COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
SINGLE JUSTICE No.:
_____

ON COMBINED APPEAL FROM LOWER COURT MATTERS:
Norfolk Superior Court Criminal No. 2282CR00117
Dedham District Court Criminal No. 2382CR00313
Dedham District Court Restraining Order No. 2354RO0429

COMMONWEALTH	)	
v.	)	**DEFENDANT'S EMERGENCY PETITION FOR RELIEF FROM ORDER REVOKING BAIL BROUGHT PURSUANT TO G. L. c. 211 § 3**
AIDAN KEARNEY, **Petitioner/ Defendant**	)	

INTRODUCTION

Now comes the petitioner, Aidan Kearney, by and through undersigned counsel, and hereby requests that the Single Justice vacate the bail revocation entered in the above-referenced Dedham District Court criminal action, and return him to release on personal recognizance, a personal surety, or a reasonable bail with a stay away order.

This petition is brought to remedy the Dedham District Court's error-laden revocation of a Superior Court bail against petitioner Aidan Kearney. The District Court did not properly apply the applicable bail revocation statute, G.L. c. 276 sec. 58, and unlawfully revoked the bail because (1) Mr. Kearney's release will not "seriously endanger any person or the community" as a matter of law in light of the complainant's minor, *de minimis* allegations and Petitioner's lack of criminal record, (2) detention of

Mr. Kearney is not "necessary to reasonably assure the safety of any person or the community", in light of the allegations, (3) the Court made no written findings justifying its actions as required by law in section 58, (4) the Court revoked the prior Superior Court bail for 90 days when the maximum under section 58, is 60 days, and in any event should never have been revoked at all, and (5) stay away orders and a restraining order are in place, and constitute appropriate, adequate protections in the circumstances. Mr. Kearney respectfully requests that the Single Justice render a speedy de novo decision on the trial court's defective bail revocation.

Mr. Kearney has additionally been the victim of a coordinated full court press by police and prosecutors across the above-captioned three cases against his First Amendment rights and his investigative, muckraking journalism. Mr. Kearney did not commit crimes in connection with this district court complainant, and was instead set up by investigators who used a troubled woman to exact revenge with false charges. He also asks the Single Justice, once the bail issue is determined, to reserve and report the further issues raised in his trio of cases to the full bench for briefing, solicitation of amici, and argument, as follows:

1. The bail revoked out of Norfolk Superior Court for sixteen counts of witness intimidation, picketing and related conspiracy indictments was set on unprecedented and unconstitutional charges, infringing on defendant's first amendment rights and brought in violation of procedural and substantive due process for lack of notice that the conduct-peaceful investigative journalism, satire, and political hyperbole- was now deemed, for the first time, the crime of witness intimidation under G.L. c. 268 sec. 13A and B. The statute is

vague, overbroad, and violates the First Amendment and Article 16. The District Court's defective bail revocation inflicts particular irreparable harm on Mr. Kearney, warranting review by the full bench. The order deprives him, as a professional journalist, of the ability to investigate the Read case as it develops, and stealing from him forever, for each day of incarceration, the ability to exercise his fundamental rights under the first amendment and article 16. He cannot wait for the normal appellate review process because his rights will be lost forever and the unlawful campaign to suppress Mr. Kearney's reporting will have prevailed over the First Amendment and Article 16.

2. The restraining order granted in Dedham District Court based on the same allegations in the Dedham District Court criminal matter contained an overbroad, vague, unlawful prior restraint[1] in that it ordered Mr. Kearney, by way of an ex parte telephone hearing, in paragraph 14, "Not to disclose confidential DCF records and/or court records relating to the plaintiff." See Restraining Order, para. 14, filed herewith.

[1] *Shak v. Shak*, 484 Mass. 658, 661 (2020) recognized the necessity of immediate review of a prior restraint thus: "Because the prior restraint of speech or publication carries with it an "immediate and irreversible sanction" without the benefit of the "protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted," it is the "most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand"). As "one of the most extraordinary remedies known to our jurisprudence," *Nebraska Press Ass'n*, 427 U.S. at 562, in order for prior restraint to be potentially permissible, the harm from the unrestrained speech must be truly exceptional. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). A prior restraint is permissible only where the harm expected from the unrestrained speech is grave, the likelihood of the harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive means to mitigate the harm. See *Nebraska Press Ass'n*, supra. [Endnotes omitted].

3. Mr. Kearney's telephones and computers were seized in connection with the now-Superior Court indictments regarding witness intimidation and picketing, and the State Police and the Special ADA appointed have not provided copies of the contents of the devices and have not provided the Superior Court with a written plan to search the items with a third party screening "taint team" as they have agreed and as is required by *Preventive Medicine Associates, Inc., and another v. Commonwealth*, 465 Mass. 810 (2013) (Third party screening team required where items to be searched may contain privileged material). See Emergency Motion for Protective Order, filed herewith, outlining risks and irreparable harm.

All of these measures are part of a coordinated effort to suppress Mr. Kearney's first amendment rights. Without the intercession of the full bench, they will succeed.

SINGLE JUSTICE JURISDICTION FOR BAIL ISSUE

The proper means for review of errors of law attendant to a trial court bail revocation is through a petition to the Single Justice, invoking the court's inherent authority to correct errors and abuses in inferior courts, as codified in G.L. c. 211 sec. 3. See *Commonwealth v. Pagan,* 445 Mass. 315 (2005); *Commonwealth v. Delaney*, 415 Mass. 490 (993) (Two leading bail revocation cases where full SJC bench accepted appeals from the single justice and heard the cases on the merits without questioning Single Justice jurisdiction). In *Commesso v. Commonwealth*, 369 Mass. 368, 372 (1975), the full bench upheld the jurisdiction of the single justice to review bail determinations under Section 58. The Court stated:

We therefore uphold the jurisdiction of the single justice to review bail determinations under Section 58. . . . Similarly, we think the full court has jurisdiction to review, on exceptions, report, or appeal, questions of law arising in a bail determination by a single justice under Section 58. G. L. c. 211, Sections 5, 6. Cf. *Stranad v. Commonwealth,* 366 Mass. 847 (1974); *Commonwealth v. Baker*, 343 Mass. 162 , 163 (1961).

Commesso, 369 Mass. at 373-74. In addition to confirming such jurisdiction in the Single Justice session and the full court for questions of law, the *Commesso* bench allowed de novo review of a bail determination in the Single Justice session:

> The statute is not explicit as to the role of the single justice. 'Relief in this type of case must be speedy if it is to be effective.' *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Bail determinations must often be done in haste, "without that full inquiry and consideration which the matter deserves." Id. at 11 (opinion by Jackson, J.). We therefore think that the single justice has the power to consider the matter anew, taking into account facts newly presented, and to exercise his own judgment and discretion without remanding the matter for reconsideration by the Superior Court judge. Id. at 373.

Thus the Single Justice session is the proper forum and the framework for review is to honor the need for a speedy resolution for an incarcerated petitioner by allowing the Single Justice to decide the matter anew without remand under *Commesso, supra.* There is then the possibility of an appeal to the full bench on errors of law only.

APPLICABLE BAIL STATUTE

Here, Mr. Kearney was at liberty on personal recognizance and stay away orders in connection with Norfolk Superior Court criminal number 2282CR00117, alleging sixteen counts of witness intimidation, picketing under G.L. c. 268 secs. 13A and B, and conspiracy to commit same. [2] The Superior Court recognizance and conditions were set under G.L. c. 276 section 57, which governs bail determinations in Superior Court. Thereafter, Mr. Kearney was arraigned on December 26, 2023, in Dedham District Court on the second case, alleging one count of domestic assault and one count of witness intimidation to which Mr. Kearney absolutely denies without qualification and pleads not guilty.

At arraignment on the second case, the Dedham Court revoked the Superior Court bail determination and held Mr. Kearney for 90 days according to the docket. See Dedham District Court docket no. 2382CR00313, filed herewith. Section 58 of chapter 276, the applicable bail revocation statute, provides, after probable cause is determined for the new offense,:

> the court shall then determine, in the exercise of its discretion, whether the release of said person will seriously endanger any person or the community. In making said determination, the court shall consider the gravity, nature and circumstances of the offenses charged, the person's record of convictions, if any, and whether said charges or convictions are for offenses involving the use or threat of physical force or violence

[2] These unprecedented charges for protected acts of journalism are brought in violation of the First Amendment, Article 16 of the Massachusetts Declaration of Rights, substantive and procedural due process protections, and related case law defining overbreadth, vagueness, chilling effects, and related provisions. See *infra.*

> against any person, whether the person is on probation, parole or other release pending completion of sentence for any conviction, whether he is on release pending sentence or appeal for any conviction, the person's mental condition, and any illegal drug distribution or present drug dependency. If the court determines that the release of said person will seriously endanger any person or the community and that the detention of the person is necessary to reasonably assure the safety of any person or the community, the court may revoke bail on the prior charge and may order said person held without bail pending the adjudication of said prior charge, for a period ***not to exceed sixty days***. G.L., c. 276 sec. 58. (Emphasis added).

The petitioner respectfully asks that the Single Justice reverse the order revoking the bail, as the required showing has not been made.

THE PETITIONER, AIDAN KEARNEY

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.

Mr. Kearney has focused his investigative reporting on a pending murder case in Norfolk Superior Court, Commonwealth v. Karen Read, #2282CR00117. When the instant District Court domestic charges were lodged, Mr. Kearney was out on personal recognizance after being charged with crimes related to intimidation of witnesses in the Karen Read murder case. Ms. Read has been charged in the 2022 death of her boyfriend, Boston Police officer John O'Keefe. Mr. Kearney has been an outspoken supporter of Ms. Read, and has frequently detailed why he believes Read was framed. The case has garnered national attention, thanks to Kearney and his detailed series "Canton Cover Up.".

Police and prosecutors do not like his methods and disagree with his opinions and conclusions on particular matters. For the first time in Massachusetts, and in the country[3], police and prosecutors in Norfolk County have indicted a journalist for engaging in fully constitutional journalistic endeavors, under the influence of a brazen, unethical conflict of interest. Time-honored journalistic tactics and hard-nosed investigative reporting have now been criminalized into felonies in Norfolk County .

Here, Mr. Kearney has criticized, embarrassed, and exposed wrongdoing by investigators working on the Read matter pending in the Norfolk Superior Court. This same group of investigators from the state police assigned to the Norfolk District

[3] Two experienced paralegals on the defense team have performed exhaustive research and have not located a single case where a journalist has been criminally prosecuted for the time-honored journalistic methods employed herein by Mr. Kearney and used as a basis for criminal charges in the above-referenced Norfolk Superior Court criminal action. See paralegal's affidavits field herewith. Further, petitioner has offered many internet links of journalists engaging in the same conduct all over the state and country with impunity, where often networks and news outlets brag and advertise such tactics as badges of honor. See affidavit of Aidan Kearney, filed herewith.

Attorney's Office has now utilized the witness intimidation statute against Mr. Kearney in a transparent effort to silence him on the very same case they are prosecuting, and stem his repeated exposure of their failures, or worse, on the Read case. 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, G.L. c. 268 sec. 13B, ("witness intimidation") to suppress his voice and ability to investigate.

These efforts have unconstitutionally chilled Mr. Kearney's speech. He reports: "Here are some examples of ways in which my reporting and speech have been limited as a result of these orders.

1. I have had to miss 3 Select Board meetings because Chris Albert is a member of the Select Board. At all of these meetings the Karen Read case is brought up, and I cover them in my reporting. I am unable to film or interview people at the meeting.
2. I could not attend a historic Special Town Meeting, in which the citizens of Canton voted to audit the Select Board, because I knew that several of the witnesses would attend.
3. [Prosecutor] Mello put it in writing that he believes I violated the order, despite not once contacting any of the 8 individuals. This suggests that he believes that me even talking about any of these 8 people is a violation of

the order. If I have to constantly worry about being arrested for violating the order if I talk about these people it will create a chilling effect that will prevent me from talking about them at all.

4. For two weeks I stopped doing live shows as a result of this chilling effect. Instead I had to do pre-recorded videos because I am in constant fear that the government will take things that I said out of context and turn them into violations. This is a perfectly legitimate fear because we've seen the government do this repeatedly in the charging documents. The best example is how they baselessly claim that I called Chris Albert's pizza shop and ordered food that I intended not to pick up.
5. Nine more people have been charged with witness intimidation for protesting peacefully[4] outside of Chris Albert's business. They are attempting to tie this to me.

Police and prosecutors have ignored the First Amendment itself, precedent establishing protection for political hyperbole, precedent established to protect journalists receiving secret or confidential materials in no less than the Pentagon Papers litigation in 1971, and protections established by this Court for searching a defendant's records that may contain privileged materials. See *Preventive Medicine, supra*.

Mr. Kearney asks to be released by the Single Justice and that the full bench hear the foregoing other issues with adequate time to solicit amici, brief the case and hear oral argument on the issues raised.

[4] These respondents are known in the media as the "Canton 9". One, a juvenile, on information and belief, obtained a finding of no probable cause. The other eight are adults and the clerk-magistrate hearing results are pending as to whether the complaints will issue for witness intimidation and/ or picketing under G.L. c. 268 sec. 13A\B.

ARGUMENT

FACTORS TO BE CONSIDERED ON SECTION 57 BAIL REVOCATION

The District Court must use the statutory factors to decide whether "…. the release of said person will seriously endanger any person or the community and that the detention of the person is necessary to reasonably assure the safety of any person or the community", Id. and then if so, "may" revoke bail. Id.

The first factor is the "gravity, nature and circumstances of the offense charged." Taking the complainant's allegations, (to which Mr. Kearney respectfully states are lies including the expository allegations leading to their encounter), she admits stealing his personal property consisting of notes from his review of her phone, which she invited him there to review. See Medfield police report, filed herewith. She "proceeded to the living room couch where the note pad still was. Gaetani stated she crumpled the paper, placed it inside her shirt and Kearney came to the living room." The complainant alleges Mr. Kearney "grabbed her by the shoulder, turned her towards him, grabbed her wrist in an attempt to get the paper back, did not find it and pushed her in the back onto the couch." "Gaetani advised me she did not have any visible marks or injuries and refused medical treatment." Thus, taking the allegations as they are, in an incident instigated by the complainant where she stole his property, she fell or was pushed on to the couch with no injuries.

The nature and circumstances attendant to this fact pattern do not "seriously endanger" the complainant or anyone else in the future. They do not support a finding that "detention … is necessary" to reasonably assure complainant or anyone else's future safety. The complainant has described *de minimis* physical contact resulting in her

landing on a couch with no mark or injury occasioned by her own theft and destruction of Mr. Kearney's notes. The government is alleging only a minimal incident on its face, not seriously endangering anyone at the time, and not creating a serious future risk warranting necessary pretrial incarceration due to dangerousness. As to verbal interactions allegedly providing a source for a single witness intimidation charge, Mr. Kearney absolutely denies any intimidating conduct, which conduct itself is not a basis for a finding of a future risk of seriously endangering the complainant or the community.

The words of the statute have to be given their meaning. Merriam-Webster.com defines "serious" as "having important or dangerous possible consequences" and "excessive or impressive in quality, quantity, extent or degree." In a related context, "serious bodily injury" is defined under Massachusetts law as permanent disfigurement, loss or impairment of a bodily function, limb or organ. See G.L. c. 265 sec. 13(A)(b)(i). Petitioner is not asserting that serious bodily injury is necessary for the finding, but is rather pointing out that the word "serious" is not merely window dressing or surplusage. It is patently self-evident that the allegation described does not create such a future serious risk making detention "necessary". If detention is not necessary, it may not be ordered, and Mr. Kearney should be returned to bail. If the incident does not provide a basis for a "serious" risk in the future, Mr. Kearney should be returned to bail. The order is faulty on both grounds.

The next factor is whether the respondent has any criminal record. Here, Mr. Kearney has no record of convictions whatsoever and only has a pending Superior Court matter. Before the false allegations lodged here, Mr. Kearney was on personal recognizance enjoying the holiday season and his birthday with his children and family.

He had, and has, absolutely no intent to contravene any bail warnings, restraining orders or stay away orders. It would be absurd and irrational for Mr. Kearney to risk his liberty in the way alleged by complainant. In any event, Mr. Kearney's status as a lifetime law-abiding citizen (he was an Eagle Scout) obviously gives no basis for the District Court's detention order and militates strongly in the opposite direction.

The next factor is whether charges or convictions involve the use of force or threat of physical force. While the misdemeanor assault and battery charge does allege this factor, as set forth above the allegation facially supporting the charge does not satisfy the "serious" and "necessary" standards. The mere category of charge itself, in light of this alleged fact pattern, is wholly insufficient to make incarceration "necessary".

The Court is to also consider whether the person is on probation, parole or other release pending completion of sentence for any conviction, whether he is on release pending sentence or appeal for any conviction. Mr. Kearney has no convictions and the issues of probation, parole, release pending sentence, or on appeal of a conviction are non-factors.

Finally there are no issues regarding Mr. Kearney's "mental condition, and any illegal drug distribution or present drug dependency", non-factors in a dangerousness/ seriousness analysis in this matter.

Analyzing the factors to be considered, there is no rational path to a lawful finding that Mr. Kearney would seriously endanger anyone in the future, warranting incarceration.

THE COURT MADE NO WRITTEN FINDINGS

Chapter 276 section 58 states "Said order shall state *in writing the reasons therefor* and shall be reviewed by the Court upon the acquittal of the person, or the dismissal of, any of the cases involved. A person so held shall be brought to trial as soon as reasonably possible." G. L. c. 276, § 58, seventh par. (emphasis added). Here, the Court did not state in writing anything but for writing the word "allowed" on the Commonwealth's motion face. See Order, filed herewith.

Cognizant of the foregoing written reasons requirement, undersigned counsel and the defense team's investigator consulted the online docket where it indicates the alleged presence of an additional "order revoking pretrial release" but no online image of such a purported document is available. Our investigator went personally to the clerk's office and was told by Danielle, an administrative clerk's office employee, that there was no such form filled out in this case and that the Judge only endorsed the face of the Commonwealth's actual motion. That endorsement is one word-"Allowed" and does not constitute findings.

Where the trial court did not set forth its reasons for its action against the explicit statutory directive to do so, Mr. Kearney has grounds for immediate release by the Single Justice under either the superintendency power or under the right to immediate release under G.L., chapter 248 relating to the issuance of a writ of habeas corpus. He is held without statutorily required written reasons.

THE DISTRICT COURT ERRED IN ORDERING A 90 DAY REVOCATION

A Superior Court bail may only be revoked under section 58 of chapter 276, which provides, if a revocation is ordered, only a 60 day revocation. Compare sec. 58B of

chapter 276, which allows a 90 day revocation but not for bails set, as here, under section 57. See also, *Josh J., a juvenile, vs. Commonwealth*, 478 Mass. 716, n. 3 (2018) (Acknowledging applicability of only a 60 day period for revocations of section 57 Superior Court bails, as here.) While this Court should certainly rectify this error of law and clarify this issue for future cases, here the Single Justice should reverse the revocation as a matter of law based on the lack of findings, and the lack of serious danger making incarceration necessary.

THE SINGLE JUSTICE SHOULD FIND THAT ADEQUATE, PROPERLY TAILORED ORDERS ARE PRESENTLY IN PLACE

Bail revocation under § 58 is limited to cases involving subsequent serious offenses where the nature of the offense constitutes a danger. *Paquette v. Commonwealth*, 440 Mass. 121, 128 (2003). This set of allegations does not qualify. Mr. Kearney is presently subject to stay away orders and restraining orders in both pending matters. He now acutely understands how vulnerable he is to false charges and those who would like to see him personally destroyed. He has never been in jail or in trouble, and is suffering presently. See Prison Journal, filed herewith. Mr. Kearney has a stable living situation in central Massachusetts and a large supportive family who he leans on for support. He will obey all court orders as he has always done and looks forward to being vindicated. He asks the Court to vacate the order and allow him to resume contact with his two small children and family.

CONCLUSION

For the foregoing reasons, Mr. Kearney respectfully requests that the Single Justice hear the matter regarding his bail revocation, vacate the ruling of the District Court revoking bail, and return him to liberty under the prior Superior Court bail determination. He further requests that the Single Justice reserve and report the remaining issues set forth above to the full bench for the reasons stated. Finally, he requests that the Justice enter any further orders and rulings necessary to effectuate his requests, and any such other relief as the Justice deems proper.

WHEREFORE, Mr. Kearney respectfully requests that the Single Justice enter appropriate orders as above.

Dated: January 22, 2024

Respectfully submitted,
For the defendant,
AIDAN KEARNEY
By Defense Counsel,

*TIMOTHY BRADL*_____

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AFFIDAVIT OF COUNSEL

1. I, Timothy J. Bradl, on oath, do hereby depose and state that the foregoing factual statements in the instant brief are accurate to the best of my knowledge, information and belief.
2. All documents and affidavits filed herewith are true and accurate copies of the original.

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

*TIMOTHY BRADL*_____
Timothy J. Bradl

CERTIFICATE OF SERVICE

I hereby certify that on the above date a true copy of the foregoing document was served via email and by US mail upon all parties of record, SADA Kenneth Mello.

*TIMOTHY BRADL*_____
Timothy J. Bradl