

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJ-2024-0018

TRUSTEES OF BOSTON UNIVERSITY and
BOSTON GLOBE MEDIA PARTNERS LLC,

Petitioners,

v.

CLERK MAGISTRATE OF THE CAMBRIDGE DISTRICT COURT

Respondent.

BRIEF OF THE ASSOCIATION OF MAGISTRATES AND ASSISTANT CLERKS OF
THE TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS
AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Association of Magistrates and Assistant Clerks of The Trial Court of The Commonwealth of Massachusetts (the "Association") is a voluntary association of Clerk-Magistrates¹ and Assistant Clerks that provides education and advocacy services to its membership to help maintain public confidence in the integrity, impartiality, and independence of the courts. The Association has an interest in the proper functioning of the Massachusetts courts and the just and correct interpretation of the laws governing their administration.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), *amici* and their counsel declare that:

- a) no party or a party's counsel authored this brief in whole or in part;
- b) no party or a party's counsel contributed money to fund preparing or submitting the brief;
- c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and
- d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

¹ The word "Clerk Magistrate" includes Registers of Probate and anyone serving in the position of Clerk Magistrate, Clerk, Register, Recorder, Assistant Clerk Magistrate, Assistant Clerk or Assistant Register.

ISSUE DISCUSSED

1. Whether the public has a common law or constitutional right of access to applications for the issuance of criminal complaints prior to the conduct of any hearing in matters where the presiding judicial officer has determined that the hearings on such applications will be conducted in public and finds that no probable cause exists.

SUMMARY OF ARGUMENT

In Bos. Globe Media Partners, LLC v. Chief Justice of the Trial Court, 483 Mass. 80 (2019) the Court determined that hearings in the District Courts conducted in accordance with G.L. c. 218, § 35 ("show cause hearings") are not presumptively public. In making its determination the Court addressed at some length the requirements and practices of holding the written applications for complaints separate and apart from the records of other proceedings and in cases in which the application is denied the Court equated treatment of such records to a no bill returned by a grand jury. The Court recognized that making such records public would undermine the purposes of secrecy and protecting such individuals from the collateral consequences of the accusations being made. In affirming its holding in Eagle Tribune Pub. Co. v. Clerk Magistrate of the Lawrence Div. of the Dist. Ct., 448 Mass. 647 (2007)

the Court again stated that the burden to demonstrate the need to make such records public lies with the petitioner. Bos. Globe Media Partners, LLC v. Chief Justice of the Trial Court, supra at 101.

In the instant case, the Petitioners' arguments center on the Clerk Magistrate's determination that the show cause hearings themselves will be conducted in public. In advancing these arguments, however, the Petitioners presume that every fact set forth in the application itself will necessarily become public at the time of the hearing. This is not an accurate statement of the law or the practice of the District Court. The application may contain incendiary, personal identifying or irrelevant information unnecessary to the conduct of the hearing and not raised by either the petitioner or respondent at the time of the hearing. The applications may contain information about witnesses or victims not present at the time of the hearing and not considered by the Clerk Magistrate. Misnomer or misidentification of the accused is a not uncommon occurrence at such hearings and the elucidation of such information at the outset of the hearing may preclude further consideration by the Clerk Magistrate. The respondent may elect not to participate in the hearing and in the event the Clerk Magistrate determines that probable

cause does not exist the application will never become a public document. The Petitioners in this matter conflate the applications themselves with the conduct of the hearings.

The Clerk Magistrate has made a reasoned determination that the public interest will be served by the conduct of the hearings in public, that determination does not equate to a determination that the applications themselves should also become public prior to the conduct of the hearing and a finding of probable cause. In every instance in which the Clerk Magistrate determines that probable cause exists the applications themselves will become public after such a determination. The Petitioners' request is for the Clerk Magistrate to make public the applications of respondents against whom the Clerk Magistrate determines no complaint should issue.

The Court should reject the Petitioners' attempt to impose on those individuals against whom no complaint issues the injurious and collateral consequences of making the applications themselves a permanent part of the public record. To do so would both prejudice the respondents, third parties and the ability of the Clerk Magistrate to conduct a hearing free of any prejudicial pre-hearing publicity and attention.

The Court should answer the question presented in the negative and deny the relief sought in the Petition.

ARGUMENT

I. THE USE OF SHOW CAUSE HEARINGS UNDER G.L. c. 218, § 35A, IS APPROPRIATELY LIMITED AND THE EXERCISE OF THE POWER GRANTED SUBJECT TO JUDICIAL REVIEW

Section 35A was enacted and is used in the Commonwealth as a means for private citizens to seek application for the issuance of misdemeanor complaints in the District Courts for persons not under arrest. G.L. c. 218, § 35A; Victory Distributors, Inc. v. Ayer Div. of the Dist. Court Dept. , 435 Mass. 136, 140 (2001). The procedure does not apply to persons who have been arrested by the police, or in cases in which the Attorney General or a district attorney decides to prosecute. Id. at 143; Bradford v. Knights, 427 Mass. 748, 752-753 (1998). In those cases, a Clerk Magistrate has no power to bar the prosecution. Id. A show cause hearing is not available in cases where the accused presents an imminent threat of bodily injury, commission of a crime, or flight. G.L. c. 218, § 35A.

The Clerk Magistrate can act under section 35A only in cases which present no public safety threat, in cases in which there has been no arrest and in cases where the Attorney General and the district attorney have decided not to independently prosecute. The decision of whether to carry out the action of the Clerk Magistrate to issue, or decline to issue, a complaint remains

subject to executive review by the Commonwealth and judicial review by the District Court.

II. THE COURT HAS PREVIOUSLY DETERMINED THAT APPLICATIONS FOR A COMPLAINT TO ISSUE ARE NOT PUBLIC RECORDS AND THE BURDEN TO DEMONSTRATE A NEED FOR THE RECORDS TO BECOME PUBLIC LIES WITH THE PETITIONER.

In Eagle Tribune Pub. Co. v. Clerk Magistrate of the Lawrence Div. of the Dist. Ct., 448 Mass. 647 (2007), the Court addressed the issue of whether a news publication was entitled to public access to a show cause hearing conducted under G.L. c. 218, § 35A. The Court concluded that it was not. In Bos. Globe Media Partners, LLC v. Chief Justice of the Trial Court, 483 Mass. 80 (2019), the Court again reached the same conclusion. In reaching its decision in 2019, the Court spent a substantial portion of its opinion reviewing the handling of the very records the Petitioners seek in this instance. Id. at 94-99. In doing so the Court found that show cause proceedings were "most closely analogous to grand jury proceedings." Id. at 94. The Court noted that in grand jury proceedings if the information submitted to the grand jury in a case in which no bill was issued were to become public such a result would undermine the important goal of protecting the accused individual "from notoriety and disgrace." Id. at 95, citing Matter of a John Doe Grand Jury Investigation, 415 Mass. 727, 729, 615 N.E.2d 567 (1993).

The Court noted specifically that if the Petitioners or any other party wishes to see such records "the burden will not be on the Trial Court or the accused 'to overcome the presumption of public access by showing good cause to impound' these records." *Id.* at 101, quoting Commonwealth v. Winfield, 464 Mass. 672, 681(2013). The burden the Court stated "rests with the proponent of the motion to show why the interests of justice would be served by making a document that is not presumptively public available to the public in this particular case." *Id.*, quoting Winfield, supra.

In evaluating any such request the Court advised that the Clerk Magistrate "should balance the interests of transparency, accountability, and public confidence that might be served by making the requested records public against the risk that disclosure would unfairly result in adverse collateral consequences to the accused." Boston Globe Media Partners, at 102. The Clerk Magistrate has followed the Court's dictum closely in this instance. In doing so, the Clerk Magistrate has made the extraordinary decision to conduct the hearings in public, but at the same time has maintained the non-public confidential nature of the applications themselves. The Petitioners argument focuses on the alleged inconsistency of this treatment, but in doing so ignores the very real difference between the two decisions.

III. THE PETITIONERS HAVE NOT MET THEIR BURDEN TO MAKE THE RECORDS PUBLIC AND THE CLERK MAGISTRATE HAS DEMONSTRATED GOOD CAUSE FOR THE RECORDS OF THOSE CASES

IN WHICH NO PROBABLE CAUSE IS FOUND TO REMAIN NON-PUBLIC.

The Petitioners' arguments are ones of timing only as they relate to instances in which the Clerk Magistrate finds probable cause. In cases in which probable cause is found, the record will become public. Id. at 87-88. The Petitioners' request at its core is a request for records in cases in which no probable cause is found. If those records become public, all of the information contained in the applications will remain on the public record and will permanently impose on the respondents and any named or identifiable third parties in those cases all of the adverse collateral consequences attendant to that decision. In arguing that the Clerk Magistrate's decision to make the hearings public necessarily imposes a requirement to make the applications public, the Petitioners ignore the fact that the hearing itself will not necessarily result in the disclosure of the information contained in the applications.

The application may contain incendiary, personal identifying or irrelevant information unnecessary to the conduct of the hearing and not raised by either the petitioner or respondent at the time of the hearing. The applications may contain information about witnesses or victims not present at the time of the hearing and not considered by the Clerk Magistrate. Misnomer or misidentification of the accused is a

not uncommon occurrence at such hearings and the elucidation of such information at the outset of the hearing may preclude further consideration by the Clerk Magistrate. The respondent may elect not to participate in the hearing and in the event the Clerk Magistrate determines that probable cause does not exist the application will never become a public document. The decision about whether a hearing is public and whether and when particular documents become public are different decisions.

The Court itself recognizes this dichotomy in instances in which it reviews the sealing of particular documents and restrictions on public access for good cause. See, New England Internet Café, LLC v. Clerk of the Superior Court for Criminal Business in Suffolk County, 462 Mass. 76, 90, 966 N.E.2d 797 (2012) (judge may seal documents on showing of good cause); Republican Co. v. Appeals Court, 442 Mass. 218, 222-223, 812 N.E.2d 887 (2004) ("Massachusetts has long recognized a common-law right of access to judicial records," but right of access may be restricted on showing of "good cause").

In this case, given the unique grand jury like nature of show cause hearings, the Petitioners have the burden to demonstrate why the denial of access to such records would impair the interests of justice in this particular case. No such showing can be made. In instances in which the Clerk Magistrate finds probable cause the records will become public

in short order and there is no demonstrable purpose served by their premature publication.

In instances in which no probable cause is found the publication of information not necessary to the conduct of any hearing will serve no judicial purpose and will impose on the respondents, and any third parties named or identified, adverse collateral consequences which far outweigh any benefit of publication. The identity of the named respondents and the information that the petitioners in those complaints believe are important to the conduct of the hearing will necessarily become public information through the hearing process itself. The pre-hearing disclosure of any information will be inconsistent with the purpose of the show cause hearing and will impair the ability of the Clerk Magistrate to conduct the hearing.

The public tendencies towards majoritarianism that seek to make every decision the subject of public debate and sentiment are inconsistent with the obligations of the Commonwealth to charge or not to charge acting with fairness and dispassion. See Note, Public Disclosure of Jury Deliberations, 96 Harv.L.Rev. 886 (1983). The Petitioners in this case, unsatisfied with the access that has been provided, seek to start the show cause hearing in the public domain before affording the Clerk Magistrate a fair opportunity to conduct the hearing as intended by the statute and the applicable standards. The Court should deny that request.

CONCLUSION

The Association respectfully requests that the Court decline to grant the requested relief.

THE ASSOCIATION OF MAGISTRATES AND
ASSISTANT CLERKS OF THE TRIAL
COURT OF THE COMMONWEALTH OF
MASSACHUSETTS

AS AMICUS CURIAE

By its attorneys,

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Dated: January 17, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this day, January 17, 2024, a true and accurate copy of the foregoing document has been served upon the other parties to this appeal by electronic mail and first class United States mail to their attorneys.

/s/ Peter J. Haley

Peter J. Haley