

No. 21-1136

ORIGINAL

In the
Supreme Court of the United States

Supreme Court, U.S.
FILED

FEB 10 2022

OFFICE OF THE CLERK

M.S.,

Petitioner,

v.

J.B.,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Judicial Court of the
Commonwealth of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

M.S. (PSEUDONYM PERMITTED)
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QUESTION PRESENTED

Mass. G.L. c. 209A(1)b provides for ex-parte restraining orders, records of which are maintained regardless of whether the order is vacated following a two-party hearing. In *Vaccaro v. Vaccaro*, 425 Mass. 153, 157-158 (1997) the Massachusetts Supreme Judicial Court found that “there is no statute that permits an order’s record . . . to be expunged from the state-wide system.”

The question presented is:

Does Mass. G.L. c. 209A(1)b prima facie infringe a defendant’s 5th and 14th Amendment rights to due process and equal protection, with no remedy, by making the record of a vacated ex-parte restraining order, that did not survive two-party scrutiny, available to courts and law enforcement, which, respectively, may use it to assess a false impression of dangerousness in a traffic stop or as a reason to withhold bail in regard to the defendant.

PARTIES TO THE PROCEEDINGS

The District Court of Massachusetts, Brookline Division issued an order on July 28, 2020 (App.8a) requiring the use of pseudonyms to protect the identities of the parties. Subsequently, this practice was continued in the Massachusetts Court of Appeals and Massachusetts Supreme Judicial Court. Separately, Petitioner is filing an unredacted petition under seal. The parties are:

Petitioner

- [REDACTED] — M.S. (Pseudonym)

Respondent

- [REDACTED] — J.B. (Pseudonym)

Additional Respondent

- Maura Healey
Attorney General of Massachusetts

This petition challenges the prima facie constitutionality of Mass. G.L. c. 209A. Therefore 28 U.S.C. § 2403(b) may apply.

LIST OF PROCEEDINGS

Massachusetts District Court (Brookline)

Docket No. 1909RO0088

J.B. v. M.S.

Finding and Ruling Issued: June 8, 2020

Order Requiring Pseudonyms: July 28, 2020

Massachusetts Court of Appeals

No. 20-P-924

J.B. v. M.S.

Opinion: August 18, 2021

Rehearing Order: September 1, 2021

Massachusetts Supreme Judicial Court

No. FAR-28481

J.B. v. M.S.

Order Denying Further Appellate Review:

November 12, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, M.S., requests this court issue a writ of certiorari to reverse and remand the decision below.



OPINIONS BELOW

Massachusetts Supreme Judicial Court Docket FAR-28481 Ruling denying Defendant's Application for Further Appellate Review, November 12, 2021. (App.1a).

Massachusetts Court of Appeals Docket No. 2020-0924, Order Denying Defendant's Motion for Reconsideration and Modification, Denied without prejudice to renewal to the Supreme Judicial Court, September 2, 2021. (App.6a).

Massachusetts Court of Appeals Docket No. 2020-0924, Opinion affirming Massachusetts District Court Ruling Denying Petition for Expungement and Denying Plaintiff's request for costs, August 18, 2021. (App.2a).

Massachusetts District Court (Brookline) Docket No. 1909RO0088, *J.B. v. M.S.* Order permitting pseudonyms July, 28, 2020. (App.8a).

Massachusetts District Court (Brookline) Docket No. 1909RO0088, *J.B. v. M.S.* Ruling Denying Petition for Expungement issued, June 8, 2020. (App.9a).

Massachusetts District Court (Brookline) Docket No. 1909RO0088, *J.B. v. M.S.* Ex-Parte 209A Restrain-

ing Order issued November 7, 2019, Order Terminating 209A at 10-Day Hearing on December 3, 2019.¹ (App.13a).



JURISDICTION

Jurisdiction in this matter is proper and timely, dating from the Massachusetts Supreme Judicial Court's denial of Defendant's Application for Further Appellate Review on November 12, 2021 (App.1a) and is invoked pursuant to 28 U.S. Code § 1257.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV § 2

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹ The Court Hand Notated the December 3, 2019 Termination Order on the original November 7, 2019 Ex Parte Order.

U.S. Const., amend. V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process or law nor shall private property be taken for public use without just compensation.

Mass. G.L. c. 209A(1)b

Section 1. As used in this chapter the following words shall have the following meanings:

“Abuse”, the occurrence of one or more of the following acts between family or household members:

(b) placing another in fear of imminent serious physical harm;

Mass. G.L. c. 209A(7)

Section 7: Abuse prevention orders; domestic violence record search; service of order; enforcement; violations

Section 7. When considering a complaint filed under this chapter, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to

determine whether the named defendant has a civil or criminal record involving domestic or other violence.

Mass. G.L. c. 209A(8)

Section 8: Confidentiality of records

All confidential portions of the records shall be accessible at all reasonable times to the plaintiff and plaintiff's attorney, to others specifically authorized by the plaintiff to obtain such information, and to prosecutors, victim-witness advocates as defined in section 1 of chapter 258B, domestic violence victim's counselors as defined in section 20K of chapter 233, sexual assault counselors as defined in section 20J of chapter 233, and law enforcement officers, if such access is necessary in the performance of their duties . . . Such confidential portions of the court records shall not be deemed to be public records under the provisions of clause twenty-sixth of section 7 of chapter 4.



STATEMENT OF THE CASE

A. Statement of Facts

Defendant and Plaintiff briefly dated in early 2019 in Massachusetts. Defendant broke off the relationship and moved to California. Plaintiff discovered she was pregnant and informed Defendant in September 2019. The Parties amicably communicated almost exclusively by text messages about the pregnancy from opposite coasts of the United States.

On November 6, 2019, Defendant, for the first time, informed Plaintiff he would be interested in joint-custody of the expected child. On November 7, 2019, Plaintiff obtained an ex-parte 209A(1)b restraining order in state district court in Massachusetts, while the Defendant was three-thousand miles away at home in California.

It was undisputed in the record that there was no history of abuse between the parties and the ex-parte order was obtained under Massachusetts' "in fear of imminent harm" standard. Both Plaintiff and Defendant appeared at the ten-day return hearing in Massachusetts where the Defendant alleged the ex-parte order was obtained via numerous perjuries and fraud on the court by Plaintiff. The order was vacated by showing of good cause by Defendant and the Plaintiff not having met her burden on the precise same facts as the ex-parte order was issued a few weeks prior.

The ex-parte order was ordered destroyed in all locations, except Massachusetts' DVRS² and CARI³ databases, which are accessible to law enforcement and courts.

Defendant filed a petition for expungement from DVRS and CARI, including arguing due process issues he had preserved at the return hearing, which was denied after hearing and he timely appealed.

² Massachusetts' "Domestic Violence Recordkeeping System".

³ Massachusetts' "Court Activity Record Information" system.

B. Procedural History⁴

1. Trial Court

On November 7, 2019, Plaintiff obtained an ex-parte 209A(1)(b) order in Massachusetts state district court while Defendant was at home in California.

The ex-parte order was terminated by showing of good cause by Defendant at the ten-day return hearing and ordered destroyed everywhere but the DVRS and CARI databases.

Defendant petitioned for expungement of the vacated ex-parte order. The Petition was denied on June 8, 2020. Defendant timely noticed appeal on June 17, 2020. On July 28, 2020 use of pseudonyms were permitted by Order of the state district court.

2. Appellate Courts

The Massachusetts Court of Appeals affirmed the state district court by written opinion dated August 18, 2021 and denied Plaintiff's request for costs. Defendant filed a Motion for Reconsideration with the Court of Appeals on August 31, 2021, which the Court of Appeals denied without prejudice to renewal in the Supreme Judicial Court on September 2, 2021. Defendant's Further Appellate Review Application to the Massachusetts Supreme Court was denied on November 12, 2021, giving rise to this writ of certiorari.

⁴ Procedural history not relevant to this writ has been excluded.



REASONS FOR GRANTING THE PETITION

I. THE MASSACHUSETTS COURTS ERRED IN FAILING TO INVALIDATE MASS. G.L. c. 209A(1)B AS PRIMA FACIE UNCONSTITUTIONAL.

Massachusetts General Law c. 209A(1)b is designed to allow a plaintiff, who is in reasonable fear of imminent harm to obtain a restraining order against the person plaintiff fears may imminently abuse them. In order to meet this desirable public policy of preeminently preventing domestic violence, such orders are granted on a temporary basis at a single-party hearing, with the remedy provided being a two-party hearing within ten days, in which a defendant may make their case.

In many instances a defendant is successful at the two-party hearing and the ex-parte order is vacated, as is the situation in the case at bar.

The Petitioner has no issue with this obvious need for the rare ex-parte exception. But, having provided this extraordinary avenue to plaintiffs, Massachusetts then oversteps by maintaining a record of the vacated ex-parte order in two databases, DVRS and CARI. In the situation where a 209A is initially sought at a two-party hearing (rather than ex -parte) and a plaintiff is unsuccessful with no 209A order issued, no such record is maintained in DVRS and CARI.

Once a vacated order record is in DVRS and CARI, neither Mass. G.L. c. 209A, nor any other Massachusetts statute provides any remedy and Massachusetts courts have found in *Vaccaro v. Vaccaro* 425 Mass. 153,

156 (1997) “there is nothing in . . . G.L. c. 209A, that permits a record to be removed or that authorizes a the entry of a judicial order directing expungement of a record from the system.” Further finding, “The system is designed to promote the goal of preventing abuse . . . by providing a judge (and other authorized agencies) with complete information about a defendant.” *Id.* at 157.

Massachusetts went even further, in *M.C.D. v. D.E.D.*, 90 Mass. App. Ct 337, and extended its findings in *Vaccaro*, to a situation where the trial court found the even where the vacated ex-parte order was obtained via a “false allegation” that the maintenance of the record in DVRS and CARI was proper. The case at bar is procedurally indistinguishable from *M.C.D. v. D.E.D.*, which appears in the Massachusetts Court of Appeals opinion in the instant case.

Defendants have no remedy, even when faced with perjured, ex-parte allegations in matters where there is well-supported evidence that one private citizen is weaponizing an ex-parte process against another private citizen. This is the case at bar. Three thousand miles away, there is nothing Defendant could possibly do to protect himself from such an order issuing ex-parte and even upon success at the two-party hearing, the Defendant has no remedy, except to clear the nigh impossible burden that the ex-parte order was obtained by “fraud on the court.”

Defendant and similarly situated defendants unquestionably hold lesser rights to prospective 5th and 14th Amendment due process than before the issuance of a vacated ex-parte 209A.



CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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