

NORFOLK, SS: COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT, STOUGHTON DIVISION
DOCKET Nos.

COMMONWEALTH

v.

AIDAN KEARNEY

EMERGENCY MOTION FOR PROTECTIVE ORDER

Now comes the defendant in the above-entitled matter, by and through undersigned counsel, and respectfully moves for a protective order seeking, *inter alia*, a Court order mandating that the district attorney and state police cease and desist from searching Mr. Kearney's electronics seized in the instant case, unless and until an independent special master-headed third party screening team ("taint team") can be appointed. See *Preventive Medicine Associates v. Commonwealth*, 465 Mass. 810 (2013) (Full bench decision from SJC approving lower Court taint team order and mandating for future cases that where [as here] target of search warrant is indicted [or complained against or even where attorney involvement pre-charge, see fn. 12] that "before any search of these emails may take place, the Commonwealth must present to a Superior Court Judge and obtain the Judge's approval of the search protocol to be used and specifically the procedures proposed to protect against searches of privileged communications between the defendant and his attorneys.")

In compliance with the command of *Preventive Medicine, supra*, Mr. Kearney respectfully requests:

1. An order requiring the prosecution and police to cease and desist from searching any devices until further orders issue from the Superior Court after hearing;
2. The appointment of a taint team headed by a Court-appointed special master to screen the search of his devices and shield privileged materials from investigators;
3. That since the Norfolk County District Attorney is conflicted out of the case, has appointed a special prosecutor, and is therefore not an appropriate source for a taint team, that a third party special master be appointed at Commonwealth expense;
4. The return of the devices since, upon information and belief, mirror images of the contents have been taken according to standard investigative protocols for retention and analysis by police, rendering the continued seizure unreasonable under the Fourth Amendment and Article Fourteen of the Massachusetts Declaration of Rights; and
5. The provision, as required by *Preventive Medicine*, of all data reviewed by the taint team segregated by presumptively privileged material and reviewable material for review and comparison by the defense.

INTRODUCTION

Mr. Aidan Kearney is an investigative journalist who owns, reports from, and operates a number of news outlets that broadcast over the internet through YouTube, Facebook, and his own websites and web pages. He livestreams news, investigates serious matters of public concern, and often breaks stories before viewers' very eyes live on air. He offers pointed and unapologetic commentary to his viewers, which number in six figures, and cumulatively reach into the millions. He protests, urges boycotts, engages in political hyperbole, satire, rhetorical confrontation, rallies his supporters in the field, chases down witnesses and investigative targets wherever they may be found, petitions the government for redress, and exposes corruption by

government officials. He practices advocacy journalism, and provides in-depth, well-sourced factual reporting, often accompanied by a call to action for justice and truth.

Police, prosecutors, and some jurists do not like his methods and disagree with his opinions and conclusions on particular matters. For the first time in Massachusetts, and possibly the country, these police and prosecutors in the Stoughton District Court have decided that time-honored journalistic tactics and hard-nosed investigative reporting may now be criminalized into felonies.

Here, Mr. Kearney has criticized, embarrassed, and exposed wrongdoing by investigators working on a particular criminal matter pending in the Norfolk Superior Court. This same group of investigators from the state police assigned to the Norfolk District Attorney's Office has now utilized the witness intimidation statute against Mr. Kearney in a brazen effort to silence him on the very same case they are prosecuting. They for the first time have used the witness intimidation statute in an unprecedented way for their own personal benefit to stop Mr. Kearney in the exercise of his fundamental right to speak out and petition the government for redress under the First Amendment. They have seized the tools of his trade by ransacking his home and seizing his phones and computers, they have arrested him at his children's bus stop, and they have perverted the use of an already unconstitutionally overbroad statute to suppress his voice and ability to investigate.

PRIVILEGED MATERIAL AT RISK

Mr. Kearney's phones and computers ("the devices") are full of attorney-client privileged communications and materials from matters in two Superior Courts and one District Court. There are also privileged communications regarding attorney-client consultation on the legality of matters ultimately raised in the instant case as well. In addition, there are a plethora of other

privileged materials on the devices relating to “thousands of confidential sources who have sent me information and tips for stories under the condition of anonymity. All of these sources are in danger of being exposed and their privacy violated.” This includes *police sources* from past cases and current pending cases Mr. Kearney is covering. These very investigators whom he has exposed on the Karen Read murder case “will now be able to find out the identities of their colleagues who bravely stepped forward to offer up information on their coworkers...” if they are allowed to avoid required Court hearings analyzing the applicability of the journalist-source privilege.

This flies in the face of the requirements of the First Amendment and Article Sixteen of our Declaration of Rights. Before ordering a reporter to divulge a source and the information gathered, a judge must “consider the effect of compelled disclosure on values underlying the First Amendment and art. 16.” *Petition for Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Info.*, 395 Mass. 164, 171 (1985). Accordingly, a judge must balance the public interest in the use of every person’s evidence against the public interest in protecting the free flow of information. *Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 599 (1991). See also *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 403 n.33 (2005). The law does not trust, and in fact prohibits, law enforcement from making these determinations behind closed doors alone with Mr. Kearney’s captured devices.

Further, there are also reams of exculpatory evidence that need to be accessed from Mr. Kearney’s devices critical to establishing his defense herein, HIPAA private medical documents and communications, countless materials Mr. Kearney needs to access for ongoing unrelated stories he is working on, and many completely irrelevant and immaterial friend and family communications sensitive and private in nature.

SEARCH WARRANT

The Commonwealth has violated the command of *Preventive Medicine, supra*. In their zeal to suppress Mr. Kearney's voice, they have willfully ignored the law, failing to assure any Court that privileged communications exposed in the search will be protected. In any event, under *Preventive Medicine*, this process must be done with the involvement of the defendant and of the Court, and cannot be satisfied *ex parte*. "The defendants' involvement in the review procedure in particular is a crucial check against the potential for mistakes or abuse by the taint team." *Preventive Medicine, at 828*. Further, "judicial supervision is essential" where the Commonwealth seeks to search the e-mails of an indicted defendant, because of the risk that privileged attorney-client communications will be included in those e-mails. *Id. at 821*. "[B]efore any search of those e-mails may take place, the Commonwealth must present to a Superior Court judge and obtain the judge's approval of the search protocol to be used and specifically the procedures proposed to protect against searches of privileged communications between the defendant and his attorneys. Court supervision is necessary because the harm to the defendant could be irreparable if the Commonwealth viewed privileged materials, even if only by accident. Further, unless the Commonwealth can demonstrate a compelling contrary reason, the defendant must have an opportunity to be heard before the judge approves a particular search method." *Id. at 823-24*, (footnotes omitted). Here, no such involvement has been offered, in fact, the Commonwealth reportedly opposes such efforts in full.

RELIEF REQUESTED

The Commonwealth has placed the Court at a crossroads. They have ignored blackletter law in place for the protection of fundamental rights. Court intervention is needed to vindicate

the First Amendment, Article Sixteen, the rights of journalists, the defendant's fundamental right to defend himself and to seek counsel, and the right to petition the government for redress against an unlawful seizure.

Here, the Commonwealth has brazenly trampled all of these protections, and has completely forsworn its duty to do justice and support and defend the Constitution. Judicial intervention is legally required, necessary, and appropriate, ordering the Commonwealth to cease and desist, allowing return and access to Mr. Kearney's devices, and ordering a Superior Court hearing at which a special magistrate should be appointed to protect Mr. Kearney's privileged information as set forth above.

WHEREFORE, Mr. Kearney respectfully requests that the Court grant the relief requested, and any such other relief as the Court may deem necessary and appropriate.

Date: November 20, 2023

Respectfully Submitted,

Aidan Kearney
By Counsel,

/S/TIMOTHY J. BRADL
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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, that the foregoing facts stated 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/AIDAN KEARNEY
Aidan Kearney

CERTIFICATE OF SERVICE

I, Timothy J. Bradl, do hereby certify that I have served Counsel of record for the Commonwealth, by hand or email and/or first class mail, postage paid on the foregoing date with a true copy of this motion / memorandum.

TJB
/s/ Timothy J. Bradl