

Rollins decided to retaliate unconstitutionally by criminally prosecuting him.

1.0 NATURE OF THE ALLEGED OFFENSE

The Suffolk County Police Report authored by Officer Dante Williams, Incident # 212082441, alleges that then-Suffolk County District Attorney Rachael Rollins was making statements to members of the press on public property on November 9, 2021, at approximately 6:10 p.m. (Police Report, attached as **Exhibit 1.**) Officer Williams claims that while Rollins was making her statements, Mr. DePina “began to loudly heckel [sic] her, while making multiple offensive comments of a personal nature directly to her” (*Id.*) The report goes on to claim that Mr. DePina’s statements “appeared as an intent to effect [sic] or interfere with” pending criminal matters in Suffolk County in which Mr. DePina was a defendant, and that Mr. DePina “made several indirect references to these cases during his verbal offensive.” (*Id.*)

Mr. DePina recorded this encounter and uploaded it to his Facebook page. (*Id.*) The Report alleges that Mr. DePina previously made multiple attempts to contact Ms. Rollins to talk to her about these pending criminal matters. (*Id.*)

The recording on the Facebook page shows, in actuality, that Mr. DePina was engaged in protected speech under the First Amendment to the U.S. Constitution and Art. XXI & LXXVII of the Massachusetts Declaration of Rights. The recording further shows that Officer Williams made a knowingly false report. The transcript of this event speaks for itself. (**Exhibit 2.**)

2.0 FACTUAL BACKGROUND

The Police Report and Complaint deliberately omit any mention of the statements Mr. DePina actually uttered, despite Rollins, Officer Williams, and the Clerk-Magistrate having access to a recording of the incident. An electronic copy of the recording is provided herewith as **Exhibit 3.** For the convenience of the Court, attached as **Exhibit 2** to this Motion is a transcript of the

relevant portion of Mr. DePina's recording, starting from when Rollins begins to address the press.

Here are Mr. DePina's statements to Rollins during the press conference, in full:

JOAO DEPINA: What was you saying? What was you saying? Oh, last December. Shit. Yeah. Yeah. Good.

Oh. It's just her. This is going to be great. This is going to be amazing. All right. Ready, guys.

DA ROLLINS: Thank you. (Inaudible) facts of the case. As you know, (inaudible) district attorneys of the Commonwealth of Massachusetts.

JOAO DEPINA: And what happens when civilians are hurt?

DA ROLLINS: So right now in the last three days we had multiple –

JOAO DEPINA: In the last 40-something years I've been alive we had several black men in Boston shot.

DA ROLLINS: -- emotional –

JOAO DEPINA: So we need to really get emotionally correct and help ourselves. And then we sit there and we got to get answers from our DA.

DA ROLLINS: -- right now –

JOAO DEPINA: And so our DA can give us answers and allow us to survive. PTSD is real in Boston. And –

DA ROLLINS: -- emotionally disturbed people –

JOAO DEPINA: I am very emotionally disturbed because she is emotionally disturbed because she has a duck for a boyfriend and she's very nasty to people and she's, she abuses her power.

UNKNOWN: Excuse me, sir. Excuse me. I'm sorry.

JOAO DEPINA: To lock up black men in the community.

DA ROLLINS: -- since I –

JOAO DEPINA: And this is how it's going to happen because we got to stand up for ourselves.

Every guy, let everybody know what really happens with our fake ass DA, because what happens is she comes and she tells us lies.

And when people get shot, we should get answers. Everybody deserves answers in Boston. Every single family –

DA ROLLINS: -- right now –

JOAO DEPINA: Every single family deserves answers. Like mine.

DA ROLLINS: -- wonderful –

JOAO DEPINA: My mom needs answer, too. My mom needs answers.

DA ROLLINS: -- three days we've had –

JOAO DEPINA: My mom needs answers and my mom needs answers, Rachael. My mom needs answers for the murder of my brother, Rachael.

Michael DePina was murdered in the streets of Dorchester and we still have no answers and the DA's office is still not doing that because she is very in tuned into, into locking black and brown men up for petty crimes, and that is what's going on.⁵ Yeah.

Imagine what the police are going through right now. I am emotionally disturbed because of Rachael Rollins. I am emotionally disturbed because, yeah. And our families get stabbed and shot and raped, and Rachael Rollins' office don't give two shits about us.

DA ROLLINS: -- going into this --

JOAO DEPINA: Thank you. And you should not be confirmed because you are no good. You abuse your power. Let's keep going.

DA ROLLINS: Just remember –

JOAO DEPINA: Just remember, abuse of power is not good for an elected official. And this is what we're dealing with all the time because we deal with –

DA ROLLINS: -- men and women –

JOAO DEPINA: You put your life at risk? You sit behind a desk, Rachael.

DA ROLLINS: This is nothing.

⁵ See, e.g., Antonio Planas, “Activist’s family is hit by violence,” BOSTON HERALD (Jun. 8, 2014) (discussing Defendant’s call for ending violence in the wake of his brother Michael’s homicide on June 6, 2014), available at <https://www.bostonherald.com/2014/06/08/activists-family-is-hit-by-violence/>.

JOAO DEPINA: Yeah. This is nothing. Just like you are nothing. Let's ask your duck boyfriend. Let's ask your duck boyfriend if this is nothing.

This is what will happen, because when we don't like you, Rachael, because you are turning your back on black and brown people like we said that you would, Rachael.

Yes, Rachael. We're going to get a little louder so everybody can hear us, Rachael. Yes. Because this is what's going to happen.

I don't care about the press. You know, I don't care. Sorry, press. Sorry, people. Freedom of speech. This is beautiful. This is called freedom of speech. When Channel 10 wants to answer a question, just let me know. I'll be quiet, sir.

DA ROLLINS: No one –

JOAO DEPINA: Telemundo.

DA ROLLINS: -- in order to –

JOAO DEPINA: But, yeah. You can't sign a job that you're going to get killed and up for they don't get paid enough. And you treat the police like shit.

DA ROLLINS: -- people –

JOAO DEPINA: The city of Boston been treating the police like shit. You make them work overtime. You make them get tired. They don't get good recovery time. The poor police.

DA ROLLINS: The men –

JOAO DEPINA: Yes. They need better services. The poor police shouldn't have to come to a job after they witness a traumatic situation. The police should deserve to have two days off and have time with their family, Rachael.

DA ROLLINS: Well, they were grateful –

JOAO DEPINA: The police are always under stress, and they're grateful that people like me are speaking up for them because nobody else speaks up for the police.

Hey, Rachael Rollins, I'm here talking to you, honey. Yes. I'm talking to you. Freedom of speech, isn't that a bitch. Huh.

Freedom of speech. Freedom of speech. Free press. Free speech. You won't get a good interview with me around, ever. Ever. Ever. Because what you're doing is abuse of power, Rachael.

Let's talk about the state rep going to Michigan and using state funds. And let's talk about the state rep that is using, that used a cell phone that is from a state issued cell phone to talk derogatory to other women, to other black women like you, Rachael.

Aren't you black? Aren't you black, darling? Yeah. This is what mental health looks like, huh, Rachael? Because that's what you just told the press. This is what mental health is. This is what mentally disturbed people look like.

And what does, what does mentally disturbed lawyers look like? What does a scorned woman look like? Oh. Oh. Oh. You want me tell you about it.

Why did BU fire you? They fired you. They fired you, Rachael. And then also, let's talk about your ex-boyfriend, your ex-duck boyfriend, Rachael. The same one that you be watching their kids for. Yes. And let's talk about your current boyfriend, Rachael, your other duck boyfriend. Everybody knows him.

Have you ever met a DA that has a duck for a boyfriend? Today you meet him. Today you meet Rachael Rollins. Hi, honey. I'm here to give it to you. I'm here. I'm here for it. I'm here for it, honey.

Rachael, just tell them the truth. You don't care. All you care about is going to the next position. You don't care about our black and brown community. You're worried about going to the next position, Rachael. Yes. You got a good picture of me?

Make sure, Rachael, make sure they know that you only worry about yourself and becoming the U.S. attorney. That's, you don't get, you don't, you -- no. Because I'm blocking their stuff. I'm sorry but I told you guys this.

Rachael, Rachael, I'm here, honey. Here comes the other counterparts. Okay. We'll let the Commissioner Long talk. Come on, Commissioner Long. He's a nice guy. Now we let him have an interview.

COMMISSIONER LONG: Good evening. At about 9:30 this morning officers assigned to District B-3 reported (inaudible).

JOAO DEPINA: Bye, Rachael.

COMMISSIONER LONG: Upon arrival –

JOAO DEPINA: Love you still. I'm mentally disturbed. Don't forget that. You said it on camera so when we go to court I'm going to use it.

(Exhibit 2 at 2-9.)

Mr. DePina made no threats. Mr. DePina engaged in no form of harassment, nor anything that could possibly be construed as intimidation of someone connected to a pending criminal proceeding. Rather, Mr. DePina exercised his right to criticize a District Attorney for abusing her power, opportunistically seeking higher office without caring for the people of Boston, and not taking adequate care of Boston police officers. Mr. DePina has a First Amendment right to do so. Contrary to the falsifications made by Officer Williams in the Police Report, there are no references, whether direct or indirect, to any pending criminal matters against Mr. DePina in his remarks to Rollins while she was speaking, except perhaps an allusion to this not-yet-filed complaint for the equivalent of *lese majeste*.

Also notably absent from the Police Report is any mention that Mr. DePina is not merely a citizen with criminal matters pending against him, but he is also a politician who ran for Boston City Council, District 7 in both 2017 and 2021. (See “Ballotpedia” page for Mr. DePina, attached as **Exhibit 4**.)⁶ It is galling to claim that a politician criticizing the job performance of a public official constitutes criminal intimidation or harassment.

3.0 ARGUMENT

“After the issuance of a [criminal] complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate (or judge), *see* Commonwealth v. McCarthy, 385 Mass. 160, 430 N.E.2d 1195 (1982), for a violation of the integrity of the proceeding, *see* Commonwealth v. O'Dell, 392 Mass. 445, 466 N.E.2d 828 (1984), or for any other challenge to the validity of the complaint.” Commonwealth v. DiBennadetto, 436 Mass. 310, 313, 764 N.E.2d 338 (2002). The court must view the evidence presented in the complaint and reasonable inferences in

⁶ Available at: https://ballotpedia.org/Joao_DePina (last visited Jan. 6, 2022).

the light most favorable to the Commonwealth. See Commonwealth v. Rex, 469 Mass. 36, 41, 11 N.E.3d 1060 (2014).

The evidence presented in the Complaint, namely video directly referenced therein, is insufficient evidence, demonstrating a lack of probable cause. To the extent Officer Williams withheld the relevant portion, the integrity of the proceedings were violated. And, the complaint is otherwise invalid under the U.S. Constitution and the Massachusetts Declaration of Rights.

3.1 Standards for Section 13B

Mass. Gen. Laws c. 268, § 13B provides that:

Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; . . . or (iii) misleads, intimidates or harasses another person who is a: . . . (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; . . . 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, [commits a criminal offence].

The statute defines “harass” as “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” *Id.* at § 13B(a). Though the term “intimidates” is not defined by the statute, Massachusetts courts have found that “the essence of intimidation is fear.” Commonwealth v. Potter, 39 Mass. App. Ct. 924, 926 (1995); see also Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 799 (1998) (superseded by statute on

unrelated grounds) (noting that intimidation is “putting a person in fear for the purpose of influencing his or her conduct”).

Application of the statute is restrained by the Constitution. “In considering the First Amendment's protective reach, ‘critical’ to the examination is the context . . . of the speech at issue.” Commonwealth v. Bigelow, 475 Mass. 554, 562 (2016), citing Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 744, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). In O'Brien v. Borowski, 461 Mass. 415, 425, 961 N.E.2d 547, 556 (2012), the SJC confined the definition of “harassment” under G.L. c. 258E to the constitutionally unprotected categories of fighting words and true threats. Notably, the definition of “harassment” in G.L. c. 258E expressly includes violations of Section 13B. Similarly, the federal witness intimidation statute, 18 U.S.C. § 1512, is limited to constitutionally unprotected speech such as true threats. U.S. v. Colhoff, 833 F.3d 980, 984-85 (8th Cir. 2016); accord United States v. Carmichael, 326 F. Supp. 2d 1267, 1279 (M.D. Ala. 2004). Thus, O'Brien must be read to similarly restrict Section 13B to only unprotected speech of fighting words or true threats. Mr. DePina uttered neither fighting words nor true threats.

3.2 The Criminal Complaint was Issued Without Probable Cause

To pass constitutional muster, a criminal statute that seeks to punish an individual for speech must apply only to unprotected speech. Otherwise, the statute would be void under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. Mr. DePina’s statements are protected and the complaint must be dismissed.

“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Virginia v. Black, 538 U.S. 343, 359 (2003). As the SJC observed in O'Brien, “the ‘true threat’ doctrine applies not only to direct threats of imminent physical harm, but to words

or actions that -- taking into account the context in which they arise -- cause the victim to fear such harm now or in the future and evince intent on the part of the speaker or actor to cause such fear.” 461 Mass. at 425. Similarly, the “fighting words” exception “is limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” *Id.* at 423. Such provocation must be immediate. See Byrnes v. City of Manchester, 848 F. Supp. 2d 146, 157 (D.N.H. 2012) citing Chaplinsky v. New Hampshire, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). The “heckl[ing]” and “offensive comments of a personal nature” alleged in the Police Report do not constitute such unprotected speech.

Mr. DePina’s statements do not come close to being harassing, intimidating, or threatening. He was standing among a crowd of press and citizens on a public road during a press conference. Rollins was not alone and there is no allegation that Mr. DePina was in immediate physical proximity to her. Mr. DePina did not make any statements that threatened or even suggested any form of physical harm to Rollins or anyone else. Rather, Mr. DePina, a candidate for public office, merely criticized Rollins for not paying sufficient attention to criminal matters involving average citizens, not taking sufficient care of Boston police officers, lying to the public, and caring more about becoming a U.S. Attorney than helping the people of Boston. The Police Report itself states that Mr. DePina’s statements amounted to no more than “loudly heck[ling] her” and “making multiple offensive comments of a personal nature,” conduct that any public official should expect as a possibility when addressing the public. (Exhibit 1.) Mr. DePina did not make any reference to

any pending criminal matters against him while she was speaking,⁸ and there is no allegation that Rollins actually felt intimidated by any of Mr. DePina's statements. Criticizing a public official for being lousy at their job does not constitute intimidation or harassment. If there were probable cause to arrest someone for criticizing a district attorney during a press conference, then no one involved with pending criminal cases could ever dare criticize a district attorney for fear of criminal prosecution. This would give prosecutors enormous, and unconstitutional, control over the speech of criminal defendants. This is what Ms. Rollins wants. This court stands between this censorious and unconstitutional desire and reality.

Rollins may very well have felt annoyed at a citizen criticizing her during a press conference, while campaigning for her personal confirmation as U.S. Attorney. But, merely voicing negative opinions of a public official and political nominee, without any implication of physical violence or contact, does not constitute fighting words. O'Brien at 429. None of Mr. DePina's statements were so abusive as to provoke an immediate violent reaction or breach of peace. Compare Baker v. Glover, 776 F. Supp. 1511, 1516 (M.D. Ala. 1991) ("To the extent that there are any true fighting words left, the court is of the opinion that the phrase 'Eat Shit' does not fall within this category. Such words do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace'"), quoting Chaplinsky, 315 U.S. at 572. Mr. DePina's statements are constitutionally protected.

⁸ After Rollins left the podium, Mr. DePina stated "Love you still. I'm mentally disturbed. Don't forget that. You said it on camera so when we go to court I'm going to use it." (**Exhibit 2.**) None of the other statements regarding Rollins mentioned court. Mr. DePina saying that he would use Rollins's statement that Mr. DePina was mentally disturbed as part of court proceedings is neither fighting words nor a true threat. It is, at most, a statement to opposing counsel of a defense. Of course, this statement only came after Rollins besmirched Mr. DePina, accusing him of being "mentally disturbed" because he dared to criticize her while she wanted to preen for the cameras.

Mr. DePina's statements do not constitute a true threat, either. Though Mr. DePina was in the same physical location as Rollins, there were other members of the press recording the conference, as well as members of law enforcement present. Under these circumstances, Rollins could not have had any reasonable apprehension of physical violence from Mr. DePina. Mr. DePina also did not make any statements that could reasonably be construed as a threat to later engage in violence. He was merely a member of the public, and a fellow politician, criticizing Rollins for what he felt was her poor job performance.


Even if Officer Williams's false statement that Mr. DePina somehow made indirect reference to the other matters pending against him, this does not alter the analysis. A criminal defendant is free to say, in public, at a prosecutor's press conference, "You're a terrible prosecutor for prosecuting me in these X, Y, Z cases." Professional criticism, even from a defendant, is neither fighting words nor a true threat. Whether Officer Williams sought to curry favor from Rollins, or Rollins abused her office to prosecute Mr. DePina, the Constitution does not tolerate this charge.

4.0 CONCLUSION

For the foregoing reasons, Mr. DePina respectfully requests that this Court allow the Motion to Dismiss.

EXHIBIT 1

Suffolk County Police Report,
Incident # 212082441

CRIMINAL COMPLAINT ORIGINAL		DOCKET NUMBER 2107CR003064	NO. OF COUNTS 1	Trial Court of Massachusetts BMC Department	
DEFENDANT NAME & ADDRESS Joao G Depina [REDACTED]				COURT NAME & ADDRESS BMC Dorchester 510 Washington Street Dorchester, MA 02124- (617)288-9500	
DEFENDANT DOB 12/12/1978	COMPLAINT ISSUED 11/12/2021	DATE OF OFFENSE 11/09/2021	ARREST DATE	ORIGINAL	
OFFENSE CITY / TOWN Boston	OFFENSE ADDRESS Ferndale St. and Norfolk St.		NEXT EVENT DATE & TIME 12/27/2021 09:00 AM		
POLICE DEPARTMENT Boston PD Area B-3		POLICE INCIDENT NUMBER 212082441		NEXT SCHEDULED EVENT Arraignment	
OBTN	PCF NUMBER 2446892	DEFENDANT XREF ID 6492112		ROOM / SESSION Arraignment (1st) Session	

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.

COUNT	CODE	DESCRIPTION
1	268/13B/A	WITNESS/JUROR/POLICE/COURT OFFICIAL, INTIMIDATE c268 §13B

On 11/09/2021 did, directly or indirectly, wilfully threaten, attempt or cause physical injury, emotional injury, economic injury or property damage to; or did convey a gift, offer or promise of something of value to; or did mislead, intimidate or harass another person who was a witness or potential witness; 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; 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; person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or family member of a person described in this section, with intent to or with reckless disregard for the fact that it may; (i) 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 (ii) 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, in violation of G.L. c.268, § 13B(1).

(PENALTY: state prison not more than 10 years; or jail or house of correction not more than 2½ years; or fine not less than \$1000, not more than \$5000; or both. Superior Court jurisdiction, however, District Court has final jurisdiction for intimidation of a witness or juror under G.L. c.218, §26.)

SIGNATURE OF COMPLAINANT <i>[Signature]</i>	SWORN TO BEFORE CLERK/MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK X <i>[Signature]</i>	DATE 11/12/21
NAME OF COMPLAINANT Brenando Deo Cruz	CLERK/MAGISTRATE/ASST. CLERK X <i>[Signature]</i>	DATE 11/12/21

Notice to Defendant: 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.



**APPLICATION FOR
CRIMINAL COMPLAINT**

1 of 1

I, the undersigned complainant, request that a criminal complaint issue against the accused charging the offense(s) listed below. If the accused **HAS NOT BEEN ARRESTED** and the charges involve:

- ONLY MISDEMEANOR(S). I request a hearing **WITHOUT NOTICE**, because of an imminent threat of
 - BODILY INJURY COMMISSION OF A CRIME FLIGHT **WITH NOTICE** to accused
- ONE OR MORE FELONIES. I request a hearing **WITHOUT NOTICE** **WITH NOTICE** to accused
- WARRANT is requested because prosecutor represents that accused may not appear unless arrested.

ARREST STATUS OF ACCUSED
 HAS HAS NOT been arrested

INFORMATION ABOUT ACCUSED

NAME (FIRST MI LAST) AND ADDRESS
DEPINA, JOAO G. [REDACTED]

HAIR Black	RACE BLACK	COMPLEXION MEDIUM BROWN	SCARS/MARKS/TATTOOS
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EMPLOYER/SCHOOL	MOTHER'S MAIDEN NAME (FIRST MI LAST) GOMES	FATHER'S NAME (FIRST MI LAST) DEPINA, JOSE
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CASE INFORMATION

COMPLAINANT NAME (FIRST MI LAST) WILLIAMS, DETECTIVE DANTE	COMPLAINANT TYPE <input checked="" type="checkbox"/> POLICE <input type="checkbox"/> CITIZEN <input type="checkbox"/> OTHER	PD BOSTON POLI
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ADDRESS 1 BULFINCH PL. BOSTON, MA 02114	PLACE OF OFFENSE FERNDALE ST. AND NORFOLK ST., BOSTON, MA 02124
	INCIDENT REPORT NO. 212082441 OBTN
	CITATION NO(S). 212082441

1	OFFENSE CODE 268/13B/A-5	DESCRIPTION WITNESS/JUROR/POLICE/COURT OFFICIAL, INTIMIDATE c268 §13B	OFFENSE DATE 11/09/2021
	VARIABLES (e.g. victim name, controlled substance, type and value of property, other variable information; see Complaint Language Manual) 11/09/2021 (OFFENSE DATE)		

2	OFFENSE CODE	DESCRIPTION	OFFENSE DATE
	VARIABLES		

3	OFFENSE CODE	DESCRIPTION	OFFENSE DATE
	VARIABLES		

REMARKS	COMPLAINANT'S SIGNATURE <i>[Signature]</i>	DATE FILED 11/12/21
DEF. MADE STATEMENTS TO THE VT. W/ INTENT TO INTIMIDATE HER		

COURT USE ONLY	A HEARING UPON THIS COMPLAINT APPLICATION WILL BE HELD AT THE ABOVE COURT ADDRESS ON	DATE OF HEARING	AT	TIME OF HEARING	COURT USE ONLY
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DATE	PROCESSING OF NON-ARREST APPLICATION (COURT USE ONLY)	CLERK/JUDGE
	NOTICE SENT OF CLERK'S HEARING SCHEDULED ON:	
	NOTICE SENT OF JUDGE'S HEARING SCHEDULED ON:	
	HEARING CONTINUED TO:	
	APPLICATION DECIDED WITHOUT NOTICE TO ACCUSED BECAUSE: <ul style="list-style-type: none"> <input type="checkbox"/> IMMINENT THREAT OF <input type="checkbox"/> BODILY INJURY <input type="checkbox"/> CRIME <input type="checkbox"/> FLIGHT BY ACCUSED <input type="checkbox"/> FELONY CHARGED AND POLICE DO NOT REQUEST NOTICE <input type="checkbox"/> FELONY CHARGED BY CIVILIAN; NO NOTICE AT CLERK'S DISCRETION 	

DATE	COMPLAINT TO ISSUE	COMPLAINT DENIED	CLERK/JUDGE
11/12/21	<input checked="" type="checkbox"/> PROBABLE CAUSE FOUND FOR ABOVE OFFENSE(S) NO(S) <input checked="" type="checkbox"/> 1. <input type="checkbox"/> 2. <input type="checkbox"/> 3. BASED ON <input checked="" type="checkbox"/> FACTS SET FORTH IN ATTACHED STATEMENT(S) <input type="checkbox"/> TESTIMONY RECORDED: TAPE NO. _____ START NO. _____ END NO. _____ <input type="checkbox"/> WARRANT <input checked="" type="checkbox"/> SUMMONS TO ISSUE ARRAIGNMENT DATE: 12/27/21	<input type="checkbox"/> NO PROBABLE CAUSE FOUND <input type="checkbox"/> REQUEST OF COMPLAINANT <input type="checkbox"/> FAILURE TO PROSECUTE <input type="checkbox"/> AGREEMENT OF BOTH PARTIES <input type="checkbox"/> OTHER: COMMENT	<i>[Signature]</i>

PAGES: 1 - 18

VIDEO TRANSCRIPTION

November 9, 2021

Transcribed by Jessica F. Story, CSR, RPR

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1
2
3 JOAO DEPINA: What was you saying? What
4 was you saying? Oh, last December. Shit.
5 Yeah. Yeah. Good.

6 Oh. It's just her. This is going to be
7 great. This is going to be amazing. All right.
8 Ready, guys.

9 DA ROLLINS: Thank you. (Inaudible)
10 facts of the case. As you know, (inaudible)
11 district attorneys of the Commonwealth of
12 Massachusetts.

13 JOAO DEPINA: And what happens when
14 civilians are hurt?

15 DA ROLLINS: So right now in the last
16 three days we had multiple --

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18 years I've been alive we had several black men
19 in Boston shot.

20 DA ROLLINS: -- emotional --

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22 emotionally correct and help ourselves. And
23 then we sit there and we got to get answers from
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9 because she has a duck for a boyfriend and she's
10 very nasty to people and she's, she abuses her
11 power.

12 UNKNOWN: Excuse me, sir. Excuse me.
13 I'm sorry.

14 JOAO DEPINA: To lock up black men in the
15 community.

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10 mom needs answers, Rachael. My mom needs
11 answers for the murder of my brother, Rachael.

12 Michael DePina was murdered in the
13 streets of Dorchester and we still have no
14 answers and the DA's office is still not doing
15 that because she is very in tuned into, into
16 locking black and brown men up for petty crimes,
17 and that is what's going on. Yeah.

18 Imagine what the police are going through
19 right now. I am emotionally disturbed because
20 of Rachael Rollins. I am emotionally disturbed
21 because, yeah. And our families get stabbed and
22 shot and raped, and Rachael Rollins' office
23 don't give two shits about us.

24 DA ROLLINS: -- going into this --

1 I don't care. Sorry, press. Sorry, people.
2 Freedom of speech. This is beautiful. This is
3 called freedom of speech. When Channel 10 wants
4 to answer a question, just let me know. I'll be
5 quiet, sir.

6 DA ROLLINS: No one --

7 JOAO DEPINA: Telemundo.

8 DA ROLLINS: -- in order to --

9 JOAO DEPINA: But, yeah. You can't sign
10 up for a job that you're going to get killed and
11 they don't get paid enough. And you treat the
12 police like shit.

13 DA ROLLINS: -- people --

14 JOAO DEPINA: The city of Boston been
15 treating the police like shit. You make them
16 work overtime. You make them get tired. They
17 don't get good recovery time. The poor police.

18 DA ROLLINS: The men --

19 JOAO DEPINA: Yes. They need better
20 services. The poor police shouldn't have to
21 come to a job after they witness a traumatic
22 situation. The police should deserve to have
23 two days off and have time with their family,
24 Rachael.

1 DA ROLLINS: Well, they were grateful --

2 JOAO DEPINA: The police are always under
3 stress, and they're grateful that people like me
4 are speaking up for them because nobody else
5 speaks up for the police.

6 Hey, Rachael Rollins, I'm here talking to
7 you, honey. Yes. I'm talking to you. Freedom
8 of speech, isn't that a bitch. Huh.

9 Freedom of speech. Freedom of speech.
10 Free press. Free speech. You won't get a good
11 interview with me around, ever. Ever. Ever.
12 Because what you're doing is abuse of power,
13 Rachael.

14 Let's talk about the state rep going to
15 Michigan and using state funds. And let's talk
16 about the state rep that is using, that used a
17 cell phone that is from a state issued cell
18 phone to talk derogatory to other women, to
19 other black women like you, Rachael.

20 Aren't you black? Aren't you black,
21 darling? Yeah. This is what mental health
22 looks like, huh, Rachael? Because that's what
23 you just told the press. This is what mental
24 health is. This is what mentally disturbed

1 people look like.

2 And what does, what does mentally
3 disturbed lawyers look like? What does a
4 scorned woman look like? Oh. Oh. Oh. You
5 want me tell you about it.

6 Why did BU fire you? They fired you.
7 They fired you, Rachael. And then also, let's
8 talk about your ex-boyfriend, your ex-duck
9 boyfriend, Rachael. The same one that you be
10 watching their kids for. Yes. And let's talk
11 about your current boyfriend, Rachael, your
12 other duck boyfriend. Everybody knows him.

13 Have you ever met a DA that has a duck
14 for a boyfriend? Today you meet him. Today you
15 meet Rachael Rollins. Hi, honey. I'm here to
16 give it to you. I'm here. I'm here for it.
17 I'm here for it, honey.

18 Rachael, just tell them the truth. You
19 don't care. All you care about is going to the
20 next position. You don't care about our black
21 and brown community. You're worried about going
22 to the next position, Rachael. Yes. You got a
23 good picture of me?

24 Make sure, Rachael, make sure they know

1 that you only worry about yourself and becoming
2 the U.S. attorney. That's, you don't get, you
3 don't, you -- no. Because I'm blocking their
4 stuff. I'm sorry but I told you guys this.

5 Rachael, Rachael, I'm here, honey. Here
6 comes the other counterparts. Okay. We'll let
7 the Commissioner Long talk. Come on,
8 Commissioner Long. He's a nice guy. Now we let
9 him have an interview.

10 COMMISSIONER LONG: Good evening. At
11 about 9:30 this morning officers assigned to
12 District B-3 reported (inaudible).

13 JOAO DEPINA: Bye, Rachael.

14 COMMISSIONER LONG: Upon arrival --

15 JOAO DEPINA: Love you still. I'm
16 mentally disturbed. Don't forget that. You
17 said it on camera so when we go to court I'm
18 going to use it.

19 COMMISSIONER LONG: -- individual
20 (inaudible). As a result, SWAT assets were
21 brought down here (inaudible) negotiations.
22 Negotiations went on for about five or six hours
23 with this individual in an attempt for him to
24 surrender peacefully.

1 At some point this afternoon during the
2 negotiations the individual fired, fired at the
3 officers, striking three officers on scene.

4 JOAO DEPINA: Three officers were shot.

5 COMMISSIONER LONG: As a result of being
6 fired upon, officers on scene returned fire,
7 threatened the suspect. The suspect suffered
8 multiple gunshot wounds and was pronounced on
9 scene.

10 JOAO DEPINA: Told you guys.

11 COMMISSIONER LONG: The three officers
12 were taken to local area hospitals where they
13 all suffered nonlife-threatening gunshot wounds.
14 Multiple other officers were also brought to
15 local area hospitals for evaluation.

16 This is still --

17 JOAO DEPINA: Good. Get them help.

18 COMMISSIONER LONG: -- an active crime
19 scene. Witnesses are being interviewed. Still
20 canvassing for video.

21 You know, I want to highlight and make
22 note of this, that in the last three days we've
23 had four Boston police officers suffer injuries
24 as a result of facing --

1 JOAO DEPINA: Yes. She did say that.

2 COMMISSIONER LONG: Again, this
3 highlights the dangers the men and the women of
4 the department every single day they put on
5 their uniforms. I can't say enough about the
6 professionalism, courage and bravery that
7 officers show every day, not just on Saturday
8 night and not just here today, but every day
9 they put on the uniform.

10 NEWSPERSON: Commissioner, how are the
11 officers doing and what was that like, to go to
12 the hospital (inaudible) your officers?

13 COMMISSIONER LONG: It's never a good
14 thing, right. You know --

15 JOAO DEPINA: That was a stupid question.
16 Like whoever wants to see somebody hurt.

17 COMMISSIONER LONG: -- it's emotional for
18 their (inaudible). You know, we have officers
19 (inaudible) last couple days. Emotional
20 (inaudible). It's a strong department and they
21 continue to do, they'll go out and (inaudible).

22 JOAO DEPINA: Thank you.

23 COMMISSIONER LONG: Like I said, all I
24 know is at the time (inaudible) investigation.

1 That this individual is (inaudible) pointed a
2 firearm at officers (inaudible).

3 NEWSPERSON: Did he live there?

4 COMMISSIONER LONG: We're investigating.

5 JOAO DEPINA: He was visiting.

6 COMMISSIONER LONG: -- three officers.

7 JOAO DEPINA: He's been here for ten
8 days.

9 COMMISSIONER LONG: I can't give you
10 (inaudible). That's still under investigation.

11 JOAO DEPINA: Oh. Come on. Stupid,
12 stupid questions for the press.

13 COMMISSIONER LONG: On behalf of
14 (inaudible).

15 UNKNOWN: Last question.

16 COMMISSIONER LONG: They were inside.

17 JOAO DEPINA: It's not okay to shoot at
18 anybody.

19 COMMISSIONER LONG: I'll tell you. This
20 is a great neighborhood (inaudible). No.

21 JOAO DEPINA: It's not okay to shoot at
22 police officers. It's not okay to shoot at
23 anybody. This is ridiculous. We should not
24 have to live in a war zone.

1 COMMISSIONER LONG: (Inaudible).

2 Speaking with them.

3 JOAO DEPINA: How many questions?

4 COMMISSIONER LONG: (Inaudible).

5 Downtown. It goes to the city street.

6 JOAO DEPINA: You buried that?

7 COMMISSIONER LONG: -- officer training.

8 Again, every time we see this (inaudible)

9 training (inaudible) put in the practice

10 (inaudible).

11 NEWSPERSON: You mentioned that the
12 injuries are nonlife-threatening?

13 COMMISSIONER LONG: Nonlife-threatening.

14 JOAO DEPINA: Yes. They're alive.

15 NEWSPERSON: How bad are they?

16 COMMISSIONER LONG: I'd categorize
17 (inaudible).

18 JOAO DEPINA: Yes.

19 NEWSPERSON: Can you go over again
20 (inaudible). The officers (inaudible).

21 COMMISSIONER LONG: Like I said --

22 JOAO DEPINA: That's too much. Too much.

23 They start -- he got a lot of work to go do.

24 Thank you, Commissioner Long, for all

1 your great work you guys been doing.

2 COMMISSIONER LONG: Appreciate that.

3 Thank you.

4 JOAO DEPINA: Thank you for all your
5 great work, Commissioner Long. We appreciate
6 you.

7

8 (End of video clip.)

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C E R T I F I C A T E

I, JESSICA F. STORY, Certified Shorthand Reporter, Registered Professional Reporter, do hereby certify that the foregoing testimony is true and accurate, to the best of my knowledge and ability, of the video file provided to me by the Randazza Legal Group.

WITNESS MY HAND THIS 6th day of December, 2021.



Jessica Fayre Story, CSR, RPR

My Commission expires
on August 12, 2027

EXHIBIT 5

True and Correct Copy of the Order of the
Boston Municipal Court Transferring this Matter
to this Court

COMMONWEALTH OF MASSACHUSETTS**SUFFOLK, ss.****TRIAL COURT****ORDER OF TRANSFER**

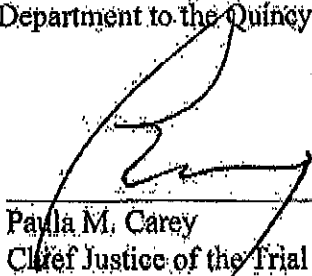
Commonwealth v. Joao Gomes Depina
Dorchester Division, Boston Municipal Court Department
No. 2107CR003064,

Commonwealth v. Joao Gomes Depina
Dorchester Division, Boston Municipal Court Department
No. 2007CR002818

and

Commonwealth v. Joao Gomes Depina
Dorchester Division, Boston Municipal Court Department
No. 1807CR003369

Pursuant to the authority contained in G.L. c. 211B, § 9 and my inherent authority as the Chief Justice of the Trial Court I hereby transfer the above-entitled actions from the Dorchester Division of the Boston Municipal Court Department to the Quincy Division of the District Court Department.



Paula M. Carey
Chief Justice of the Trial Court

Dated: December 8, 2021

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

BOSTON MUNICIPAL COURT
DOCKET NO. 2107CR003064

COMMONWEALTH OF MASSACHUSETTS

v.

JOAO G. DEPINA

COMMONWEALTH'S OPPOSITION TO THE
DEFENDANT'S MOTION TO DISMISS

The Commonwealth of Massachusetts does hereby oppose the defendant's motion to dismiss. As grounds therefor, the Commonwealth states that there was sufficient evidence presented to the clerk-magistrate to establish probable cause to believe that the defendant committed the crime of intimidation of a witness.

Prior Proceedings

On November 12, 2021, a complaint charging the defendant with intimidation of a witness, G.L. c. 268, § 13B, was issued by this Court. On January 6, 2022, the defendant filed a motion to dismiss. A hearing on the defendant's motion to dismiss is scheduled for March 31, 2022.

Facts¹

On November 9, 2021, around 6:10 p.m., then-Suffolk County District Attorney Rachel Rollins² ("D.A. Rollins") was holding a press conference at Ferndale Street and Norfolk Street, regarding a shooting incident that had occurred earlier that day. The area had been cordoned off for the press to assemble. As D.A. Rollins began making her statement, the defendant began to

¹ The Commonwealth's statement of facts is based upon the statement of facts filed in support of the application for criminal complaint, which the Commonwealth has attached as Comm. Exhibit A.

² Rachel Rollins is currently the United States Attorney for the District of Massachusetts.

“loudly heck[le] her” and “mak[e] multiple offensive comments of a personal nature directly at her.” Indeed, the defendant repeatedly invoked her name. The defendant, at the time, had three separate and open cases pending in District Court which were being prosecuted by the Suffolk County District Attorney’s Office, of which D.A. Rollins was then in charge. One of the defendant’s cases had an upcoming pretrial court date on November 16, 2021. The defendant’s comments “appeared as an intent to [a]ffect or interfere with these pending Suffolk County cases.” The defendant “made several indirect references to these cases during his verbal offensive.”

Boston Police Detective Dante Williams and Detective Jeffrey Cecil were in close proximity to both D.A. Rollins and the defendant and witnessed this incident. The defendant recorded this incident and uploaded the recording to his Facebook account. Detective Williams was able to obtain a copy of this recording. The defendant has “made multiple attempts to contact” D.A. Rollins to “talk directly” about his pending cases but has been unsuccessful. This incident “appears to be an escalation” from a prior incident at the Caribbean Festival on August 2, 2021. The defendant’s behavior immediately ceased once D.A. Rollins finished her statement and stepped away from the press.

Argument

This Court should deny the defendant’s motion to dismiss, where there was sufficient evidence presented to the clerk-magistrate to establish probable cause to believe that the defendant committed the crime of intimidation of a witness.

A complaint cannot be issued unless there has been a determination of probable cause to believe that a crime was committed and that it was committed by the defendant. *Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 560 (1996). A motion to dismiss a complaint may be appropriate if the complaint is not supported by probable cause. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002). “A motion to dismiss for lack of probable cause is evaluated from the

four corners of the application for a complaint.” *Commonwealth v. Richardson*, 479 Mass. 344, 352 (2018). “The complaint application must allege facts sufficient to establish probable cause as to each element of the offense charged.” *Commonwealth v. Ilya I.*, 470 Mass. 625, 627 (2015). “The probable cause standard on a motion to dismiss a complaint is identical to that applied in the analysis of a motion to dismiss an indictment for lack of probable cause.” *Id.*

“In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Commonwealth v. Cullen*, 62 Mass. App. Ct. 390, 402 (2004) (citation omitted), *rev. denied*, 443 Mass. 1103 (2005). “[P]robable cause requires considerably less evidence than that which is required to support a finding of guilty.” *Commonwealth v. Goldstein*, 54 Mass. App. Ct. 863, 866 (2002).

Circumstantial evidence, which “is competent to establish guilt beyond a reasonable doubt,” *Commonwealth v. Gilbert*, 423 Mass. 863, 868 (1996), may certainly establish probable cause. *See Commonwealth v. Torres*, 442 Mass. 554, 563 (2004) (“The evidence, although entirely circumstantial, was sufficient to support” the conviction); *Commonwealth v. Guerrero*, 32 Mass. App. Ct. 263, 266 (1992) (“web of circumstantial evidence” supported conviction). “An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable.” *Gilbert*, 423 Mass. at 868 (citation omitted). “Whether an inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense.” *Commonwealth v. Gonzalez*, 452 Mass. 142, 146 (2008) (citation omitted). The evidence alleged, and reasonable inferences therefrom, must be “viewed in the light most favorable to the Commonwealth.” *Commonwealth v. Rodriguez*, 75 Mass. App. Ct. 235, 238 (2009) (citation omitted).

The defendant claims that there was insufficient evidence presented to establish probable cause to believe that he committed the offense of intimidation of a witness. Because there was sufficient evidence presented to support a finding of probable cause for the charge, this Court should deny the defendant's motion to dismiss.

In the relevant context, a person commits the crime of intimidation of a witness when he "willfully, either directly or indirectly ... intimidates or harasses another person who is a[n] ... attorney... 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...." G.L. c. 268, § 13B; *Commonwealth v. Carvalho*, 88 Mass. App. Ct. 840, 845 (2016) (in order to establish intimidation of a witness, the Commonwealth is required to prove that the defendant, either directly or indirectly, made a willful effort to intimidate or harass another person who is an attorney at any stage of a criminal investigation or proceeding). The term "harass" shall mean "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." G.L. c. 268, § 13B. "Intimidation is putting a person in fear for the purpose of influencing his or her conduct." *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998).

"Words do not need to be expressly intimidating, threatening, or harassing" to fall within the meaning of intimidation. *Hrycenko v. Commonwealth*, 459 Mass. 503, 511 (2011). "The assessment whether the defendant made a threat is not confined to a technical analysis of the precise words uttered[;] ... the jury may consider the context in which the allegedly threatening statement was made and all of the surrounding circumstances." *Carvalho*, 88 Mass. App. Ct. at

845-46 (citations omitted). “The Commonwealth does not need to prove that the victim of witness intimidation was actually intimidated or frightened.” *Commonwealth v. Nordstrom*, 100 Mass. App. Ct. 493, ___, 179 N.E.3d 593, 602 (2021). “An action does not need to be overtly threatening to fall within the meaning of ‘intimidation.’” *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705, 708 (2007).

Here, during a press conference, the defendant was heckling and making numerous offensive comments of a personal nature towards D.A. Rollins. At the time, D.A. Rollins’s office was prosecuting the defendant on three separate cases. As alleged in the complaint, during his verbal barrage, the defendant made indirect references to these cases and his comments demonstrated an intent to interfere with or affect these upcoming cases. Finally, the defendant has repeatedly attempted to contact D.A. Rollins to discuss his cases and this incident was an escalation of a prior incident in August. Taking these facts together, there was sufficient evidence presented to establish probable cause to charge the defendant. *See Carvalho*, 88 Mass. App. Ct. at 347 (defendant landlord’s approaching tenant victim, after victim obtained a harassment prevention order, and asking her if she “feel(s) good about yourself,” was sufficient to sustain defendant’s witness intimidation conviction); *Commonwealth v. Rivera*, 76 Mass. App. Ct. 530, 531 (2010) (intimidation of witness where defendant yelled at victim, who was about to be questioned by police, “we were just joking around right”); *Hrycenko*, 459 Mass. at 505-10 (defendant’s sending letter to judge’s home after judge had sentenced defendant, referencing his long criminal record and knowing the judge’s address and asking judge to reconsider sentence, constituted intimidation of a witness).

Moreover, in arguing that there was insufficient evidence to sustain the charge, the defendant refers to facts outside the complaint, including newspaper articles and a transcript of the

defendant's recording. A motion to dismiss a complaint, however, "is decided from the four corners of the complaint application, without evidentiary hearing." *Commonwealth v. Humberto H.*, 466 Mass. 562, 565 (2013) (citations omitted). "A motion to dismiss a complaint, in which the defendant challenges whether the charge is supported by probable cause, is a very limited remedy analogous to a postindictment [*McCarthy*] motion to dismiss." *Commonwealth v. Huggins*, 84 Mass. App. Ct. 107, 111 (2013). Thus, this Court is limited to the facts outlined in the complaint when deciding the defendant's motion. As argued above, there was sufficient evidence presented therein to charge the defendant.

The defendant, nevertheless, argues that the comments he made at the press conference are protected free speech under the First Amendment, and, as such, cannot constitute a crime.

"While most speech is protected from government regulation by the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, ... there are 'certain well-defined and narrowly limited classes of speech' that are not protected because they are 'no essential part of any exposition of ideas, and are of such slight social value as a step to truth' that whatever meager benefit that may be derived from them is 'clearly outweighed' by the dangers they pose."

O'Brien v. Borowski, 461 Mass. 415, 422 (2012) (citations omitted). Among these well-defined and narrowly limited classes of speech are "fighting words" and "true threats." *Id.* True threats have been defined as the following:

those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'

Commonwealth v. Walters, 472 Mass. 680, 690-91 (2016) (citations omitted). A true threat "need not take the form of an explicit statement that the speaker intends to cause imminent, physical harm to the victim, but may comprise 'words or actions that—taking into account the context in

which they arise—cause the victim to fear such harm now or in the future.’” *Id.* at 691 (citations omitted). “The term ‘true threat’ has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit.” *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001). Fighting words are “limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” *O’Brien*, 461 Mass. at 423. “In considering the First Amendment’s protective reach, ‘critical’ to the examination is the context and content of the speech at issue. *Commonwealth v. Bigelow*, 475 Mass. 554, 562 (2016). “The regulation of threatening speech has been held not to violate the First Amendment where the speech harasses or is a ‘true threat.’” *Chou*, 433 Mass. at 236.

In the present case, the defendant’s speech was neither lawful nor protected. The purpose of the defendant’s comments was to harass D.A. Rollins and attempt to intimidate her so that her office would address his current cases in a different manner. The offense of intimidation of a witness exists to protect the integrity of court proceedings, among other reasons (*Rivera*, 76 Mass. App. Ct. at 532-35), and the defendant does not have a protected right to use speech to interfere with a court proceeding. Thus, the defendant’s comments are not protected by the First Amendment. *See Commonwealth v. Johnson*, 470 Mass. 300, 309-10 (2014) (where the sole purpose of defendants’ speech was to harass victims and where speech was integral to criminal conduct, such speech is not protected by First Amendment); *Chou*, 433 Mass. at 235-37 (defendant producing and putting up numerous missing persons flyers about his ex-girlfriend/victim, where flyers contained identifying information and sexually explicit language, did not constitute protected free speech). Moreover, the issue of whether the defendant’s comments constitute

constitutional protected speech or “whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide” with the appropriate jury instructions. *Bigelow*, 475 Mass. at 571-72.

Conclusion

Based upon the foregoing, this Court should deny the defendant’s motion to dismiss.

Respectfully submitted,
For the Commonwealth



ANTHONY H. MELIA
Assistant District Attorney
District Attorney’s Office
225 Main Street, Room G301
Worcester, MA 01608

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Marc J. Randazza, Esquire, electronically at ecf@randazza.com, on March 22, 2022.



Anthony H. Melia

TRIAL COURT OF MASSACHUSETTS
BOSTON MUNICIPAL COURT
DORCHESTER DIVISION

COMMONWEALTH OF MASSACHUSETTS)

Plaintiff,)

v.)

JOAO DEPINA,)

Defendant.)

Case No. 2107 CR 003064

REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

Defendant Joao DePina hereby files his Reply in support of his Motion to Dismiss.

1.0 INTRODUCTION AND FACTUAL BACKGROUND

Rachel Rollins was under consideration to be the U.S. Attorney for the District of Massachusetts. Mr. DePina, a political activist, came to an outdoor press conference and expressed his opinion about Rollins’s abuse of power and neglect of her duties – including neglect of a case involving his own brother’s murder. The Commonwealth would prefer to exclude what DePina actually said from the record, instead relying on a materially false police report. However, it cannot do so. *See Franks v. Delaware*, 438 U.S. 154 (1978) (if the complaint contains intentionally or recklessly false information, the defendant is entitled to be heard on the discrepancy).¹ Once the court reviews the transcript and/or the actual video of the event, as it must under *Franks v. Delaware*, it will see what any reasonable person would – the police report is materially false, as is the Commonwealth’s legal position.

¹ Further, even in the absence of *Franks v. Delaware*’s clear mandate, if the complaint references an external document or recording, as this one does, this necessarily incorporates the material, which is properly considered in a motion to dismiss hearing. *See* Section 2.1, *infra*.

2.0 ARGUMENT

Rollins initiated this prosecution under Mass. Gen. L. c 268, § 13B. This requires that the Commonwealth prove, beyond a reasonable doubt, that (1) the target of the alleged intimidation was an attorney involved in a criminal proceeding, (2) the defendant willfully endeavored or tried to influence the target, (3) the defendant did so by means of intimidation, force, or threats of force, and (4) the defendant did so with purpose of influencing the target as to a pending proceeding. *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 702 N.E.2d 37 (1998).

It can do none of the above.

2.1 The Court May Conclude Now that Mr. DePina's Speech is Protected

It is not even clear that the statute at hand applies to Ms. Rollins. There is no case in which an elected District Attorney responded to a First Amendment protected protest with a prosecution under this statute. However, there is a case that is close. The Commonwealth cites *Commonwealth v. Bigelow*, 475 Mass. 554 (2016) incorrectly – for the proposition that “whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide.” *Opp.* at 8, citing *Bigelow* at 571-72. The Commonwealth carefully edited that quote to only give the Court half of the ruling. The true quote is: “**if it cannot be concluded that, as a matter of law, the speech at issue is constitutionally protected speech**, the question whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide.”

The prosecution's position wilts if the Court reviews the transcript. The Commonwealth argues that it cannot do so, as the transcript lies outside the four corners of the Complaint and must be ignored when deciding a motion to dismiss. *Opp.* at 6. What the Commonwealth fails to acknowledge, however, is that the Complaint refers to Mr. DePina's statements shown in the

transcript in summary fashion and even refers to a recording of the video of Mr. DePina's interaction with Ms. Rollins that law enforcement obtained. The Commonwealth's Complaint is vague as to the contents of Mr. DePina's statements. If it actually identified what Mr. DePina said, the lack of probable cause would be obvious. Because of the possibility for such deliberate obfuscation, a court may consider matters of public record and documents integral to, referred to, or explicitly relied on in the complaint, whether or not attached, on a motion to dismiss. *Marram v. Kobrnick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000); *Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555, 884 N.E.2d 524 (2008); and *Shuel v. DeIeso*, 16 LCR 329, 329 n.2 (2008).

Although the Commonwealth cites to *Commonwealth v. Bell*, 83 Mass. App. Ct. 61, 62, 981 N.E.2d 200 (2013), as to whether the Court may look outside the four corners of the application, the Court may consider this material if there is no objection. *Commonwealth v. Murphy*, 98 Mass. App. Ct. 1103, 150 N.E.3d 1155 (2020). There does not appear to be an objection, only a recitation of the ordinary caselaw. The Commonwealth is obviously aware of the contents of Mr. DePina's speech as it avers possession of the recording, which should cause it to question whether it should prosecute this matter at all under *Murphy*. If it were responsible in its prosecution, it would have specifically identified what statements were allegedly unlawful. The Court should not allow this political prosecution to go forward simply because the Commonwealth chose to be vague, especially because it knows full well that if the Court considers the actual content of Mr. DePina's speech, rather than the deliberately (or at least recklessly) false "summary" of it, this case would need to be dismissed.

2.2 Mr. DePina Did Not "Intimidate" or "Harass" Ms. Rollins

The Commonwealth claims that the statute applies because DePina "*intimidated*" or

“*harassed*” Rollins. Opp. at 4. The Commonwealth admits that for speech to be “*harassing*” it must “*seriously alarm*” or “*cause a reasonable person ... to suffer substantial emotional distress.*” The Commonwealth further admits that to claim the “victim” is “*intimidated*” requires putting the person “*in fear.*” Opp. at 4. However, the record shows that neither of these conditions could have been met even if the standard was a hypersensitive person, much less a “reasonable” person.

Let us address “intimidation” first. Was Rachel Rollins, surrounded by police, while a man stood on the outskirts of a press conference criticizing her record in “fear?” If so, she had a peculiar way of showing it, as nothing the Commonwealth has presented shows anything except Rollins responding to mock and insult DePina. (See Motion to Dismiss *Exhibit 2* at 3:1-11) (calling Mr. DePina “emotionally disturbed.”) There is no statement from Rollins that she was “in fear.” The complaint does not even allege that she was “in fear.”

We now address whether a reasonable person would “suffer substantial emotional distress” if confronted with DePina’s words. It is certain that the most powerful law enforcement official in Boston was *annoyed* at her moment in the limelight being marred by a citizen challenging her record and her pending appointment. But, the U.S. Constitution does not recognize *lèse majesté*² as an offense. If this causes “*severe emotional distress,*” then any journalist who writes negatively about a prosecution should also be haled into court to answer for their “crime.”

However, we really get to the core of the Commonwealth’s lack of probable cause when we finally get to page 7 – where the Commonwealth argues “In the present case, the defendant’s speech was neither lawful nor protected.” Opp. at 7. The Commonwealth tries to support this position by claiming that DePina’s protest was either “true threats” or “fighting words.”

² Merriam-Webster’s dictionary defines *lèse majesté* as “(1)(a) a crime (such as treason) committed against a sovereign power; (1)(b) an offense violating the dignity of a ruler as the representative of a sovereign power; and (2) a detraction from or affront to dignity or importance.

2.3 Mr. DePina Did Not Utter Any “True Threats” or “Fighting Words”

The Commonwealth claims that DePina’s speech constitutes “fighting words.” This is the last refuge of an anemic attempt by Rollins to abusively use the power of the state to swat down a political opponent. Chaplinsky’s “fighting words” exception applies “only when a defendant's spoken words, when directed to another person in a public place, ‘tend to incite an immediate breach of the peace.’” *State v. Read*, 165 Vt. 141, 148, 680 A.2d 944, 948 1996 Vt. LEXIS 44, *12 (1996) (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942)). This doctrine is already a derelict theory on the sea of jurisprudence. Justice Morse, of the Supreme Court of Vermont, had a reasonable editorial discussion of this doctrine in *Read*:

In my view, the “fighting words” doctrine has become an archaic relic, which found its genesis in more chauvinistic times when it was considered bad form for a man to back down from a fight. Even the United States Supreme Court, which created it in *Chaplinsky v. New Hampshire*, has never since used the “fighting words” doctrine to uphold a conviction. Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1129 (1993). Recognition in legal analysis that it is “reasonable” to expect a person to retaliate with his fists when provoked by speech, it seems to me, runs counter to what the law should endorse.

Id. at 156 (citation omitted).

To the extent that the fighting words doctrine remains intact, and to the extent that this Court wishes to apply it despite its ludicrous and sexist roots in the theory that there are words that would provoke a “real man” to violence, it does not apply here. The transcript of Mr. DePina’s speech is in the record and properly considered here. There is nothing in the transcript nor in the broadest interpretation of common sense or human nature that would suggest that any reasonable person would be so strongly provoked by Mr. DePina’s words that she would lose control of herself and feel the need to physically attack DePina in order to defend her honor.

The assertion that Mr. DePina made a true threat is even more ridiculous. As the

Commonwealth notes, true threats are limited to “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual” *Commonwealth v. Walters*, 472 Mass. 680, 690-91 (2016); *see also Virginia v. Black*, 538 U.S. 343, 359 (2003) (same). The Commonwealth does not explain how Mr. DePina’s statements constitute even an oblique hint of a threat, much less a true threat; it merely mentions that true threats are not constitutionally protected and asserts in conclusory fashion that Mr. DePina’s purpose was to harass and intimidate Ms. Rollins. (Opp. at 7-8.) It fails to address the context of Mr. DePina’s statements, *i.e.*, criticisms of a public official about her job performance during a press conference. It fails to identify any case in any jurisdiction where a statement during a press conference has been found even potentially to be a true threat. It fails to identify how Mr. DePina’s statements could possibly be viewed by anyone as a threat to commit an act of violence. It also fails to identify any alleged facts supporting even an inference that Mr. DePina’s purpose in making his statements was to communicate such a non-existent threat to Ms. Rollins. As a matter of law, Mr. DePina’s statements were not true threats.

2.4 DePina did not “willfully endeavor or try to influence the target”

The record shows that DePina’s statements had nothing to do with trying to “influence” anyone from taking any action with respect to any pending case. The police report and the opposition to the motion to dismiss lack candor, claiming that DePina made “several” references to pending cases. The police report references the recording, which is the best evidence, and the transcript is in the record. The only time that DePina even fleetingly refers his pending cases is in response to Rollins insulting him as “mentally disturbed.” DePina then says that he intends to use this statement in court. *See Motion to Dismiss Exhibit 2, Transcript at p. 9, lines 15-18.* This fails to meet this element.

The Commonwealth tries to bolster its case by reporting that DePina "... has 'made multiple attempts to contact' D .A. Rollins to 'talk directly' about his pending cases but has been unsuccessful". *See* Opposition. Why wouldn't he? A party is permitted to contact the opposing counsel. Is the Commonwealth's position that if an attorney is working on a case, that phone calls to the attorney's office are "intimidation?" Even the police report makes it clear, on the surface, that none of these attempts to contact Rollins were successful. How can attempted phone contact with opposing counsel rise to the level of "true threats," or "fighting words?" It can not.

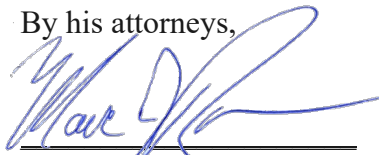
3.0 CONCLUSION

If the Court examines nothing more than the Complaint, it should be able to come to the conclusion that Mr. DePina's words were in no way a violation of the statute under which he was charged. However, if the Court refuses to consider the actual transcript of the hearing, it will have committed reversible error both as a matter of procedure and as a matter of Mr. DePina's fourth and fourteenth amendment rights as discussed in *Franks v. Delaware*. Once the Court reviews the actual transcript and recordings of the event in question, it again would commit reversible error if it did not dismiss this prosecution as a First Amendment violation.

Dated: March 29, 2022

Respectfully submitted,
JOAO DEPINA

By his attorneys,



MARC J. RANDAZZA

BBO# 651477

Randazza Legal Group, PLLC

30 Western Avenue

Gloucester, MA 01776


(978) 801-1776


ecf@randazza.com

CERTIFICATE OF SERVICE

I, Marc J. Randazza, hereby certify that a true and correct copy of the foregoing document was served upon all pro se parties and all attorneys of record in via e-mail and first-class mail, postage prepaid, this 29th day of March, 2022, as follows:

Suffolk County District Attorney
Anthony Melia


510 Washington Street
Dorchester Center, Massachusetts 02124



Marc J. Randazza