and other personal information. That information is then circulated to the public — without the victim's permission. One of the most grievous examples of doxxing occurred in the spring of 2022 when an unknown employee of the U.S. Supreme Court leaked the draft opinion in the *Dobbs v. Jackson Women's Health Organization*, which indicated that six justices had voted to overturn *Roe v. Wade*. As the opinion was expected to be released at the end of the Court's term sometime in late June, and could potentially be changed prior to its release, activist groups undertook a campaign to attempt to intimidate the justices into “changing their minds.” On Tik Tok, a social media platform, activists doxxed personal information about the six justices who were revealed to have voted to overturn *Roe*, making public the justices' physical

addresses, IP addresses, and credit card information, including CVV and expiration date. Soon afterward and with this information, massive protests were staged directly outside the justices' homes in an attempt to make them change their decision.

On June 8, 2022, Nicholas Roske traveled to the home of Brett Kavanaugh, an associate justice of the United States Supreme Court, with plans to break in Kavanaugh's home, kill him, and then commit suicide. After arriving at Kavanaugh's residence, Roske told police he was frustrated with the leaked Supreme Court decision that was poised to overrule *Roe v. Wade*.¹ The sole purpose and intent for doxing is to incite others to commit harassing, intimidating and illegal acts. Accordingly, it is not considered protected speech in any regard.

Here, the Defendant, by his own admissions and self-documentation, has illegally conspired with a police department dispatcher to "run the license plates" of witnesses to determine where they live. With that information, he has personally visited and harassed witnesses at their homes, gone to sporting events of the children of witnesses and harassed them, telephoned the work places of witnesses and harassed witnesses. He has additionally, by use of his social media platform, he has published (doxxed) the personal information and addresses of these witnesses and organized and directed his followers to visit and harass witnesses' homes and other venues where they or their family members may be. As in the case of the Justice Kavanaugh, the sole purpose of the Defendant in doxing personal information about the witnesses in this case was to

¹ Lybrand, Holmes; Sneed, Tierney (July 27, 2022). *"FBI says man accused of attempting to kill Brett Kavanaugh said he was 'shooting for 3' justices"*. CNN. Retrieved October 30, 2022.

incite the many followers of his internet site into confronting and intimidating these witnesses.

The First Amendment protects persons and journalists who report the news and offer opinions on matters pending in the courts. It does not give license for people to obstruct justice and interfere with the judicial system. Accordingly, without appropriate protection for witnesses and decision makers, justice would be corrupted and subject to mob rule and intimidation. Massachusetts has enacted constitutional means to protect the integrity and safety of witnesses to judicial proceedings such as G.L. c. 268 sec. 13B. Absent such protections the right to a fair trial would become superfluous.

B. The Conditions of Bail Set by the District Court are not Overbroad

Mass. Gen. Laws c. 276 sec. 58 specifically permits a judge or clerk magistrate to set conditions of bail to insure the protection of witnesses or victims to a crime. The pertinent portion of the statute states:

If the justice or clerk or assistant clerk of the district court, the bail commissioner or master in chancery determines it to be necessary, the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release.

In the case at bar, the District Court followed accepted practice to protect those witnesses who have been harassed by the Defendant. These orders, which mandate no contact, or institute keep-away distances are similar to those commonly issued daily in Massachusetts criminal cases as well as in cases of domestic abuse under G.L. c. 209A and domestic relations cases. Here, the Court mandated that the Defendant not contact any of the witnesses or their families or go to their homes or places of business.

Contrary to the Defendant's sworn affidavit, the Court placed no restrictions upon him in "reporting News" about the Karen Read case. Nor has he been prohibited from "following investigative leads" and reporting on those leads. Moreover, the court specifically noted that the Defendant was not prohibited from attending court sessions if witnesses were present. The Defendant's bail conditions only prevent him from contacting and /or harassing any witnesses in the case. Further, contrary to the Defendant's affidavit, he is not barred from going to the Norfolk District Attorney's Office for any legitimate purpose as long as he has no contact with the State Police Detective who is a witness in the Karen Read case. Additionally, he is not barred from going anywhere in "Downtown Canton" with the exception of the pizza shop owned by Witness Albert, as it is the witness' place of business. He has been not been prevented from going to Canton Town Hall for any lawful purpose, as long as he does not directly confront witness Albert, who is a town selectman. The stay away order issued to protect witness Albert was issued due to the fact that the Defendant had a history of obstructing town business at select board hearings by harassing witness Albert about the Karen Read case.

Although the Defendant asserts that he has not intimidated or threatened any of the witnesses, the witnesses have complained of threats and intimidation by him to the point where the Stoughton District Court has issued multiple criminal complaints against the Defendant. The conditions of bail set by the District Court are not overbroad as they only restrict the Defendant from contact with witnesses who are the identified victims of the Defendant's harassment. Moreover, they restrict him only from inciting others to

harass these witnesses or their families at their homes, places of work or their children's schools.

Protection of victims and witnesses is a key provision of Massachusetts bail law as its aim is to insure that witnesses will feel free to report crimes and testify in court. Here, because part of the intimidation was done under the guise of "reporting", the court had to issue those orders necessary to prevent further harassment or abuse. As such, those orders were tailored specifically to the Defendant's case and are not overbroad in the least.

CONCLUSION

Neither the First Amendment to the U.S. Constitution nor the Massachusetts Declaration of Human Rights grants the Defendant, whether he be a journalist or not, the right to interfere with the justice system and intimidate witnesses to a crime. The conditions of bail issued by the district court are not overbroad and have been specifically tailored to the facts of the charges pending against the Defendant and should be affirmed. The Commonwealth further requests that the Superior Court impose any further conditions of bail on the Defendant as the Court may deem appropriate.

Respectfully submitted,

For the Commonwealth
By its Special Prosecutor,

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CERTIFICATE OF SERVICE

I, Kenneth S., Mello, Esq., hereby certify that I have caused a copy of the foregoing to be served upon counsel for the Defendant, Timothy J. Bradl, Esq., via email to timbradl@msn.com on this 31st day of October, 2023.