

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
DORCHESTER DIVISION
Docket No. 07-6928

COMMONWEALTH

v.

OMAR MOHAMMED

**COMMONWEALTH'S MOTION IN OPPOSITION TO DEFENDANT'S
MOTION FOR PRE-INDICTMENT DISCOVERY**

Now comes the Commonwealth in the above-captioned matter and, pursuant to Rule 3 of the District/Municipal Court Rules of Criminal Procedure, requests that this Court deny the Defendant's Pre-Indictment Discovery Request.

As grounds, therefore, the Commonwealth alleges that the Defendant is not entitled to full disclosure of discovery at this stage of the proceedings according to Rule 3 because the Municipal Court lacks the authority to enter any discovery order, and the defendant is entitled to discovery at his Superior Court arraignment. Additionally, this case is subject to a Grand Jury investigation and the structure of the rules recognizes that the Grand Jury should be free to pursue an investigation that may result in an indictment in as secret a manner as possible, unhindered by any concern that the defendant, due to the premature

disclosure of information about the matter, may have the opportunity to interfere
in the investigation.

Respectfully Submitted
SUFFOLK COUNTY DISTRICT ATTY
DANIEL F. CONLEY

A handwritten signature in black ink, appearing to be 'DFC', written over a horizontal line.

BY: Anne K. Kaczmarek
Sp. Assistant District Attorney
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**COMMONWEALTH'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR PRE-INDICTMENT DISCOVERY**

Rule 3 of the District/Municipal Court Rules of Criminal Procedure, which governs arraignment and pretrial discovery procedure in the Boston Municipal Court,¹ provides in relevant part:

(c) Order for Pretrial Conference; Discovery; Pretrial Hearing. At arraignment in the District Court, the judge shall issue a written order to the attorney representing the defendant and to the prosecutor to (1) engage in a pretrial conference between themselves prior to a pretrial hearing in accordance with Mass.R.Crim.P. 11 and (2) appear before the court on a date certain for the conduct of the pretrial hearing on the results of that conference. If the parties agree to a date for the pretrial conference, said date shall be recorded on that order.

Such order issued by the District Court or Boston Municipal Court shall also require the parties to provide, permit and obtain discovery in accordance with G.L. c. 218, s. 26A, and Mass.R.Crim.P. 14, in

¹ Rules 7, 13, and 14 of the Massachusetts Rules of Criminal Procedure, which apply to both District Court and Superior Court cases, also address arraignment, pretrial motions, and pretrial discovery, respectively. Mass.R.Crim.P. 7, 13, 14 (App. C).

advance of the scheduled pretrial hearing and to be prepared to submit either a tender of plea or admission at said hearing or, in lieu thereof, a pretrial conference report, completed and signed by both parties. Discovery that is not provided, permitted or obtained in accordance with the arraignment order shall be the subject of a court order, a motion for relief, or sanctions at the pretrial hearing, as provided in Rule 4(b).

(d) Charges Not Within District Court Final Jurisdiction. [Portion omitted]. *The preliminary discovery required to be included in the arraignment order under section (c) of this rule shall apply only to cases within the court's final jurisdiction.*

District/Municipal Court Rules of Criminal Procedure 3 (emphasis supplied). Read plainly, Rule 3 does not grant defendant a right to "preliminary" discovery in a case that is outside the Municipal Court's final jurisdiction.²

Moreover, in apparent recognition pre-indictment discovery is not required under the Rules of the District/Municipal Court, the Superior Court Rules require that the Commonwealth provide discovery at arraignment. Standing Order 2-86 of the Standing Orders of Superior Court explicitly provides in relevant part:

Duty of Prosecutor. [Portion omitted]. It is the responsibility of the prosecutor to provide to the defendant at the time of the arraignment a complete discovery package. By the term "package" is meant at the least:

- (a) copies of all police reports which are discoverable then in the possession of or reasonably available to the prosecutor;

² First degree murder is not within a District Court's final jurisdiction. See G.L. c. 218, § 26.

- (b) copies of all written statements of the defendant or of witnesses then in the possession of or available to the prosecutor;
- (c) copies of all results of all scientific tests, ballistics reports, fingerprint reports, and other documentary evidence then in the possession of or available to the prosecutor; and
- (d) an opportunity to examine all photographs or real evidence then in the possession of or available to the prosecutor;
- (e) the Grand Jury minutes.

Standing Order of the Superior Court 2-86. Thus, in a case over which a Municipal Court does not have final jurisdiction, the Municipal Court lacks the authority to enter any discovery order, and the defendant is entitled to discovery at his Superior Court arraignment.³ The structure of the rules recognizes that the Grand Jury should be free to pursue an investigation that may result in an indictment in as secret a manner as possible, unhindered by any concern that the defendant, due to the premature disclosure of information about the matter, may have the opportunity to interfere in the investigation. This deference afforded to the Grand Jury regardless of whether a criminal complaint has been issued before or during the Grand Jury proceedings.

Notwithstanding the seemingly clear parameters of pretrial discovery, defendant argues that the act of his arrest immediately imposes on the

³ Subsequent discovery requests, and to a lesser degree, the timing of such requests, are governed by Rules 11, 13, and 14 of the Massachusetts Rules of Criminal Procedure. Under Rule 11, the pretrial conference report, which addresses matters "as will promote a fair and expeditious disposition of the case," must be filed within 21 days after arraignment. Mass.R.Crim.P. 11(a)(2)(A). Under Rule 14(a)(1) and 14(a)(2) defendant may make a motion for discovery "pursuant to Rule 13." Mass.R.Crim.P. 14(a)(1), (2). Under Rule 13(d)(2)(A), "a pretrial motion [the subject matter of which could not be agreed upon at the pretrial conference] shall be filed within seven days after the date set for the filing of the pretrial conference report." Mass.R.Crim.P. 13(d)(2)(A).

Commonwealth an obligation to provide discovery on a timetable that defendant dictates. In effect, defendant claims that he should have the right to conduct his investigation in lock step with the Grand Jury and the Commonwealth's, and to have access to the information known to the Commonwealth in order to aid his own investigation. Neither the rules, nor any statute, nor the constitution grants the defendant this privilege.⁴ While defendant has a right to discovery, he has failed to articulate a right to discovery on a timetable of his choosing.

Defendant's receipt of discovery in the manner prescribed by the Massachusetts Rules of Criminal Procedure will not result in any violation of his rights. The Commonwealth is amply justified in opposing the discovery of witness statements until the conclusion of the Grand Jury investigation. Long-established policy requires that Grand Jury proceedings be secret. *United States v. Proctor & Gamble, Inc.*, 356 U.S. 677, 681-682 (1958). The reasons for secrecy are, among others, to prevent suborning of perjury or tampering with witnesses who may testify before the Grand Jury and later appear at the trial of those indicted, and to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes. *United States v. Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954). *Accord Commonwealth v. Pezzano*, 387 Mass. 69, 73 (1982). Disclosure of witness statements prior to completion of the Grand Jury investigation would compromise the secrecy necessary to further the above-mentioned goals.

⁴ The Commonwealth does not argue that defendant is not entitled to the discovery sought in his motion. The Commonwealth simply points out that there is no authority entitling defendant to discovery whenever he demands it.


CONCLUSION

The Commonwealth respectfully urges this Court to deny the defendant's petitions.

Respectfully submitted
For The Commonwealth,

DANIEL F. CONLEY
District Attorney

By:

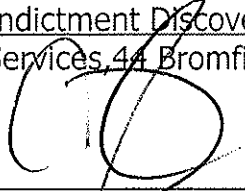


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Dated: October 24, 2007

CERTIFICATE OF SERVICE

I, Anne K. Kaczmarek, Special Assistant District Attorney for Suffolk County, hereby certify that I have, on this 24th Day of October 2007 served a true copy of Commonwealth's Opposition To Defendant's Motion For Pre-Indictment Discovery to Holly A Clarke, Committee For Public Counsel Services, 44 Bromfield Street, Boston, MA 02108 by first class mail.



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