

After Case Annulled, Privacy and Right to Know in Conflict

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Hanover — The New Hampshire Supreme Court is weighing whether a documentary filmmaker should have access to law enforcement records related to a high-profile case in which a former Dartmouth student was acquitted of rape or if all the state's files in the matter should be permanently closed to the public.

At issue is the potential conflict between the privacy rights asserted by Parker Gilbert, the former Dartmouth student who was found not guilty in a jury trial two years ago and subsequently had his case annulled — meaning the court case is treated as if it never happened — and the state's Right-to-Know Law, which gives the public access to government records, with some exceptions.

Underscoring the tension of the case, and the issues involved, is the fact that the request-for-records case itself is sealed to the public, including the legal briefs filed in the New Hampshire Supreme Court.

The filmmaker, Norwich resident Elizabeth Canner, called the situation “pretty Orwellian.”

“It creates the idea that you can erase history,” Canner said. “The annulment is creating a state fiction and erasing historical fact.”

Gilbert is referred to only as “John Doe,” and the only public documents in the case are a brief order from the Supreme Court two days before its March 3 hearing in the matter, stating “the court has concluded that oral argument in this case should not be confidential,” and the video and audio from the hearing.

Attorneys involved in the case either declined to comment or said they could not

comment, and court officials said the case itself was sealed, meaning legal filings are not available to the public or the news media.

Court clerks also now say there is no record of a criminal case involving Gilbert, an indication that his case has been annulled, which the oral arguments on March 3 made clear.

Gilbert had been charged with raping a fellow Dartmouth student in May 2013, with the prosecution contending he entered her unlocked dorm room and began assaulting her while she slept.

The defense, however, argued that the sexual encounter was consensual, “clumsy, awkward, drunk college sex.”

A jury in March 2014 found Gilbert not guilty of five counts of aggravated felonious sexual assault and a misdemeanor criminal trespassing charge.

Canner said the records-request dispute started when she sought case records from Hanover police and the Grafton County Attorney’s Office — which are distinct from the official court record — in June 2014, more than a month after Gilbert filed a petition to annul the record of his arrest and trial.

Under the state’s annulment statute , any person who has been acquitted or had a case dismissed “may petition for annulment of the arrest record or court record, or both, at any time.”

People who have been convicted — except for violent crimes, felony obstruction of justice, and other offenses with an extended prison term — can also petition for annulment, with the timing depending in part on the underlying crime. Someone convicted of a Class A felony, for example, has to wait 10 years. State law holds that annulment may be granted if a judge believes it “will assist in the petitioner’s rehabilitation and will be consistent with the public welfare.”

Once someone has a case annulled, he or she “shall be treated in all respects as if he or she had never been arrested, convicted or sentenced,” with some exceptions, and the court records are sealed and available only in very limited circumstances, such as to “law enforcement personnel for legitimate law enforcement purposes.”

The law specifically states that journalists are not subject to civil or criminal penalties for reporting that a person has had a case annulled, nor for reporting details of the underlying case.

Law enforcement records are subject to the state's Right-to-Know law, which protects the public's right to view government documents unless they fall under specific exemptions, with the burden of proof falling on the agency to prove a record is exempt, according to a 2015 memo from the New Hampshire Attorney General's Office. One such exemption is if release of such records would amount to an "unwarranted invasion of privacy."

New Hampshire's court system is excluded from the Right-to-Know law, but the state Supreme Court has established that the New Hampshire Constitution creates a "right of public access to court records," the memo states, though the right is not absolute.

Buttressing that was a 1976 amendment to the New Hampshire Constitution that stated, "Government, therefore, should be open, accessible, accountable, and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."

Canner said she wanted to ensure accuracy in the reporting of her film *Silent U*, a documentary she is making that focuses on such college campus issues as sexual assault and hazing. She filmed the entire Parker Gilbert trial, and the case is featured in the film, she said.

Canner said she sought the prosecution case file from Grafton County Attorney Lara Saffo and filed a Right-to-Know request in early June 2014 because she had questions about the way the Gilbert case was handled and how courts and police handle allegations of sexual assault in general.

About three weeks later, according to Canner, Saffo said her office had redacted about 1,000 pages and was still working on her request. Canner requested the redacted documents that were "ready to go," she said, but Saffo did not release them.

Then, on July 2, 2014, Saffo told Canner by email that she was trying to protect privacy interests and material that had already been sealed and had filed a petition in court for declaratory judgment, asking for guidance. Saffo made

Canner, and Gilbert through his attorney, parties to the case.

Saffo, who attended the March 3 Supreme Court hearing, declined to comment on the case.

“I can’t comment on that matter or even confirm whether or not this office has a file. I can’t say anything further,” Saffo said via email.

Canner said “it’s interesting to note” that she was able to obtain official audio recordings of some motion hearings in the Gilbert case while his annulment request was pending.

A court docket in early March referred to Grafton County Attorney’s Office v. Elizabeth Canner et al., listing Gilbert — who is referred to as John Doe — as a party in the case, and the town of Hanover as an intervenor. But the case itself has been sealed, according to Carole Alfano, the spokeswoman for the New Hampshire court system.

“The file remains confidential and sealed,” Alfano said.

Canner’s attorney, Robert Bertsche, a Boston-based First Amendment attorney, said he could not comment on the case.

“The papers in this case are sealed — unnecessarily, in my view, but sealed nonetheless. For that reason, I am not comfortable substantively discussing the case publicly at this time,” he said via email.

Messages left for Cabot Teachout, Gilbert’s attorney in the Canner case, were not returned. But George Ostler, a Norwich-based lawyer in the same firm who helped represent Gilbert at trial, said they would have no comment.

Charlie Bauer, a Concord-based attorney who represents the Hanover Police Department in the matter, also declined comment.

However, an official videotape of the 32-minute March 3 hearing before the New Hampshire Supreme Court is online, and sheds light on the issues at the heart of the dispute.

Gilbert, through Teachout, is appealing a Superior Court ruling that appeared to

favor Canner's request, and Teachout framed the issue as "whether annulled police and prosecution records are public records within New Hampshire's Right-to-Know Law."

The tape of the proceeding also makes clear that the Superior Court is handling the case in a "bifurcated" proceeding. Even if the earlier court ruling is upheld, a Superior Court judge would still have to determine if the records were exempt from disclosure under the exceptions in the Right-to-Know law.

"We really have a very narrow issue to decide today, and that is whether the annulment statute trumps the Right-to-Know," Justice Carol Ann Conboy said during the hearing. "(It's a) very narrow question because, due to the bifurcation, it may well develop that John Doe succeeds in his argument that under the Right-to-Know exceptions, this material should not be provided. ... He may lose at this stage, and ultimately prevail later."

Teachout said his client has a right to privacy now that the case is over.

"There are privacy interests not only for John Doe in this case, but also several of the witnesses, the alleged victim, and other entities who may have information within the police and prosecution files," he said earlier in the hearing.

He also argued his client has the right to proceed in life without the case hanging over him.

"If the Superior Court thought that while there has been so much publicity about this trial that really an annulment is kind of a useless exercise, that's the Superior Court's decision, but the Superior Court in this case found that it wasn't a useless procedure. The Superior Court found that restricting public access to John Doe's records is necessary, and it's in the public interest," Teachout said.

Bertsche, Canner's attorney, argued that the annulment statute should be read narrowly, in light of New Hampshire's commitment to open records, and said that the annulment act "doesn't take a legal fiction and impose it on a historical reality."

"There's no question that an incident happened. It was reported as a rape. It was investigated by police. It was prosecuted through an eight-day jury trial that received considerable publicity, and the jury acquitted John Doe at the end of

that proceeding,” Bertsche said. “... That doesn’t become untrue by virtue of creating a legal fiction that says we will treat this acquitted defendant as though he had not been arrested for purposes of employment.”

One of the purposes of annulment is to ensure that people who were acquitted or have been rehabilitated are not treated unfairly by prospective employers when seeking a job later.

The tape of the hearing also indicates that the Superior Court judge agreed with Bertsche’s argument that while one clause of the annulment statute says court records relating to an arrest, conviction or sentence shall be sealed, that doesn’t mean that law enforcement records themselves have to be sealed.

Another clause in the annulment statute says only that “the arresting agency and the prosecuting agency shall clearly identify in their respective files and in their respective electronic records that the arrest or conviction and sentence have been annulled.”

Teachout, arguing for Gilbert, said the trial court “took a very narrow and restrictive view” of the two subsections and that other language in the statute suggested that the annulled police and prosecution records were no longer open generally to the public.

Questions from the justices indicated that some were struggling to find a balance between the two laws, and also how to deal with a request to wipe clean what had been a widely reported case.

“Couldn’t the purpose of both be achieved by striking the name of John Doe from these records?” asked Justice James Bassett. “Because it seems to me that this is, was, a high-profile case on a very significant issue for society. And aren’t the people entitled to understand how that case was prosecuted, and decisions were made about that?”

Justice Gary Hicks also wondered whether the public welfare is really served by annulment in some high-profile cases, considering that references to the case are still widely available on the Internet.

“Does the existence of social media and search engines make that a vainglorious exercise?” he asked.

And Justice Robert Lynn appeared uncomfortable with the notion of sealing all police and prosecution records via annulment before a judge could assess what was in the files.

“For example, and please understand, I’m taking this out of thin air — I have no suggestion that this actually happened — but suppose that in the police or the prosecutor’s file relating to this case there was some memorandum from Dartmouth, let’s say, to the prosecutor that said, ‘You know, this is going to really look bad for Dartmouth if this guy gets convicted. Maybe you ought to go kind of easy on this.’ ”

Although Saffo now appears to be seeking guidance on Canner’s records request, both Teachout and Bertsche made clear during the hearing that the county attorney initially opposed Gilbert’s annulment petition.

During the March 3 hearing, Bertsche cited the county attorney’s filing, saying that the papers read: “In most annulment situations, the state also denies the existence of the file, that there is any file at all. In this case, that denial is not in the public welfare. The state believes it is important for the public welfare that future students who report sexual assaults be able to ask reasonable questions about this trial, which is well known on campus, and receive reasonable answers.”

Canner, the filmmaker, has received several fellowships and awards for her work, including Dartmouth College’s Visionary Award for her film *Orgasm Inc.: The Strange Science of Female Pleasure*, an investigative film on the pharmaceutical industry and women’s health.

She said she didn’t want the intent behind her pursuing the documents related to the Gilbert case to be misconstrued.

“It’s not so much to better understand (Gilbert), but to understand how the courts and police function,” she said. “We the people are the ones that hold the police and the courts accountable.”

She also said while annulment may have a purpose, so does the openness of government records.

“There are some good reasons for giving people a fresh start, but I think we still need transparency,” Canner said.

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