COMMONWEALTH OF MASSACHUSETTS

NORFOLK SJC-13589

FREEDOM TO PROTEST COALITION,
NICHOLAS ROCCO, JON SILVERIA,
TRACEY ANNE SPICUZZA, LORENA JENKINSON,
DANA STEWART LEONARD, AND PAUL CRISTOFORO

V.

COMMONWEALTH OF MASSACHUSETTS, KAREN READ,
AND NORFOLK COUNTY SUPERIOR COURT

ON EXPEDITED REVIEW FROM AN ORDER
OF THE SINGLE JUSTICE OF THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
DENYING THE PETITIONERS' G.L. c. 211, §3 PETITIONS

COMMONWEALTH'S BRIEF

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APRIL 2024

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ISSUE PRESENTED

Where the trial judge's order setting a buffer zone for an imminent trial effectuated the significant government interest of a fair trial, did not burden more speech than necessary to protect the interests of a fair trial particularly as it related to witnesses and jurors, and allowed demonstrators to demonstrate 200 feet away from the courthouse complex, did the Single Justice abuse his discretion or otherwise err in denying the petitioners' G.L. c. 211, §3 petitions?

STATEMENT OF THE CASE[1]

On June 9, 2022 the Norfolk County grand jury returned indictments charging Karen Read with second-degree murder, in violation of G.L. c. 265, §1; manslaughter while operating under the influence of liquor, in violation of G.L. c. 265, §13½; and leaving the scene where death resulted, in violation of G.L. c. 90, §24(2)(a½)(2), concerning the death of John O'Keefe. (R. 8, 10).[2] On March 26, 2024, the Commonwealth filed a "Motion for Buffer Zone Surrounding Norfolk Superior Court and Request for Order Prohibiting Signs or Clothing in Favor of Either Party or Law Enforcement."

[1] References are as follows: Addendum (A.); Record Appendix (R.); Petitioners' Brief (Pet. Br.); Transcript of April 4, 2024 Hearing. (Tr.). All are followed by page number.

[2] A complaint previously issued out of Stoughton District Court (R. 10, 11).

(R. 23, 30-33). On April 3, 2024, petitioners Tracey Anne Spicuzza, Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo filed the "Citizens' Motion to Intervene for the Limited Purpose of Upholding and Defending the First Amendment by Opposing the Commonwealth's Motion for A Buffer Zone and Restraining Signs or Clothing that Express a Viewpoint About the Trial." (R. 24, 34-54). On April 3-4, 2024, the American Civil Liberties Union of Massachusetts filed a motion for leave to file an amicus memorandum and its amicus memorandum. (R. 24, 55-59). At hearing on April 4, 2024, the trial judge (Beverly J. Cannone, RAJ), denied the Citizens' motion to intervene, and granted the ACLU motion for leave to file an amicus. (R. 24, 256; A. 22/ Tr. 9-10). Defendant Read took no position on the Commonwealth's motion. (R. 256; A. 20-21/Tr. 8-9).

Later that day, the trial judge issued a memorandum and order stating that:

> It is hereby, **ORDERED** that no individual may demonstrate in any manner, including carrying signs or placards, within 200 feet of the Courthouse Complex during trial unless otherwise Ordered by the Court. This complex includes the Norfolk Superior Courthouse building and the parking area behind the Norfolk County Registry of Deeds building. Individuals are also prohibited from using audio enhancing devices while protesting.

> It is further **ORDERED** that no individuals will be permitted to wear or exhibit any buttons, photographs, clothing, or insignia, relating to the case pending against the defendant or relating to any trial participant, in the Courthouse during the trial. Law enforcement officers who are testifying or are members of the audience are also prohibited from wearing their department issued uniforms or any police emblems in the Courthouse.

(A. 35-36).

On April 10, 2024, the individuals denied intervention in Norfolk Superior Court filed a petition under G.L. c. 211, §3, and an emergency motion to stay. See SJ-2024-0122.[3] (R. 124-184). On the same day, an unincorporated organization and individual persons also filed a substantially similar petition under G.L. c. 211, §3. (R. 185-245).[4] The Commonwealth filed a consolidated response (R. 246-315), the petitioners filed a consolidated reply (R. 316-327), and on April 12, 2024, a Single Justice of the Supreme Judicial Court for Suffolk County denied the petitions, finding that: the denial of the motion to intervene was not appropriate for review under G.L. c. 211, §3; however, there was

[3] On April 9, 2024, the individuals who moved to intervene filed a petition under G.L. c. 231, §118 in the Appeals Court. On April 10, 2024, a single justice (Peter W. Sacks, J.), concluded that he had no authority to act under G.L. c. 231, §118. See 2024-J-0205 (R. 66-121).

[4] Both petitions were filed by the same counsel.

standing to challenge the buffer zone order; and that the buffer zone order was a reasonable restriction of time, place, and manner, as it was content neutral, burdened no more speech then necessary to serve a significant government interest, and left ample alternative channels of communication (Serge Georges, Jr., J.) (A. 37-44). That same day the petitioners filed a consolidated notice of appeal (R. 336-339).

On April 16, 2024, the petitioners filed a memorandum and appendix pursuant to Supreme Judicial Court Rule 2:21 (SJC-13589, Docket #2). On April 19, 2024, this Court allowed the appeal to proceed on an expedited basis (SJC-13589, Docket, #8).

Jury selection in the Norfolk Superior Court trial commenced on April 16, 2024 and is ongoing (R. 16-17).

STATEMENT OF FACTS[5]

At the April 4, 2024 hearing on its motion for a buffer zone, the Commonwealth proffered the following: its proposed buffer zone had been used in other criminal trials in the court house; the proposals was neutral,

[5] The Statement of Facts is premised on the affidavit of the lead prosecutor who argued the motion that was filed before the trial judge (R. 256), and the transcript of the April 4, 2024 hearing which was produced on April 23, 2024 (R. 256-257; A. 13-23).

regardless of viewpoint, content of signage or clothing; the Commonwealth's motion was about the jurors' duty to perform their civic duty free from extraneous influences; and that a fair and impartial jury was needed. (R. 256; A. 49-50/Tr. 5-6). The Commonwealth noted that the judge would inquire about extraneous influences, and raised to the court the potential impossibility of the jury being able to answer in the negative if they were bombarded each time they walked in or out of the courthouse. (R. 256; A. 50/Tr. 6). The Commonwealth analogized its request for a buffer zone to time and place restrictions in voting cases (A. 50-51/ Tr. 6-7). The Commonwealth noted that there were instances in the last year where jurors in other cases had to receive instructions from the court due to the impact from the activities related to pretrial hearings in this matter (R. 256; A. 50/Tr. 6).

The trial judge stated that rather than handle the motion for a buffer zone administratively, she had scheduled it for hearing to give the defendant an opportunity to be heard. The defendant took no position. (R. 256; A. 52-53/ Tr. 8-9). The trial judge found that nothing in the Massachusetts Rules of Criminal Procedure supported intervention by private citizens in criminal

cases but stated that she read the motion to intervene. (R. 256; A. 53-54/Tr. 9-10). The trial judge indicated that she also reviewed the ACLU amicus and found it very helpful. (A. 54/Tr. 10). The trial judge orally found that an external buffer zone was appropriate; prudent regulation on in-court expression was needed; a 500-foot buffer zone was far too excessive; and that her obligation was to reasonably accommodate the rights of all people to protest in a meaningful way while ensuring that the case be decided fairly based on the evidence without any undue interference from outside pressures or influence in accordance with law. (R. 257; A. 54-55/Tr. 10-11).

In her written order, the trial judge noted that to ensure the defendant's right to a fair trial, the court could restrict protected speech, "so long as the restrictions do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" (A. 35-46), quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). The trial judge then found:

> In this case, it is well documented that protestors have shouted at witnesses and confronted family members of the victim. Individuals have also taken to displaying materials which may or may not be introduced

> into evidence during trial, and airing their opinions as to the guilt or innocence of the defendant on their clothing or on signage. Witness intimidation has also been a prevalent issue in this case. Given these past actions, the Court concludes there is a substantial risk that the defendant's right to a fair trial will be jeopardized if prospective jurors are exposed to the protests and messages displayed on signs or otherwise, particularly before this Court has had an opportunity to instruct the jurors about their obligations with regard to remaining fair and unbiased. The risk extends during trial where jurors and witnesses would have no choice but to be exposed daily to the messages and viewpoints of the protestors when entering and leaving the courthouse or sitting in the courtroom.
>
> The defendant here is entitled to a fair trial with an impartial jury, free from outside influence, focused solely on the evidence presented in the courtroom during trial and the applicable law. To protect this right, this Court must reduce the risk of exposing witnesses or jurors in this case to such outside influences.

(A. 36).

ARGUMENT

The Single Justice did not abuse his discretion or otherwise err in denying the petitioners' G.L. c. 211, §3 petitions where the trial judge's order setting a buffer zone for an imminent trial effectuated the significant government interest of a fair trial, did not burden more speech than necessary to protect the interests of a fair trial particularly as it related to witnesses and jurors, and allowed alternative channels of communication, including demonstrations 200 feet away from the courthouse complex.

Relief under G.L. c. 211, §3, is "extraordinary," and, where the Single Justice of the Supreme Judicial Court for Suffolk County denied relief, this Court only disturbs such denial where there is an abuse of discretion or other clear error of law. Conkey v. Commonwealth, 452 Mass. 1022, 1023 (2008); Eagle-Trib. Pub. Co. v. Clerk-Magistrate of Lawrence Div. of Dist. Ct. Dep't, 448 Mass. 647, 651 (2007).

Under G.L. c. 211, §3: "The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." This power is "extraordinary" and is exercised only in "the most exceptional circumstances." McMenimen v. Passatempo, 452 Mass. 178, 184-185 (2008),

quoting Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990), quoting Costarelli v. Commonwealth, 374 Mass. 677, 679 (2008). Parties seeking the application of G.L. c. 211, §3, must show a substantial claim of violation of substantive rights and error that cannot be remedied under the ordinary review process. Planned Parenthood League of Mass., Inc., 406 Mass. at 706.

The Single Justice did not abuse his discretion in denying the petitioners' G.L. c. 211, §3 petitions challenging the buffer zone order, as the buffer zone order is narrowly tailored to protect the substantial government interest of ensuring a fair trial with a fair and impartial jury. "Protecting a defendant's right to a fair trial is undeniably a substantial government interest." Commonwealth v. George W. Prescott Pub. Co., LLC, 463 Mass. 258, 269 (2012) (citations omitted).

The Commonwealth also has a right to a fair trial. See Commonwealth v. Underwood, 358 Mass. 506, 511 (1970); see also Commonwealth v. Lowder, 432 Mass. 92, 102 (2000) ("The Commonwealth, as well as a criminal defendant, has the right to a fair trial"); Commonwealth v. Soares, 377 Mass. 461, 483 (1979) ("Later, the government's interest in trial by a jury not unfairly

biased in favor of acquittal was recognized, and the right of the prosecution to exercise peremptory challenges is now clearly established"), overruled in part by Commonwealth v. Sanchez, 485 Mass. 491 (2020).

The buffer zone order was well within the trial judge's authority to maintain the fairness and impartiality of the jury and to ensure a fair trial. "A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial." Crocker v. Justices of Superior Court, 208 Mass. 162, 179 (1911) (finding that judge could move trial to another county). "Without such a power it might become impossible to do justice either to the general public or to the individual defendant." Id.[6] The judge's inherent authority includes both control of a court's own proceedings and of the environment of the court. Carrasquillo v. Hampden County District Courts, 484 Mass. 367, 384 (2020), citing First Justice of the Bristol Div. of the Juvenile Court Dep't

[6] See also id. ("There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such as extent as to poison the judgment and prevent the freedom of fair action").

v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court, 438 Mass. 387, 397-398 (2003) (further citations omitted).

Further, under G.L. c. 220, §2:

> The courts of the commonwealth and the justices thereof shall have and exercise all the powers necessary for the performance of their duties. They may issue all writs, warrants and processes and make and award judgments, decree, orders and injunctions necessary or proper to carry into effect the powers granted to them, and, if no form for such writ or process is prescribed by statute, they shall frame one in conformity with the principles of law and the usual course of proceedings in the courts of the commonwealth.

G.L. c. 220, §2 (A. 31-32).

This authority concerning matters affecting the court proceedings extends to outside the courtroom and courthouse. See e.g., Commonwealth v. Hardy, 464 Mass. 660, 664 n. 6 (2013) (closing entire floor of courthouse on which courtroom located and limiting spectators during the reading of the verdict (but not press or law enforcement)); Commonwealth v. Gomes, 459 Mass. 194, 201-202 (2011) (requiring as a matter of common law that judges attend a view so judge could address and cure at earliest practicable time improprieties that may occur).

The trial judge made more than sufficient factual findings to justify the creation of the buffer zone

around the courthouse complex. The trial judge, who had long presided over the extensive pretrial proceedings (R. 10-29), found that protestors had shouted at witnesses and confronted the victim's family members. (A. 35). The trial judge also found that individuals had displayed materials referencing matters which may or may not be introduced into evidence during trial, as well as opining as to the guilt or innocence of the defendant with messaging on their clothing or on signage. (A. 35). Additionally, the trial judge found witness intimidation had been a prevalent issue in this case. (A. 35).[7] Given those findings, the trial judge was well equipped to conclude that there was a substantial risk that the defendant's right to a fair trial would be jeopardized if jurors were exposed to the protests and messages displayed on signs (A. 35). The trial judge found this risk existed particularly before she had an opportunity to instruct the jurors about their obligations with regard to remaining fair and unbiased and specifically

[7] See e.g., Commonwealth v. Kearney, 2382CR00313 (eight counts of intimidation of a witness, in violation of G.L. c. 268, §13B; five counts of picketing with intent to obstruct or impede the administration of justice or with the intent to influence any witness, in violation of G.L. c . 268, §13A; and three counts of conspiracy, in violation of G.L. c. 274, §7).

found that this risk extended during trial where when entering, exiting, or sitting in the courtroom, jurors and witnesses would have no choice but to be exposed daily to the messages and viewpoints of the protestors (A. 35).

The State may impose reasonable restrictions on the time, place, or manner of protected speech and assembly, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Desrosiers v. Governor, 486 Mass. 369, 390-392 (2020), quoting Boston v. Back Bay Cultural Ass'n, Inc., 418 Mass. 175, 178-179 (1994), quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Whether the regulations are reasonable depends on "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Commonwealth v. Bohmer, 374 Mass. 368, 374 (1978), quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Where, as found by the Single Justice (A. 43), the buffer zone order is an injunction, the order must burden no more speech then necessary to serve

the government interest. Cf. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764-766 (1994).

The buffer zone order is content neutral. Governmental regulation of expressive activity is content neutral where it is "*justified* without reference to the content of the regulated speech." Ward, 491 U.S. at 791 (alteration in original), quoting Community for Creative Non-Violence, 452 U.S. at 293. "The principal inquiry in determining content neutrality, in speech cases generally, and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward, 491 U.S. at 791, citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984). Regulations serving purposes unrelated to the content of expression are deemed neutral, even if there is an incidental effect on some speakers or messages but not others. Id., citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986). The government's purpose is "the controlling consideration." Id.

To effectuate the significant government interest in having a fair and impartial jury, all demonstrations, regardless of the viewpoint or content, may not occur

closer than 200 feet of the courthouse complex. As noted by the prosecutor, buffer zones orders have previously been ordered during trials at Norfolk Superior Court. (Tr. 5-6).[8] The buffer zone as a security measure is content neutral. See e.g., Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 12 (1st Cir. 2004) (security measures and demonstration zone at 2004 Democratic National Convention were "plainly content-neutral"); see also Frisby v. Schultz, 487 U.S. 474, 481-482 (1988) (statute prohibiting picketing at individual private residence is content neutral).

Nor is this a prior restraint. "The Supreme Court has explicitly rejected attempts to analyze security-based time-place-manner restrictions as prior restraints." Bl(a)ck Tea Soc'y, 378 F.3d at 12, citing Hill v. Colorado, 530 U.S. 703, 733-734 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357, 374 n.6 (1997); Madsen, 512 U.S. at 763 n.2. Here, as argued by the prosecutor below (A. 50/Tr. 6), the buffer zone order was not to end protests but to regulate the place and manner of demonstrations so they would not impede a

[8] See e.g., Commonwealth v. Czerkawski, No. 1382CR01094, Docket #119, 120; Commonwealth v. Czerkawski,1482CR00117, Docket #61.

fair trial. Cf. Madsen, 512 U.S. at 763 n.2 (petitioner not prevented from expressing message in one of several ways, but only prohibited from expressing it within 36-foot buffer zone).

"A time, place, or manner restriction must be tailored narrowly to achieve a substantial government interest, but 'it need not be the least restrictive or the least intrusive means of doing so.'" Desrosiers v. Governor, 486 Mass. 369, 390-392 (2020), quoting Opinion of the Justices, 430 Mass. 1205, 1211 (2000), quoting Ward, 491 U.S. at 799. As an injunction, the buffer zone order was narrowly tailored and burdened no more speech than necessary to serve the significant government interest of a fair trial. See Madsen, 512 U.S. at 764-766.

Here, the trial judge was uniquely suited to determine the necessity of a proper buffer zone, as she has presided over the case for the vast majority of pretrial proceedings lasting over a year, and has had the opportunity to see first-hand the issues as to publicity. And the Single Justice appropriately gave dereference to the trial judge's "familiarity with the facts and background of the dispute." (A. 11). See Madsen, 512 U.S. at 765 (providing some deference to

state court's familiarity with facts even under heightened review). As the trial judge is also the regional administrative justice for Norfolk Superior Court, and in that role she is uniquely suited to understand and incorporate the parameters and acoustics of the courthouse complex, what noise outside could reach inside, how jurors and witnesses might enter and exit the court house, where witnesses and jurors could park and assemble, in determining the size of a buffer zone to effectuate the interests of a fair trial. See e.g., Bl(a)ck Tea Soc'y, 378 F.3d at 13 (in assessing security issues, "mindful that the government's judgment as to the best means of achieving its legitimate objectives deserves considerable respect"). Here, the security measures were based on conduct that occurred during the pendency of this case. While the court did not impose a buffer zone during pre-trial proceedings, where the case is now on trial and requires the participation of witnesses and jurors at the courthouse, thus raising additional concerns of witness/juror intimidation and jurors' ability to render a fair and impartial verdict free from extraneous influence, the trial judge's finding that a buffer zone was needed is unassailable.

Significantly, nothing in the buffer zone order prevents any person from entering the courthouse complex or courtroom, where there is compliance with the order. The buffer zone order does not prevent or affect the ability of media to enter the courthouse complex, the courthouse, or the courtroom. What it prevents is extraneous information to, and influence on, the jury and intimidation of witnesses.

Importantly, this is a case of a captive audience, albeit in a public space. Jurors and witnesses appear pursuant to summonses, and are subject to criminal sanctions if they fail to appear. See e.g., G.L. c. 233, §5 (penalty for nonattendance as juror); G.L. c. 233, §6 (warrant for nonattending witness); G.L. c. 234A, §42 (court may issue warrant for arrest of juror, and grand or trial juror who fails to appear shall be guilty of a crime and subject to fine); G.L. c. 234A, §44 (criminal complaints may issue for grand or trial jurors not removed from delinquency status) (A. 32-33); cf. Frisby v. Schultz, 487 U.S. at 476-487 (discussing concept of captive audiences within home); see also See e.g., Hill v. Colorado, 530 U.S. at 716-717 ("right to be let alone" has special force in privacy of home, but can also be protected in confrontational settings).

The order is not overly broad and burdens no more speech than necessary to meet the significant government interest of a fair trial. A similar buffer zone restriction has been employed in the circumstance of protecting the right to vote by enacting buffer zones prohibiting campaigning at and around polling places. Cf. Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 588-589 (2022) (discussing G.L. c. 54, §65, providing that no materials intended to influence the action of the voter shall be posted or distributed within 150 feet of the building entrance door, and noting buffer zone of 150 feet "remains modest" and could be traversed in seconds). Similar to Lyons, where the Court acknowledged that voters were entitled to peace when they undertake "this most weighty civic act," (internal quotations and citations omitted), the same principles hold true for jurors and witnesses.

The buffer zone order properly leaves open alternative channels of communication. Protests can occur at least 200 feet from the courthouse complex. Cf. Desrosiers, 486 Mass. at 392 (emergency COVID orders left alternative channels of communication open where they did not ban all in-person assembly and there were alternative means to assemble such as through virtual

assembly). Here, as found by the Single Justice, the 200 foot buffer zone is a modest distance which could be traversed in less than a minute (A. 11). The buffer zone order allows demonstrators to be close to the Norfolk Superior Courthouse complex.[9] See e.g., Bl(a)ck Tea Soc'y, 378 F.3d at 14 (holding other areas where demonstrators could protest in and around Fleet Center and in Boston were sufficient for alternative communication areas; rejecting argument that alternatives not sufficient because not within sight and sound of delegates; and finding that demonstration zone provided opportunity for expression within sight and sound of delegates, "albeit an imperfect one").

The circumstances here are dissimilar from protests and buffer zones at reproductive health facilities. See e.g., McCullen v. Coakley, 573 U.S. 464 (2014). The buffer zone here was ordered in direct response to the judge's findings of witness intimidation and recognition that demonstrations could affect the jurors' ability to be impartial and free from extraneous influence, particularly where there is a documented history of

[9] Pursuant to Mass. R. App. P. 16(a)(6) the Commonwealth has included a proffered outline plan of the buffer zone, based upon the trial judge's buffer zone order, but not a record of the trial court. (A. 68).

demonstrators referring to matters which may or may not be entered as evidence at trial, and is narrowly tailored to address those issues.[10]

Further, the buffer zone was tailored toward not only the specific issues in this trial, but toward conduct which is in itself criminal. It is illegal to picket with the intent to intimidate or influence a juror. See G.L. c. 268, §13A (A. 33); Cox v. Louisiana, 379 U.S. 559, 564 (1965) (finding analogous federal statute constitutional). As noted in Cox, "A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." Id. at 562. The judge's order gives demonstrators effective notice of G.L. c. 268, §13A.[11] It is also illegal to intimidate

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[10] The petitioners' citations to news articles, if considered, only undermines their claims that the buffer zone order interferes with their ability to protest in front of the media. (Pet. Br. 11-14, 17-18).

[11] Indeed, counsel for the petitioners was also counsel for a number of individuals who sought a declaratory judgment in federal district court alleging that G.L. c. 268, §13A and G.L. c. 168, §13B (the witness intimidation statute) in regards to picketing related to this case were unconstitutional. On November 10, 2023, the Court (Denise J. Casper, J.), denied their motion for injunctive relief, finding that the plaintiffs were not reasonably likely to succeed on the merits of their as-applied First Amendment challenge to G.L. c. 268, §13A & 13B. See O'Neil v. Canton Police Department, 2023 WL 7462523 (D. Mass. Nov. 10, 2023), appeal pending.

witnesses. See G.L. c. 268, §13B (A. 33-34); Commonwealth v. Cruz, 442 Mass. 299, 309-311 (2004) ("The legislative purpose of G.L c. 268, §13B, is to protect witnesses from being intimidated or harassed so that they do not become reluctant to give truthful evidence in investigatory or judicial proceedings"). When expressive activity produces "special harms distinct from their communicative impact," the activity is "entitled to no constitutional protection." Commonwealth v. Thompson, 45 Mass. App. Ct. 523 (1998) (addressing constitutional issues on 209A violation), quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). Where the restriction is narrowly tailored to a specific issue, and such restriction is temporary, this is not a case such as United States v. Grace, 461 U.S. 171, 175-184 (1983), where a blanket, prohibition on parading, assembling, or displaying banners, devices, or signage on public sidewalks around the Supreme Court was found unconstitutional.

Even if found to be not content neutral, the buffer zone order meets the heightened standard of strict scrutiny. See Frisby, 487 U.S. at 476-488 (for content-based exclusions, the government "must show that its regulation is necessary to serve a compelling state

interest and that it is narrowly drawn to achieve that end") (further citation omitted). As found by the Single Justice, "the government has a compelling interest in preserving the integrity and fairness of the trial." (A. 10). See e.g., Picard v. Magliano, 42 F.4th 89, 93-114 (2d Cir. 2022) (New York Penal law prohibiting demonstrations concerning the conduct of a trial within 200 feet of a courthouse supported compelling state interest as it promoted the duty of witnesses to tell the truth and of jurors to return a verdict based on the evidence, without regard to public opinion or influence; statute was narrowly tailored, where "demonstrations that address their critiques directly to judges and jurors in the immediate vicinity of a courthouse inherently direct the attention of decision-makers in the judicial process to factors from which we strive to insulate them such as the pressure of public opinion, or factual claims beyond the evidence and argument presented in the courtroom");[12] Grider v. Abramson, 180

[12] While the petitioners cite Picard for the proposition that a buffer zone was unconstitutional as to particular speech (Pet. Br. 32-33), in that case the parties agreed that a court buffer zone did not apply to a specific individual's actions, but disagreed as to whether an injunction was proper. The Second Circuit granted the

F.3d 739, 750-752 (6th Cir. 1999) (finding buffer zone created to prevent potential violence instigated by speech content, and thus comprised a content -based restriction, but found that "[b]eyond contradiction, however, that circumscription constituted a necessary and narrowly tailored means of promoting the compelling public interest in preserving community peace and safety, especially in the face of threatened violence which might impede free expression by the rally participants"). Here, it was the trial judge who was best situated as to how effectuate the compelling government interest of ensuring a fair trial.

As to the petitioners' claims concerning intervention and standing, the petitioners in SJ-2024-0122 filed a motion to intervene in Norfolk Superior Court, which was denied. See Matter of an Impounded Case, 491 Mass. 109, 115-116 (2022), quoting Randolph v. Commonwealth, 488 Mass. 1, 6 (2021) (further citations omitted) ("As a general rule, only parties to a lawsuit, or those who properly become parties, may appeal from an adverse judgment"). Intervention is "a concept foreign

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individual injunction but reversed a larger facial injunction. Id. at 100-107.

to criminal procedure." The Republican Company v. Appeals Court, 442 Mass. 218, 227 n.14 (2004). Further, while there has been intervention in First Amendment contexts, see e.g., The Boston Herald Inc. v. Sharpe, 432 Mass. 593 (2000), this is not a case of access to court materials or to a court proceeding, but rather a challenge to a trial court order governing the maintenance of trial, where the trial judge has found that the challenged conduct could potentially affect the ability to secure a fair trial.

Even if there is standing to be heard on the First Amendment issue, the petitioners otherwise have no standing to participate in or otherwise attempt to interfere with an unrelated criminal trial. Based on the petitioners' motion to intervene, which requested the right to display clothing in support of the defendant, within the courtroom (R. 269), the court could have found that the purported intervention was such was an attempt to interfere.[13] Any ability to be heard should be limited to an opportunity to solely that and not an opportunity

[13] Indeed, as the petitioners acknowledge, the "Freedom to Protest Coalition" was formed only after the denial of the motion to intervene (Pet. Br. 17). Where their members do not have standing to intervene, the Coalition does not have standing either.

to demand evidence, examine witnesses, or otherwise participate in a criminal case.

The petitioners' arguments as to due process are without merit. The Commonwealth filed the motion for buffer zone prior to the hearing, and the defendant, the only other party to the criminal action, specifically took no position on the motion. Additionally, there was sufficient time for the would-be intervenors to file a motion to intervene, which the judge said she read, and for the ACLU to file an amicus brief, which the judge also noted that she read and found persuasive on many points. Carroll v. President & Commm'rs of Princess Anne, 393 U.S. 175, 180-183 (1968) (Def. Br. 41), is inapposite, as there, a court issued an ex parte restraining order against certain persons. The judge's buffer zone order, here, by comparison, applies generally to conduct found to affect the ability to have a fair trial occurring within the 200 foot area surrounding the courthouse complex and does not single out any person or organization. This was an order of the trial judge within her inherent powers to protect the trial.[14]

[14] If, however, this Court seeks further findings, the matter should remanded to the trial judge, who then could

In sum, there was no abuse of discretion or other error in the Single Justice's denial of the petitioners' motions for relief under G.L. c. 211, §3.

CONCLUSION

The Single Justice Order denying the petitioners' G.L. c. 211, §3 petitions and motions to stay should be affirmed.

Respectfully submitted,

For the Commonwealth,
Michael W. Morrissey
District Attorney

/s/Pamela Alford

_____
Pamela Alford BBO #647136
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include observations of the management of the trial in the currently ongoing process of selecting a jury.

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
22-00117

COMMONWEALTH

vs.

KAREN READ

MEMORANDUM OF DECISION AND ORDER ON COMMONWEALTH'S MOTION FOR BUFFER ZONE SURROUNDING NORFOLK SUPERIOR COURT AND REQUEST FOR ORDER PROHIBITING SIGNS OR CLOTHING IN FAVOR OF EITHER PARTY OR LAW ENFORCEMENT

The Commonwealth seeks an Order from this Court (1) establishing a buffer zone around the Norfolk Superior Courthouse in Dedham during the trial of the defendant, in which demonstrations related to the case would be prohibited, and (2) prohibiting any individual from wearing any clothing or insignia related to the case in the courthouse during trial. While the Court recognizes and appreciates the constitutional right of the people to peacefully protest under the First Amendment to the United States Constitution,[1] the defendant has the right to a fair trial by an impartial jury under the Sixth Amendment to the United States Constitution. See U.S. Const. amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *Skilling* v. *United States*, 561 U.S. 358, 377 (2010). "This right, ensuring the defendant 'a fair trial,' has also been characterized as 'a basic requirement of due process.'" *In re Tsarnaev*, 780 F.3d 14, 18 (1st Cir. 2015), quoting *Skilling*, 561 U.S. at 378.

To ensure the defendant's right to a fair trial, the Court may restrict protected speech so long as the restrictions do not "burden substantially more speech than is necessary to further the

[1] This court acknowledges the helpful *amicus curiae* memorandum submitted by the American Civil Liberties Union of Massachusetts, Inc.

government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989). In this case, it is well documented that protestors have shouted at witnesses and confronted family members of the victim. Individuals have also taken to displaying materials which may or may not be introduced into evidence during trial, and airing their opinions as to the guilt or innocence of the defendant on their clothing or on signage. Witness intimidation has also been a prevalent issue in this case. Given these past actions, the Court concludes there is a substantial risk that the defendant's right to a fair trial will be jeopardized if prospective jurors are exposed to the protests and messages displayed on signs or otherwise, particularly before this Court has had an opportunity to instruct the jurors about their obligations with regard to remaining fair and unbiased. The risk extends during trial where jurors and witnesses would have no choice but to be exposed daily to the messages and viewpoints of the protestors when entering and leaving the courthouse or sitting in the courtroom.

The defendant here is entitled to a fair trial with an impartial jury, free from outside influence, focused solely on the evidence presented in the courtroom during trial and the applicable law. To protect this right, this Court must reduce the risk of exposing witnesses or jurors in this case to such outside influences.

ORDER

It is, hereby, **ORDERED** that no individual may demonstrate in any manner, including carrying signs or placards, within 200 feet of the courthouse complex during trial of this case, unless otherwise ordered by this Court. This complex includes the Norfolk Superior courthouse building and the parking area behind the Norfolk County Registry of Deeds building. Individuals are also prohibited from using audio enhancing devices while protesting.

It is further **ORDERED** that no individuals will be permitted to wear or exhibit any buttons, photographs, clothing, or insignia, relating to the case pending against the defendant or relating to any trial participant, in the courthouse during the trial. Law enforcement officers who are testifying or are members of the audience are also prohibited from wearing their department issued uniforms or any police emblems in the courthouse.

Date: April 4, 2024

Beverly J. Cannone
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2024-0122
No. SJ-2024-0123

NORFOLK SUPERIOR COURT
No. 2282CR0117

TRACEY ANN SPICUZZA & others[1]

vs.

COMMONWEALTH & another.[2]

FREEDOM TO PROTEST COALITION & others[3]

vs.

COMMONWEALTH & another.[4]

MEMORANDUM OF DECISION AND JUDGMENT

I have before me two petitions pursuant to G. L. c. 211, § 3, seeking relief from an order of a Superior Court judge (Cannone, J.) establishing a buffer zone in which demonstrations are prohibited within 200 feet of the Norfolk County courthouse

[1] Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo.

[2] Karen Read.

[3] Nicholas Rocco and Jon Silveria.

[4] Karen Read.

complex during a particular criminal trial.[5] As to one of the petitions, the petitioners also challenge an order denying their motion to intervene for the limited purpose of opposing the Commonwealth's motion to establish the buffer zone. For the following reasons, the petitions are DENIED.

Background. The petitions arise from the prosecution of Karen Read (defendant), who has been charged with murder and other offenses. The case has attracted considerable public interest, including demonstrations in the vicinity of the courthouse. According to the trial judge's findings, "protestors have shouted at witnesses and confronted family members of the victim. Individuals have also taken to displaying materials which may or may not be introduced into evidence during trial, and airing their opinions as to the guilt or innocence of the defendant on their clothing or on signage. Witness intimidation has also been a prevalent issue in this case."[6] To prevent such demonstrations from jeopardizing the fairness of the trial proceedings, the Commonwealth moved for an order barring demonstrations within a buffer zone of 500 feet around the courthouse. A group of individuals wishing to

[5] In the same ruling, the trial judge also prohibited the wearing or exhibiting of certain items in the courthouse during the trial. Neither petition challenges this prohibition.

[6] The petitioners do not challenge these factual findings.

demonstrate outside the courthouse during the trial moved to intervene for the limited purpose of opposing the Commonwealth's motion. The trial judge denied the motion to intervene. As to the Commonwealth's motion, the trial judge ordered "that no individual may demonstrate in any manner, including carrying signs or placards, within 200 feet of the courthouse complex during trial of this case, unless otherwise ordered by this Court. . .Individuals are also prohibited from using audio enhancing devices while protesting" (buffer zone order). The would-be interveners filed a G. L. c. 211, § 3, petition challenging both the denial of intervention and the buffer zone order. Shortly thereafter, a second G. L. c. 211, § 3, petition was filed by an association of individuals who wish to demonstrate in the buffer zone during the trial and two members of the association.

Discussion. "[A] party seeking extraordinary relief [under G. L. c. 211, § 3, must demonstrate both '"error that cannot be remedied under the ordinary review process" and a "substantial claim of violation of [his] substantive rights."'" Ardanaeh v. Commonwealth, 492 Mass. 1019, 1020 (2023), quoting Care & Protection of Zita, 455 Mass. 272, 277-278 (2009). See Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990). "A single justice faced with a G. L. c. 211, § 3, petition [must perform] a two-step inquiry," first

assessing whether this court can properly become involved in the matter and second evaluating the merits of the petition. Commonwealth v. Fontanez, 482 Mass. 22, 24 (2019).

The denial of the motion to intervene does not pass the first step of the inquiry. In my judgment, the decision whether to allow third parties to intervene in a criminal case is an ordinary procedural ruling that does not "present[] the type of exceptional matter that requires the court's extraordinary intervention." Id. at 25. Relief from that ruling is therefore denied.

The buffer zone order, in contrast, does pass the first step. The defendant's prosecution has attracted extraordinary public interest, and the creation of buffer zone around a courthouse is itself highly unusual. Moreover, where the buffer zone order was issued less than two weeks before trial, the ordinary appellate process is not adequate to remedy the harm, if any, to the petitioners' claimed First Amendment right to demonstrate near the courthouse during the trial.[7] The trial would be over before any appeal could be heard. Accordingly, I turn to the merits of the buffer zone order.

[7] On a related point, although I do not disturb the denial of the motion to intervene, I find that the petitioners have standing to challenge the buffer zone order pursuant to G. L. c. 211, § 3, where they allege that the buffer zone order infringes their First Amendment rights.

By creating an area where the petitioners may not demonstrate during the trial, the buffer zone order does impose some restrictions on the petitioners' speech.[8] However, not every government action that restricts speech violates the First Amendment. In particular, "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The buffer zone order passes muster under these standards.

[8] Contrary to the petitioners' argument, however, the buffer zone order is not a prior restraint on speech. See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 n.2 (1994) (injunction creating buffer zone around abortion clinic did not constitute prior restraint: "petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone"). Similarly, the petitioners' reliance on cases concerning courtroom closure is misplaced. No one is prevented from entering or remaining in the buffer zone, much less the courtroom; only demonstrations are prohibited in the buffer zone.

First, the buffer zone order is content neutral. The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 (1994), quoting Ward, supra. The buffer zone order prohibits all demonstrations within the buffer zone without respect to their content. Moreover, even if the "petitioners all share the same viewpoint regarding" the defendant's trial, this "does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order." Madsen, supra.

Second, the buffer zone order is narrowly tailored to serve a significant government interest, namely, the integrity and fairness of the defendant's trial.[9] Demonstrations near the courthouse threaten this interest by exposing witnesses and jurors to intimidation and harassment, undermining their ability

[9] Indeed, if I were to apply strict scrutiny to the buffer zone order, I would find that the government has a compelling interest in preserving the integrity and fairness of the trial. Cf. Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 587 (2022), quoting Burson v. Freeman, 504 U.S. 191, 199 (1992) (upholding buffer zone prohibiting electioneering near polling places: "each State 'indisputably has a compelling interest in preserving the integrity of its election processes'"). Surely, jurors selected to determine the defendant's guilt or innocence, no less than voters, "are entitled to peace while they undertake this most 'weighty civic act.'" Lyons, supra at 591.

to testify or to serve without fear of reprisal.[10] In addition, demonstrations may expose jurors to extraneous material beyond the evidence presented at trial, improperly influencing their decision. As to narrow tailoring, the First Amendment does not require that a content-neutral time, place, or manner regulation "be the least restrictive or least intrusive means" of serving the government's interest. Ward, supra at 798. Rather, in the case of an injunction, the question is "whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest." Madsen, supra at 765. In considering this question, I give deference to the trial judge's "familiarity with the facts and background of the dispute," id. at 770, as well as her knowledge of the physical layout of the courthouse complex and its environs. The buffer zone order only minimally burdens the petitioners' speech. It merely moves demonstrations 200 feet from the courthouse, a modest distance that can be traversed in less than a minute. Cf. Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 589 (2022) (upholding content-based ban on electioneering within 150 of

[10] And it is not only the witnesses and jurors in the defendant's case who might face harassment and intimidation if they must pass a gauntlet of demonstrators on their way into or out of the courthouse. Many people might come to the courthouse for reasons having nothing to do with the defendant's case, such as attorneys, parties, witnesses, and jurors involved in other matters, as well as court personnel.

polling places). Indeed, recognizing the need to balance the right to demonstrate against the defendant's right to a fair trial, the judge thoughtfully rejected the much broader 500-foot buffer zone proposed by the Commonwealth. I find that the 200-foot buffer zone burdens no more speech than necessary to protect the integrity and fairness of the defendant's trial.

Third, the buffer zone order leaves the petitioners with ample alternative channels for expressing their views. They remain entitled to demonstrate outside the buffer zone. The buffer zone order also contains no restriction whatsoever on other channels of communication, such as private conversations, letters to the editor, and social media, by which they may express their views about the defendant's case.

I conclude that the buffer zone order is content-neutral and does not violate the First Amendment. The petitions are denied.

/s/Serge Georges, Jr.
_____
Serge Georges, Jr.
Associate Justice

Entered: April 12, 2024

Volume I
Pages: 1-12
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

****
COMMONWEALTH OF MASSACHUSETTS *
Plaintiff *
*
v. * DOCKET NUMBER 2282CR00117
*
KAREN READ *
Defendant *
****

HEARING
BEFORE THE HONORABLE BEVERLY J. CANNONE

APPEARANCES:
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Canton, Massachusetts 02021
By: Adam C. Lally, Esq.
Laura A. McLaughlin, Esq.

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By: Tanis M. Yannetti, Esq.

Dedham, Massachusetts
Courtroom 1
April 4, 2024

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
None - Hearing				

PROCEEDINGS

(Court called to order 9:35:15 a.m.)

COURT OFFICER: Court, all rise, please.

Hear ye, hear ye, hear ye, all persons having anything before The Honorable Beverly Cannone, Justice of the Norfolk Superior Court and for the County of Norfolk, draw near, give your attendance, you shall be heard. God save the Commonwealth of Massachusetts.

This Court is now open. You may be seated.

THE CLERK: Judge, this is 22CR117, the Commonwealth v. Karen Read.

Can I have counsel identify themselves for the record, starting with the Commonwealth.

MR. LALLY: Good morning, Your Honor. Adam Lally for the Commonwealth.

THE COURT: Good morning, Mr. Lally.

MS. MCLAUGHLIN: Good morning, Your Honor. Laura McLaughlin for the Commonwealth.

THE COURT: Good morning, Ms. McLaughlin.

MS. YANNETTI: Good morning, Your Honor. Tanis Yannetti representing Karen Read.

THE COURT: Good morning, Ms. Yannetti. I'm told that David Yannetti is held on trial somewhere else.

MS. YANNETTI: He is, Your Honor.

THE COURT: Okay. And good morning, Ms. Read.

All right, so first and foremost, housekeeping. Mr. Lally, what is the status of the DNA?

MR. LALLY: So, Your Honor, the status of the DNA is, I spoke to the lab a -- a few times over the last couple days. They actually were able to stay late last night and finish the mitochondrial portion in regard to seeing if they were able to generate a profile from the hair sample.

THE COURT: Can you hear him, Ms. Yannetti?

MS. YANNETTI: I would -- I would actually prefer, Your Honor, if he would take the podium.

MR. LALLY: That's fine.

THE COURT: Yeah.

MR. LALLY: So, Your Honor, just to begin again. So I've spoken to the lab a few times over the last week or so, including this morning. So they were able to stay late last night and finish the generating -- to see if they could generate a mitochondrial DNA profile for the hair sample. I was informed this morning that they were able to generate a partial profile. They're still in the process of seeing if a full profile can be generated, but they've begun the process of generating a profile from the sample from Mr. O'Keefe.

As far as -- I'm a little unclear, and I -- I responded with some questions just for clarification purposes, because I'm a little unclear of -- of whether or not a partial profile would be something they could do a comparison with in regard to the MT

DNA. And then I'm also inquiring as to -- so initially, what I've been told is that they -- if they were not able to generate a profile, I would have a report on that by the end of next week. And that would essentially be the end of it.

However, given this development, I'm not sure other than they indicated that any sort of report regarding a comparison would likely be sometime after April 16th. And then obviously I asked for clarification, and I'm still awaiting that as far as what after April 16th means as far as are we talking about, you know, the week following or a month later, or what -- what the situation is. So unfortunately, I don't have a ton of clarity, but -- but at least I'm able to -- to tell the Court that they were able to generate at least a partial profile from the hair sample.

THE COURT: All right, so trial starts a week from Tuesday. I would entertain a Motion to Exclude the DNA.

All right, so let's move on to what we have here.

MR. LALLY: Understood.

THE COURT: All right, so I will hear from the Commonwealth on your motion for a buffer zone and for restricting clothing.

MR. LALLY: Thank you, Your Honor.

So the Commonwealth would ask that the motion be allowed for a number of different reasons. Essentially, what I would submit to the Court is that this is not, as the Court is well aware, this is not a novel approach. This is something that's

been done in other cases and done specifically in other cases in this courthouse. What the Commonwealth would submit is what's been proposed to the Courts is an entirely neutral motion, and that it applies equally regardless of viewpoint, regardless of, you know, content of -- of signage or clothing items or anything else. The motion the Commonwealth filed is not, in essence, about any sort of protesters or any sort of presence in regard to them, but more about the jurors and about the jurors' freedom to -- to be free and to come and perform their civic duty free from extraneous influence. We need in this case, obviously, as the Court is well aware, a fair and impartial jury. The -- and this is something that extends beyond just the empanelment of that jury. As the Court is well aware, as the Court asks questions or inquires of every jury in every case multiple times a day about whether or not they've been exposed to any sort of extraneous influences, or if they've gone online or if they've seen things on social media pertaining to the case. And the question I would ask is, how is a juror supposed to truthfully answer that in the negative when they're bombarded with it every single time that they walk in and out of this courthouse? It's not asking for a restriction on free speech or to infringe upon someone's First Amendment right. Protesting is going to happen. That's fine. It's just where it happens and how it impacts the jury in this case is -- is what Commonwealth has concerns about.

Another analogy I would make, Your Honor, is to voting

place restrictions, another fundamental right in which there are restrictions as far as signage and footage away from the voting place of -- of how close you can be, that they're not allowed inside the building with signs related to whatever specific candidate you're supporting. You can't go in the voting booth next to somebody, take your -- your candidate sign and shove it in somebody's face while they're trying to exercise their right to vote.

Essentially what this motion is asking is -- is -- or seeking to protect, is the freedom of the jurors who are called upon to execute their civic duty unfettered from extraneous influence. We're not asking the Court to restrict the media or anyone's access to the media. And I would note anecdotally that within this courthouse over the last year, a year plus, there have been several instances in which jurors on completely unrelated cases have had to receive instructions from the Court and been impacted by the activities related to this case every time that it's on.

Lastly, what I would submit to the Court is really any opposition, or at least the ones that I've seen as far as an amicus essentially, the reason for the opposition is because there are parties that want to try and see if they can influence the jury inappropriately in this case.

All we're asking for, Your Honor, all the Commonwealth is submitting and whatever form or modifications the Court deems

appropriate based on -- on the Commonwealth's proposal, but what we're essentially asking for is to allow the jury to execute their duties in this case, both during the empanelment process and throughout the course of the trial as they're hearing evidence, and not be subjected to extraneous influences, regardless of the viewpoint of those extraneous influences during the course of the exercision of that duty.

For those reasons, the Commonwealth would ask that the motion be allowed.

THE COURT: All right. Thank you.

Ms. Yannetti?

MS. YANNETTI: Thank you.

Your Honor, I have three things that I would like to put on the record for this Court.

First, please note that we do not control these protesters. This has been an organic movement that arose because ordinary citizens were made aware of the case and apparently agree with us that the prosecution of Karen Read is unjust. Speaking out against injustice is a fundamental American right. My client is appreciative of the support that she has received and continues to receive, but we in no way dictate or instruct anyone to do anything. These are strictly citizens invoking their right to free speech.

Second, while we con -- while we question whether the Commonwealth's motion is Constitutional, we are taking no

position on this issue. In our view, this is between this Honorable Court and the general public. It is between, --

THE COURT: So -- and I actually -- I share your view. I think this is something that, frankly, could have been done administratively, but I wanted to give the defendant an opportunity to be heard.

So you're not taking a position on it?

MS. YANNETTI: No. We believe that this is between the Commonwealth and the Constitution and the -- and the -- and this Honorable Court and the general public, and that while we -- the ACLU, has filed something, members of the public have filed something, they will speak to the Constitutionality of this. And other than receiving our sympathy and our blessing, we are not joining in their argument. Again, we are taking no position, and I want to make clear that our position, our intent is and always has been that we are going to win this case inside the courtroom. Your Honor, that's our -- that is what we're going to do. We're going to -- we're going to win this case inside the courtroom. And that -- with that, I'll waive further argument.

THE COURT: Okay. So I have received something styled, a citizen's motion to intervene. And I think criminal counsel surely knows that unlike civil, there is nothing in the Mass Rules of Criminal Procedure that supports intervention in a criminal case. But I've read the memo. I received it yesterday

and I've read it. I am not going to hear from counsel. I do want to say, and quoting the Appeals Court, "Intervention is a concept foreign to criminal procedure."

Now, apparently, the Civil Liberties Union of Massachusetts, understanding that, filed a motion to file an amicus curiae memorandum. So that motion is allowed. And I have read the ACLU brief, and frankly, I find it very helpful and I've been persuaded by many of the points in there. So I don't need to hear from anybody. And the ACLU, I think, did a great job in their memo and I understand their position.

So it's undisputed that under our system of government, the people's right to protest is, you know, is preserved under the First Amendment, as is the free expression of their views. I have to consider, of course, this very important Constitutional right. But the bedrock principle of the Trial Court is assuring a defendant, it is, and it must be, assuring the defendant a right to a fair trial, which includes a right to a fair and impartial jury, which by definition, is a jury free from any outside influence. So my focus has to be on having this jury hear the evidence and the law and decide this case based solely on the evidence and the law that is heard here in this courtroom. I have to balance the -- the rights of protest. The law is very clear on this. Sometimes these are competing interests, but in balancing them, in weighing all the factors, I do find that an external buffer zone is appropriate and that we

do need prudent regulation on in-Court expression, but the 500 feet is far too excessive. So I recognize that my obligation is that I must reasonably accommodate the rights of all people to protest in a meaningful way while ensuring, above all here, that this case is decided fairly, based on the evidence, without any undue interference from outside pressures or influence in accordance with the law. And that's what I will do.

So I will have a written Order and a very short decision on this by hopefully -- by tomorrow, but hopefully by this afternoon.

So I will see you all next week and I intend to go through all the motions in limine on Friday. I would like counsel to consider how you want to do empanelment. If there is a request for a questionnaire, it needs to be a supplemental questionnaire. Counsel need to work together. It needs to be one side -- one page, two sides, no longer. Counsel works together. And if you cannot agree on a questionnaire, then part one of the questionnaire will be what you agree to. Part two of the questionnaire will be what the Commonwealth wants and the defendant objects to. And part three will be what the defendant wants and the Commonwealth objects to. And it must all be on one page. So I'll see you all next Friday.

COURT OFFICER: Court, all rise, please.

(Adjourned)

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I, Donna Dominguez, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

"/s/ Donna Dominguez"
Donna Dominguez, ACT, CET
Notary Public, Commission Expires 5-17-24

April 12, 2024
Date

(781) 820-5032

donna@dhreporting.com

Keyword Index

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ADDENDUM

M.G.L.A. 211 § 3

§ 3. Superintendence of inferior courts; power to issue writs and process

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

M.G.L.A. 220 § 2

§ 2. General powers

The courts of the commonwealth and the justices thereof shall have and exercise all the powers necessary for the performance of their duties. They may issue all writs, warrants and processes and make and award judgments, decrees, orders and injunctions necessary or proper to carry into effect the powers granted to them, and, if no form for such writ or process is prescribed by statute, they shall frame one in conformity with

the principles of law and the usual course of proceedings in the courts of the commonwealth.

M.G.L.A. 233 § 5

§ 5. Penalty for nonattendance; contempt

Such failure to attend as a witness before a court, justice of the peace, master in chancery, master or auditor appointed by a court, or the county commissioners, shall also be a contempt of the court, and may be punished, in case of such failure to attend as a witness in a criminal prosecution, by a fine of not more than two hundred dollars or by imprisonment for not more than one month or both, or, in case of any other such failure to attend as aforesaid, by a fine of not more than twenty dollars.

M.G.L.A. 233 § 6

§ 6. Warrant for nonattending witness

The court, justice, master in chancery, master, auditor or county commissioners may in such case issue a warrant to bring such witness before them to answer for the contempt, and also to testify in the case in which he was summoned.

M.G.L.A. 234A § 42

§ 42. Enforcement of chapter

The court shall take whatever actions are appropriate to enforce the provisions of this chapter. Upon a finding by the court that a juror will not appear to perform or complete juror service or in response to the court's order, the court may issue a warrant for the arrest of the juror or may take such other appropriate actions as are likely to compel the juror to appear before the court. Any grand or trial juror who fails to appear for juror service or who fails to perform any condition of his juror service shall be guilty of a crime, and upon conviction thereof, may be punished by a fine of not more than two thousand dollars.

M.G.L.A. 234A § 44

§ 44. Criminal complaint for delinquent juror

The office of jury commissioner may prepare an application for the issuance of a criminal complaint against any grand or trial juror who has not been removed from delinquency status by the office of jury commissioner within thirty days after the date of a delinquency notice sent to such juror. The application shall aver that the named person was duly selected and summoned to

perform trial or grand juror service at a specified location on a specified date and that such person has failed to appear for jury service without justifiable excuse in violation of section forty-two. The information provided in the application shall be based upon the records of the office of jury commissioner. The application shall contain the name, address, and identification number of the juror and a summary of all official transactions between the juror and the office of jury commissioner that have occurred as of the date of the application. At the bottom of the application, there shall be a certificate signed by the legal counsel for the office of jury commissioner declaring that the information provided in the application is true and complete to the best of his knowledge and belief. The application shall contain such further information as deemed appropriate by the jury commissioner with the approval of the jury management advisory committee. The application may be submitted by mail or personal delivery to any superior or district court having criminal jurisdiction over such juror. The juror shall be provided with notice of hearing on any application for criminal complaint. The legal counsel or his delegate shall be authorized to represent the jury commissioner and the office of jury commissioner in all judicial proceedings arising out of any application for the issuance of a criminal complaint under this section or otherwise.

M.G.L.A. 268 § 13A

§ 13A. Picketing court, judge, juror, witness or court officer

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.A. 268 § 13B

§ 13B. Intimidation of witnesses, jurors and persons furnishing information in connection with criminal proceedings

(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 ½ 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 ½ 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.


200 Foot Buffer Zone
Norfolk Registry of Deeds
Norfolk Superior Court
Dedham District Court
Charles River
Ames St
High St
Court St
Pearl St
Norfolk St
Bates Ct
Bullard St
Village Ave
Church St
Old River Pl
Kings Ct
Maple Pl

MASS R. APP. P. 16(K) CERTIFICATION

I, Pamela Alford, Assistant District Attorney, certify that the above-captioned brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to Mass. R. App. P. 16(a)(13), (e); Mass. R. App. P. 18; Mass. R. App. P. 20 and Mass. R. App. P. 21. The above brief complies with the applicable length limitations in Mass. R. App. P. 20 as it is produced in size 12 Courier New font and contains 27 non-excluded pages.

/s/Pamela Alford

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Pamela Alford

CERTIFICATE OF SERVICE

I, Assistant District Attorney Pamela Alford, certify that on April 24, 2024, I served the above opposition to the petitioners' counsel of record, Marc J. Randazza, ecf@randazza.com &, and on Karen Read's counsel of record David Yannetti, law@davidyannetti.com, by Tyler E-filing.

/s/Pamela Alford

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Pamela Alford