

Update: Colorado Prosecutor Violated Student Editor's Rights with Criminal Libel Search Warrant

Latest Decision in Long-Running Howling Pig Case

A deputy district attorney violated Thomas Mink's Fourth Amendment right to be free of unreasonable search and seizure when she authorized Greeley, Colo. police to search his house and seize his computer pursuant to a criminal libel complaint, according to a federal district court ruling on June 3, 2011.

The ruling is the latest in an eight-year legal saga arising out of Mink's publication of an online and print newsletter called *The Howling Pig*, which he launched in 2003 while he was a student at the University of Northern Colorado (UNC). He wrote that he intended the newsletter to be "a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo," and "a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody." The site is online at <http://webspace.webring.com/people/jt/thehowlingpig/>.

At *The Howling Pig*, Mink wrote irreverent editor's notes under the pseudonym "Junius Puke" alongside an altered photo of then-UNC economics professor Junius Peake. In November 2003, Peake contacted the Greeley police claiming to be the victim of criminal libel by *The Howling Pig*. Under Colorado's criminal libel statute, Colo. Rev. Stat. § 18-13-105, it is a class 6 felony to knowingly publish any statement tending to "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Peake said he was criminally libeled by the website's use of his photograph and statements that Puke "gambled in tech stocks" in the 1990s and wore glasses to avoid being recognized by his colleagues on Wall Street where "he managed to luck out and ride the tech bubble of the nineties like a \$20 whore and make a fortune," as well as by opinions and articles about UNC, Greeley, and Northern Colorado that Peake said could be attributed to him. After a police detective researched the website and determined that Mink was its author, he submitted a search warrant affidavit for Mink's residence and property, including his computer, to then-Deputy District Attorney Susan Knox, who read and approved it. A magistrate judge later approved the warrant.

In executing the warrant on Dec. 12, 2003, police searched the house Mink shared with his mother, who was not home at the time, and confiscated the computer they shared and some of his writings. Mink also claimed police told

him he was in “big trouble” and warned him that resuming publication of *The Howling Pig* would “only make things worse” for him. In early 2004, however, a federal district court ordered his possessions returned, and the district attorney’s office said it planned to close the file after deciding it could not constitutionally prosecute Mink under the libel statute.

Mink proceeded with a lawsuit against the Colorado attorney general, the local district attorney, and Knox, claiming his constitutional rights had been violated under the Fourth Amendment by the search and seizure and under the First Amendment by the “imminent threat” of being charged with criminal libel. He also challenged the constitutionality of the Colorado criminal libel statute. In fall 2004, the District Court dismissed Mink’s suit in its entirety, finding that he lacked standing to challenge the constitutionality of the statute and that his claims against Knox were barred by the doctrine of absolute prosecutorial immunity. In April 2007, the 10th Circuit U.S. Court of Appeals declined to rule on Mink’s constitutionality claims, finding that because the district attorney had decided not to prosecute Mink and had closed the file, Mink no longer had standing to sue. However, the Circuit Court sent the case back to the District Court on the question of Knox’s prosecutorial immunity, ruling that although prosecutors receive absolute immunity when working in their role as advocates, that immunity does not extend to their role as administrators or investigative officers. Because the court found Knox was acting in the latter capacity when she approved the search warrant, it instructed the lower court to consider Knox’s claims of qualified immunity. *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007)

The Silha Center, together with the Student Press Law Center, filed an *amicus* brief in Mink’s appeal to the 10th Circuit. (The brief is available on the Silha Center website at <http://www.silha.umn.edu/resources/>. For more on the case up to the 2007 ruling, see “Tenth Circuit Declines to Strike Down Colorado’s Criminal Libel Law After Finding Student’s Challenge Moot” in the Spring 2007 issue of the *Silha Bulletin* and “Silha Center Joins Student Press Law Center in Amicus Brief” in the Winter 2005 issue.)

In 2008, the District Court granted Knox’s motion to dismiss based on qualified immunity, but the 10th Circuit reversed on appeal in July 2010, concluding that Mink had plausibly alleged that Knox violated his clearly established constitutional rights. *Mink v. Suthers*, 613 F.3d 995 (10th Cir. 2010) In the June 3, 2011 ruling, Judge Lewis Babcock of the U.S. District Court for the District of Colorado addressed Mink’s motion for summary judgment under 42 U.S.C. § 1983 and Knox’s cross-motion for summary judgment claiming she was entitled to qualified immunity. Following much of the reasoning in the 10th Circuit’s July 2010 opinion, Babcock ruled that pursuant to the doctrine of

qualified immunity, Mink had established that Knox's actions violated his constitutional right to be free from unreasonable search and seizure, a right which was "clearly established such that a reasonable person in [Knox's] position would have known that their conduct violated the law." *Mink v. Knox*, No. 84-cv-08023-LTB-CBS, 2011 U.S. Dist. LEXIS 59380 (D. Colo. June 3, 2011)

Babcock agreed with the 10th Circuit's conclusion that "no reasonable reader" of *The Howling Pig* "would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke, nor would any reasonable person believe that they were statements of fact as opposed to hyperbole or parody." The Circuit Court concluded that "no reasonable prosecutor could therefore believe that it was probable that publishing such statements constituted a crime warranting the search and seizure of Mr. Mink's property."

Knox argued that because her review of the affidavit did not include looking at the actual website or copies of the newsletter that were attached to the affidavit submitted by the police detective, she should be granted immunity. "The defense of qualified immunity would be extended beyond all reason if a prosecutor could avoid liability for an unconstitutional search and seizure by not reviewing the supporting documents," Babcock wrote. Moreover, the description of the website in the affidavit "should have alerted Ms. Knox to the fact that [the website] might constitute satire protected by the First Amendment and that she should review the actual content of the website as set forth in the attachment even if she was otherwise inexplicably not inclined to do so," Babcock wrote.

According to the Reporters Committee for Freedom of the Press on June 3, Steve Zansberg, a Denver media law attorney who represented a number of media organizations as *amici curiae* contesting the constitutionality of the Colorado criminal libel statute in an earlier iteration of the case, said the ruling was a victory for freedom of speech but it also should have addressed the constitutional question.

"The fact that there's still any question for a prosecutor dealing with free speech issues shows again why the statute should be stricken from the books," Zansberg said. "In our view, no speech of any kind should be subject to prosecution based on a statute that is facially unconstitutional."

– Patrick File
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