# Supreme Judicial Court of Massachusetts Holds That Rape Shield Law Does Not Preclude Public Access to Search Warrant Affidavit

**By Michael J. Grygiel and Zachary C. Kleinsasser**

In the context of a public access issue of first impression, the Supreme Judicial Court ("SJC") of Massachusetts – the Commonwealth's highest court – recently reaffirmed that search warrant materials are presumptively public after the search warrant return has been filed in the issuing court. *Commonwealth v. George W. Prescott Publishing Co., LLC*, 463 Mass. 258 (Aug. 23, 2012).

The SJC held that the Massachusetts rape shield law, which imposes confidentiality on police reports of rape and sexual assault, does not encompass search warrant affidavits or other judicial records pertaining to such charges. The SJC also upheld the lower court's finding that the defendant had failed to establish good cause for continued impoundment of the search warrant affidavit, and that disclosure would not jeopardize the defendant's constitutional right to a fair trial.

### Background

In early 2011, the Massachusetts State Police Department applied for and obtained a search warrant authorizing the search of a luxury condominium owned by William O'Connell, a prominent Massachusetts real estate developer. The police sought the warrant in connection with allegations that O'Connell had engaged in sexual intercourse with a minor. After the warrant had been executed and the return of service filed in the lower court, the Commonwealth moved to impound all materials filed in connection with the search warrant application. The lower court allowed the motion to impound.

George W. Prescott Publishing Co, LLC, the publisher of *The Patriot Ledger* newspaper, filed a complaint and emergency motion seeking to terminate the impoundment of the search warrant materials. After a hearing, the judge initially determined that good cause existed for continued impoundment.

Two days after the hearing, a criminal complaint issued in the lower court charging O'Connell with aggravated statutory rape, engaging in sexual conduct for a fee, and trafficking in cocaine. At *The Patriot Ledger*'s request, the judge convened another hearing and, after granting the newspaper's motion to intervene in the criminal case, ordered the Commonwealth and counsel for O'Connell to agree upon a redacted version of the search warrant affidavit that would be subject to public disclosure. The court instructed the parties to return two weeks later.

At two subsequent hearings, the Commonwealth (both the Special Prosecutor assigned to the case and the Massachusetts Attorney General's office) argued that the continued impoundment of the search warrant materials was warranted because the materials constituted a "report of rape and sexual assault" rendered confidential by the Massachusetts rape shield law. O'Connell argued that he would be unfairly prejudiced by disclosure of the search warrant materials in violation of his Sixth Amendment right to a fair trial. Both the Commonwealth and O'Connell also argued that there was good cause for impoundment.

The lower court granted T*he Patriot Ledger*'s motion to terminate the impoundment but stayed the unsealing for one week in order to permit an appeal to a single justice of the SJC. The Commonwealth and O'Connell petitioned to the single justice. After hearing extensive oral argument from counsel of record, the single justice reserved and reported the case to the full bench.

### Judicial Records, Including Search Warrants, Are Presumptively Public

In analyzing the parties' arguments on appeal, the SJC took care to emphasize the principle that, under the common law, judicial records are presumptively available to the public. Quoting Justice Holmes, the SJC observed that '"[i]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."' *Prescott*, 463 Mass. at 262-63 (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)). The SJC recognized that the Massachusetts legislature had gone so far as to codify

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the common law rule that search warrants are presumptively public, enacting a statute to the effect that once search warrant materials have been returned to court they become public documents. *Id.* at 263.

**Rape Shield Law Does Not Prohibit Disclosure of Judicial Documents**

With respect to the Commonwealth's rape shield law, the SJC held that the blanket confidentiality it imposes on reports of rape and sexual assault does not encompass judicial records, including search warrant materials, and therefore does not abrogate the common law presumption of public access thereto.

Massachusetts General Laws ch. 41, § 97D provides that "All reports of rape and sexual assault or attempts to commit such offenses and all conversations between police officers and victims of said offenses shall not be public reports and shall be maintained by the police departments in a manner which will assure their confidentiality." The Commonwealth and O'Connell argued that the legislature intended § 97D to apply not only to police records containing reports of rape or sexual assault, but to court records, such as search warrant affidavits, that *incorporate or refer to* the same information.

In a unanimous decision, the SJC disagreed, holding that § 97D does not preclude public access to police report information or the content of a victim's conversations with police regarding an alleged rape or sexual assault when they are included in documents submitted to a court. *Id.* at 264-68. Citing several cases where police divulged such information in court – including cases where police officers testified at trial about a victim's report of rape – the SJC recognized that reports about rape or sexual assault are "routinely disclosed publicly by police in the course of judicial proceedings." *Id.* at 265-66. Citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982), the SJC also held that construing § 97D as applying to judicial records such as search warrant affidavits would be "at odds with the general principle that blanket prohibitions on public access to court records are to be avoided." *Id.* at 266. "If applied to judicial records," the SJC reasoned,

> such a requirement would have unacceptably far-reaching consequences. A wide range of court records in cases involving allegations of rape or sexual assault would be subject to mandatory and permanent impoundment, regardless of the specific facts of each case. The United States Supreme Court has emphatically rejected blanket prohibitions on public access to judicial proceedings.

*Id.* at 267.

**Defendant's Fair Trial Right Not Jeopardized**

The Commonwealth and O'Connell also argued that the lower court erred in determining that good cause did not exist to continue the order of impoundment, primarily because disclosure would allegedly jeopardize O'Connell's constitutional right to a fair trial. The SJC rejected this claim, for two reasons. First, recognizing the availability of less restrictive alternatives to wholesale impoundment, the SJC found that judges "are well equipped to safeguard a defendant's right to a fair trial" by properly balancing interests and utilizing procedural tools – such as change of venue, voir dire, and proper jury instructions. Second, the SJC held that a criminal defendant's conclusory assertion that anticipated adverse pretrial publicity would prejudice the jury pool is legally insufficient to overcome the public's right of access to judicial documents.

**Conclusion**

The SJC's decision in *Prescott* endorses the well-established principle that mandatory, *per se* prohibitions on public access to court records cannot withstand judicial scrutiny. It also serves as an important reminder to prosecutors that the impoundment of judicial records is an exception to the general rule in favor of public access. *Prescott* should also strengthen the resolve of the press in seeking information at the early phases of criminal investigations that the government desires to hide from view in making clear that motions to terminate the impoundment of search warrant materials after the warrant is returned should be denied only in rare cases.

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