*Care and Protection of M.C. (II)*, 483 Mass. 444 (2019) [[Full Opinion](http://masscases.com/cases/sjc/483/483mass444.html)]

Summary by Katy Krywonis, CAFL Training Unit

This case is the second iteration of *M.C.*, following last year’s remand in “*M.C. I.,*” 479 Mass. 246 (2018). It is absolutely critical to read both *M.C.* decisions together. In both cases, the SJC addresses what C&P information may be released to the DA or a defendant in a related criminal case.

In *M.C. I*, the DA and the father sought access to impounded C&P court records and transcripts to prepare for related criminal trials in Superior Court, which the mother opposed. On appeal, the SJC held that where the DA or a defendant seeks records from a C&P case, the requestor bears the burden of demonstrating that the records should be released under the good cause standard of Rule 7 of the Uniform Rules on Impoundment Procedure, and remanded for the Juvenile Court judge to apply the good cause test. The SJC also held that a parent who testifies in their C&P does not thereby waive their Fifth Amendment privilege in their criminal case; a parent’s waiver of their patient-psychotherapist privilege in their C&P is likewise case-specific. A summary of *M.C. I.* is available [here](https://www.publiccounsel.net/cafl/professional/relevant-statutes-and-case-law/summaries-of-recent-decisions/).

In *M.C. II*, the SJC was asked to decide whether the Juvenile Court judge properly applied the good cause standard. Weighing the particular factors in this case, the SJC held that:

* the father may receive the entire, unredacted C&P transcript to mount his own defense;
* the father may not have access to the Court Investigator and GAL reports, which the Court noted are “likely too speculative, full of lay opinion, and rife with hearsay to be admissible at a criminal trial;”
* the father may not have access to the C&P trial exhibits unless he shows that they are necessary to understand the trial testimony;
* the DA may not have access to the mother’s C&P testimony unless and until she gives notice that she intends to testify in her criminal trial, in which case it would be admissible only for impeachment purposes; and
* the DA may not have access to the C&P testimony of the mother’s therapist unless and until the mother gives notice that she intends to assert a mental health defense in her criminal trial.

Facts: The parents were both respondents in a Juvenile Court C&P case and defendants in related criminal proceedings in Superior Court. After the C&P trial, the DA and the father filed motions in the Juvenile Court seeking access to the court records and the trial transcript to prepare for the pending criminal trials. The judge allowed their motions. On appeal, the SJC vacated the judge’s decision allowing the motions for release from impoundment and remanded to the Juvenile Court to apply the good cause standard of Rule 7 of the Uniform Rules on Impoundment Procedure.

On remand, the DA and the father filed renewed motions for relief from impoundment. The DA sought access to the transcripts of testimony (including that of the mother and her therapist) and admitted evidence about M.C.’s medical treatment, reports by the parents of M.C.’s medical symptoms, medical or other therapeutic measures taken by the parents on M.C., and the parents’ conduct during the time period in question. The father sought access to the trial transcript and exhibits, Court Investigator and GAL reports, all pleadings, and the trial judge’s order and findings. The judge found that they each established good cause for limited release of the entire trial transcript, access to M.C.’s medical records for review only, and medical records that were entered in evidence, for review only, upon a showing of their unavailability through discovery in Superior Court. The documents were released for trial preparation, and were to be held protectively and confidentially and returned to the Juvenile Court at the conclusion of the criminal trials. The judge did not allow release of documentary evidence of communications between the mother and her therapist or the other documents that were requested. The mother and father appealed.

Discussion: In deciding whether good cause exists to release impounded records, the judge must consider all relevant factors (including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, constitutional rights, and the reasons for the request, as enumerated in Rule 7(b)) and balance all the parties’ interests. The SJC reviewed the father’s and the DA’s requests separately.

*Release to the father*: The SJC considered the mother’s rights to privacy, to raise her child and to mount a defense in her C&P case, and her right against self-incrimination, and the father’s right to mount a defense in his criminal case. He will present a third-party culprit defense – that the mother did it.

In deciding that the father may receive the entire C&P trial transcript, the SJC reasoned that the mother had a lessened privacy interest with respect to the limited, confidential release of her testimony to the father because she chose to testify in the C&P trial where he was a party and heard all of her statements. The mother’s C&P testimony is relevant and material to the father’s defense, and her constitutional rights are protected by the limitation that her C&P testimony can only be used at her criminal trial to impeach her. In addition, the mother’s testimony regarding her communications with her therapist would be admissible at her criminal trial only if she introduces a mental health defense. The Court noted that the mother chose to testify in the C&P in consultation with her criminal defense attorney.

In denying the father’s request for the C&P trial exhibits and GAL and Court Investigator reports, the SJC reasoned that the documents likely contain hearsay that will not be relevant or admissible at a criminal trial. The father was present throughout the proceeding, received copies of many of the documents, and “is well aware of the tenor of the testimony insofar as it might suggest a basis of his defense,” so he was not precluded from pursuing a third-party culprit defense or from introducing relevant evidence in his defense.

*Release to the DA*: The SJC again considered the mother’s rights to privacy, to raise her child and to mount a defense in her C&P case, and her right against self-incrimination, and the DA’s interest in prosecuting the mother and the father. The SJC decided that the DA should not receive the mother’s testimony or her therapist’s testimony in order to protect the mother’s right to defend herself in the C&P.

The SJC reasoned that unlike the father, the DA was not present at the C&P trial. Because the DA cannot use the mother’s C&P testimony unless she testifies in the criminal trial, see *M.C. I* at 262-63, release of her testimony to the DA was premature. The mother had not indicated that she will testify in her criminal case, so there was no reason to allow the DA access to her testimony. The SJC noted that the DA’s concerns with efficiency and the smooth operation of criminal trials can be met by allowing access to the transcripts of the mother’s testimony once the mother states her intention to testify in the criminal trials. The Court further noted that the DA’s assertion that her C&P testimony might provide links to other relevant evidence was a “vague and general fishing expedition.”

The SJC went on to explain that denying access to documentary evidence of communications between the mother and her therapist, while proper, did not go far enough. The judge should have denied access to the therapist’s testimony, too. The Court noted that, as with the mother’s testimony, her therapist’s testimony may be released to the DA if the mother provides notice that she intends to pursue a mental health defense in her criminal case.

Practice Note: The *M.C.* dyad seems to provide parents who are facing criminal charges with some additional protections to testify in their C&P case. This decision suggests that the DA cannot use a C&P case for discovery, seeming to alleviate the concern left open in *M.C. I* that information released from impoundment may be used to investigate and/or prosecute a parent in a related criminal case. It seems that, going forward, it will be hard for a DA to obtain access to a parent’s C&P testimony if that parent is not testifying in their criminal case. However, as in this case, if another person is facing criminal prosecution related to the same facts as the C&P, a court may allow release to them. In addition, the SJC’s rulings on the Fifth Amendment and patient-psychotherapist privilege apply to state court proceedings; you need to consult with a federal defense attorney about how *M.C.* may impact a federal proceeding.

As always, you should consult with your client’s criminal defense attorney about what *M.C.* means for them; how to best protect the particular client in the particular circumstances of their case(s). Make sure the criminal defense attorney knows about this C&P decision! The CAFL attorney, criminal defense attorney, and mutual client should work closely together to develop a litigation strategy, including decisions like whether the client will participate in a 51B investigation, meet with the Court Investigator, or testify in the C&P. If you are private counsel and your client does not yet have a criminal defense attorney, please contact the CAFL Trial Panel Support Unit for assistance.