

BRISTOL, SS SUPERIOR COURT
FILED

SEP 24 2014

COMMONWEALTH OF MASSACHUSETTS

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

BRISTOL, ss.
BRCR2013-00983

125

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S MOTION FOR EX PARTE ORDER OF IMPOUNDMENT AND
FOR HEARING ON MOTION TO IMPOUND PENDING TRIAL

Now comes the Commonwealth and, pursuant to Rule 3 of Massachusetts Trial Court Rule VIII (Uniform Rules on Impoundment Procedure), moves this Court to enter forthwith an ex parte order of impoundment as more fully described below, and to set a hearing date at the Court's earliest convenience for the purpose of determining whether said order shall be continued beyond the ten days as provided for in Rule 3. In support thereof, the Commonwealth states as follows:

Introduction. The defendant, Aaron Hernandez, was arraigned in Attleboro District Court on June 26, 2013 on charges of first-degree murder and various firearms offenses. He was subsequently indicted by a Bristol County grand jury for the same crimes and is currently awaiting trial. This Court thereafter entered an order relating to

9/24/14 See Typed endorsement on page 7 of this motion. (Santos, J.) mk

pre-trial publicity. That order, *inter alia*, prohibited the parties from making any public statements that might heighten public condemnation of the accused or any codefendant. The pre-trial order was made in recognition of the unprecedented media scrutiny the present case has received and the potential for such scrutiny to impair the defendant's or any codefendant's ability to obtain a fair trial. Of particular concern was the impact that any pre-trial publicity might have on the potential jury pool. The government has strictly complied with the Court's order.

On September 12, 2013, the defendant filed a motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) ("Franks hearing"), for the purpose of challenging material used to obtain a warrant to search the defendant's apartment at 599 Old West Colony Street, Unit A12, in Franklin, MA. In that motion, the defendant asserted that a codefendant herein, Carlos Ortiz, submitted to a police-administered polygraph examination on June 25, 2013. During that examination, he was asked whether he had shot the victim in the present case, Odin Lloyd. Ortiz stated that he had not shot Lloyd, but the polygraph examiner determined that, in his opinion, Ortiz's response was not

truthful. This information, at least as of today, has not been disseminated by the media.¹

On or about September 12, 2013, the defendant filed a separate motion to suppress evidence obtained during the search of the 599 Old West Colony Street Apartment on the grounds that the warrant that purported to authorize the search was not supported by adequate probable cause. By way of written response thereto filed on September 24, 2013, the government conceded that the search in question was, in fact, not based on adequately articulated probable cause, and agreed that the fruits of that search must be suppressed. This action renders the defendant's request for a Franks hearing moot. Accordingly, and to avoid the potential for pre-trial publicity that might impair either the defendant's or his codefendant's right to a fair trial, the Commonwealth respectfully requests that the defendant's motion for a Franks hearing, this motion, and all supporting memoranda and documents appended to both pleadings be impounded forthwith.

Discussion. The Uniform Rules on Impoundment Procedure, as set forth in Trial Court Rule VIII, while

¹ A few news stories reported in May, 2014 that a polygraph had been administered to Ortiz by police, but the Commonwealth has not been able to locate any news stories that revealed the results of that examination.

technically applicable only to civil proceedings, *Id.*, at Rule 1, "have been considered instructive in criminal cases as well." *Commonwealth v. Silva*, 448 Mass. 701, 705 (2007). Indeed, the Supreme Judicial Court has emphasized that the "[p]ractice regarding orders of impoundment entered in criminal proceedings should hew as closely as possible to the protocol described in the uniform rules." *Republican Co. v. Appeals Court*, 442 Mass. 218, 227 n.14 (2004). The Uniform Rules, therefore, govern the Commonwealth's request for impoundment in the present case.

Under the Uniform Rules, court filings, such as the defendant's motion for a Franks hearing, are presumptively open to the public in criminal proceedings. See *New England Internet Café, LLC v. Clerk of the Superior Court for Criminal Business*, 462 Mass. 76, 82-83 (2012). Impoundment may be appropriate, however, in the discretion of the judge, where "good cause" is demonstrated. *Id.* at 83. Consistent with this "good cause" standard, the remedy of impoundment is frequently used to safeguard a criminal defendant's due process rights from the potentially toxic effects of pre-trial publicity. See *Commonwealth v. Dabrieo*, 370 Mass. 728, 741 (1976). That concern is especially acute here in view of the aforementioned intense media scrutiny the case has attracted already, scrutiny

that, as described already, provided the basis for the Court's pre-trial order. It is significant to note for the purposes of the present motion that release by either party of the material the Commonwealth now seeks to have impounded through any medium other than a pleading would amount to a clear violation of that pre-trial order.

As the SJC observed in *Commonwealth v. George W. Prescott Publ'g Co., LLC*, 463 Mass. 258, 270 (2012), regarding the types of situations in which impoundment will be necessary: "[t]here will undoubtedly be circumstances where the prejudicial nature of certain information, in combination with the type of community from which prospective jurors will be drawn or the stage of the criminal proceedings at which the information is released, will make it difficult or impossible to eradicate prejudicial publicity from the minds of prospective jurors. See, e.g., *Newspapers of New England*, supra at 633-634 (affirming judge's decision to impound search warrant affidavit). This is just such a situation. Not only is the information contained in the defendant's motion likely to increase public condemnation of the defendant² or a

² The defendant is being tried on a joint venture theory with Carlos Ortiz and so Ortiz's actions, depending on the other evidence adduced at trial, may be imputed to the

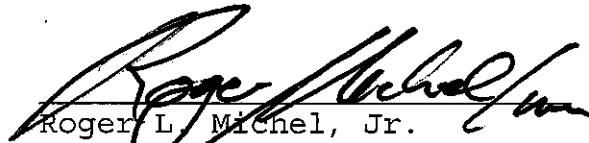
codefendant, it also references a type of evidence - a polygraph examination - that jurors would likely not otherwise hear, see Commonwealth v. Benjamin Mendes (and six companion cases), 406 Mass. 201 (1989) ("supported by the overwhelming authority throughout the country, we announce that polygraphic evidence, with or without pretest stipulation, is inadmissible in criminal trials in this Commonwealth either for substantive purposes or for corroboration or impeachment of testimony"), and evidence that neither the defendant or codefendant would likely have an opportunity to rebut at trial. Impoundment, therefore, is strongly indicated.

Conclusion. In view of the Commonwealth's concession on the defendant's motion to suppress, no legitimate purpose would be served by continuing to permit media access to the defendant's motion that references the results of Ortiz's polygraph examination. That material holds strong potential to prejudice the ability of the defendant and/or codefendant to obtain a trial by an impartial jury, and/or relates to evidence that might be used in the case. Accordingly, the Commonwealth

defendant for the purpose of establishing criminal liability.

respectfully requests this Court to impound those materials, together with this motion, forthwith.

Respectfully submitted,



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Dated: September 24, 2014

9/24/14

After review, the Commonwealth's ex parte order of impoundment and for hearing on motion to impound pending trial is **denied without hearing**. While a hearing is required should the court enter an order of impoundment, Trial Rule VIII, Rule 7, the rules do not require a hearing where the motion is to be denied. An order of impoundment, whether or not ex parte, must be accompanied by an affidavit in support thereof. See Trial Rule VIII, Rules 2 and 3. This motion was not. No reason for filing this ex parte motion was advanced. There was no showing in the motion that immediate and irreparable injury may result before a party or interested third person, such as the media, can be heard in opposition. See Trial Rule VIII, Rule 2. Further, no good cause was shown. See Trial Rule VIII, Rule 7. The public has a clear interest in the quality of the affidavits proffered in support of search warrants – or the lack thereof – and thus a clear public interest in the defense motions. The incremental additional pre-trial publicity that might flow from the facts contained in the motion at issue are not likely to render it impossible for the non-party co-defendant or for the defendant to get a fair trial. Indeed, with respect to the defendant, he filed the motion without seeking impoundment. Moreover, any impoundment order would be wholly ineffective. The Commonwealth waited a full ten days after the motion was filed before seeking to impound it. The motion, as with other publicly filed pleadings in this case, already has been distributed to numerous media outlets. That the media may have chosen, before now, not to publish information contained in the motion does not change the fact that the motion has been widely circulated to the media and is in the public domain.

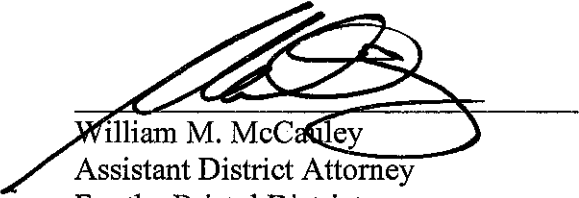
John Cash - JSC

CERTIFICATE OF SERVICE

I, William M. McCauley, certify that I have served a copy of the Commonwealth's Motion for Ex Parte Order of Impoundment and for Hearing on Motion to Impound Pending Trial by first class postage prepaid mail to Counsel for the Defendant, as follows: Charles W. Rankin, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; James L. Sultan, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; and Michael K. Fee, Latham & Watkins, LLP, John Hancock Tower, 20th floor, 200 Clarendon St., Boston, MA 02116.

Signed under the pains and penalties of perjury this 24th day of September 2014.

COMMONWEALTH OF MASSACHUSETTS,



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