

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Appeal No. 12-1236

**IN RE: REQUEST FROM THE UNITED KINGDOM PURSUANT TO THE
TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF
AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM ON
MUTUAL ASSISTANCE IN CRIMINAL MATTERS IN THE MATTER OF
DOLOURS PRICE**

**UNITED STATES OF AMERICA,
Petitioner-Appellee**

v.

**TRUSTEES OF BOSTON COLLEGE, ET AL.,
Movants-Appellants**

**GOVERNMENT’S OPPOSITION TO BOSTON COLLEGE’S
MOTION TO DISMISS ITS APPEAL AS MOOT**

On January 28, 2013, Boston College filed a Notice of Suggestion of Death informing the Court of the death of Dolours Price. In the Notice, Boston College stated, without developed argument, that Price’s death required that the district court order appealed from be vacated and the appeal dismissed as moot. That claim is meritless. Price’s death does not undercut the validity of the district court’s order requiring Boston College to provide certain documents to the government in response to subpoenas issued by the United States pursuant to the Treaty Between the

Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters (“the US-UK MLAT”). As a result, Boston College’s appeal from that order continues to present a live controversy.

Relevant Background

In moving to dismiss, Boston College does not dispute the facts set forth in prior filings in this appeal and in this Court’s decision affirming other orders granted in the same matter, *In re: Request from the United States Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price* (“*In re: Request*”), 685 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 USLW 3336 (Nov. 16, 2012) (12-627). As set forth therein,¹ the relevant facts are as follows.

On March 30, 2011, the United States submitted an application, *ex parte* and under seal, for the appointment of a Commissioner “to collect evidence from witnesses and to take such other action as necessary to effectuate a request from law

¹Citations are as follows. The citation “[Notice ¶_]” refers to Boston College’s Notice of Suggestion of Death. The citations “[Br. _],” “[Add. _],” and “[JA: _]” refer, respectively, to Boston College’s brief, addendum, and joint appendix. The citation “[S.App. _]” refers to the *ex parte* supplemental appendix filed by the government. The citation “[D. _]” refers to a docket entry in the district court case.

enforcement authorities in the United Kingdom.” *In re: Request*, 685 F.3d at 6. “The application resulted from a formal request made by the United Kingdom . . . for assistance in a pending criminal investigation in that country involving the 1972 murder and kidnapping of Jean McConville.” *Id.* The district court subsequently entered an order granting the appointment. *Id.*

The Commissioner issued two sets of subpoenas to Boston College and its personnel pursuant to this appointment seeking interviews collected as part of the so-called “Belfast Project.” *Id.* The first subpoenas sought interviews conducted with Brendan Hughes and Dolours Price. *Id.* Boston College turned over the Hughes materials but not those of Price. *Id.* The second set of subpoenas, issued in August 2011, more broadly sought recordings of “any and all interviews containing information about the abduction and death of Mrs. Jean McConville.” *Id.* at 6-7.

Boston College sought to quash both sets of subpoenas, arguing, among other things, that the Belfast Project materials should be protected as confidential academic research materials, that disclosure of the materials would have a chilling effect on future oral history projects, and that it would expose the interviewers involved in the project to possible retaliation. [Add.8, 34; JA:54-57; *see also* D.5, 12]. Boston College also requested, in the alternative, that the district court (Young, J.) undertake an *in camera* review of the documents to determine their responsiveness to the

subpoenas. [D.5]. On December 16, 2011, the district court issued a memorandum and order denying Boston College's motions to quash, but granting the request for *in camera* review. [Add.48]. Boston College did not appeal from the December 16, 2011 memorandum and order. *In re: Request*, 685 F.3d at 8.

Although Boston College did not appeal from the denial of its motions to quash, it continued to litigate the question of what documents should be produced in response to the subpoenas. In this litigation, Boston College did not argue, based on the caption of the case or any other ground, that the subpoenas were improper to the extent they sought information other than that implicating Price personally. Boston College argued, instead, that, in light of First Amendment concerns, the district court should screen the documents for relevance to the McConville abduction and murder. [JA:192]. The government, in turn, argued that the subpoenas should be construed broadly and submitted *ex parte* materials in support of that position. [JA:155; S.App.6-14].

On December 27, 2011, the district court issued an order requiring Boston College to turn over the Price materials in their entirety, which Boston College did not appeal. [D.38]. On January 20, 2012, the court issued a Findings and Order addressing the August subpoena, ordering the production of the full sets of interviews from five interviewees and individual interviews from two others. [Add.51-55].

Boston College appealed from this order, arguing generally that the district court abused its discretion in ordering the production of documents without requiring that they be “directly relevant” to the McConville abduction. [See Br.39]. Boston College did not argue that the scope of production should be further limited to those documents implicating Price personally in the abduction.

ARGUMENT

I. THE DEATH OF DOLOURS PRICE DOES NOT INVALIDATE THE DISTRICT COURT’S ORDER AND, THUS, DOES NOT MOOT THIS APPEAL.

“An appeal becomes moot if an intervening event strips the parties of any legally cognizable interest in its outcome.” *Connectu LLC v Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008). Where a party moves to dismiss an appeal on grounds of mootness, “[t]he burden of establishing mootness rests with the party urging dismissal,” and that burden, the Court has emphasized, “is a heavy one.” *Id.*

In its Notice, Boston College does not advance any developed argument as to why Price’s death renders this appeal moot. Instead, it merely presents a series of brief factual statements accompanied by the conclusory claim that these statements “mean” that Price’s death deprives the government of any right to obtain the documents that are the subject of this appeal. [Notice ¶¶1-5]. Such a skeletal argument would ordinarily be deemed waived, *see United States v. Zannino*, 895 F.2d

1, 17 (1990) (noting the “settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by developed argumentation, are deemed waived”), but, because the argument in theory raises a question of this Court’s authority to hear the appeal, a response to the substance of Boston College’s argument is warranted. *See Connectu*, 522 F.3d at 88 (“Because the inquiry into whether an appeal has become moot implicates a foundational question, sound practice dictates that we give that inquiry priority and conduct it as a threshold matter.”). As explained below, the argument is meritless.

Boston College’s argument for mootness rests on two propositions. First, Boston College contends that the caption assigned to the case in the district court demonstrates that the subpoenas were intended only to obtain information that could be used to prosecute Price herself. [Notice ¶¶1, 5]. Second, Boston College contends that, because Price is dead and cannot be prosecuted, the US-UK MLAT cannot support a request for legal assistance, because it provides that legal assistance is “not . . . available for matters in which the administrative authority anticipates that no prosecution or referral, as applicable, will take place.” [Notice ¶3]. Both propositions are mistaken.

Boston College’s claim that the case caption shows that the government’s requests only sought evidence against Price personally is at odds with the record and,

indeed, with Boston College’s own litigating position in the district court and on appeal. Nothing in the subpoenas themselves supports such a limited reading – the subpoenas that are the subject of this appeal broadly requested materials relating to “any and all interviews containing information about the abduction and death of Mrs. Jean McConville,” which very well might include interviews implicating persons other than Price in McConville’s death. [Add.4]. Nor do the proceedings in the case indicate that the district court or any party believed that the subpoenas or the investigation should be construed so narrowly. To the contrary, statements by the district court and the parties reflect that it was understood that the subpoenas generally sought, at the least, all documents relevant to the investigation of McConville’s death, not merely those that might implicate Price. [See, e.g. JA:143-45 (discussion of process and search terms that could determine what materials related to McConville), 153-55 (same)]. The only area of dispute was to what extent the request extended to materials that did not directly address the McConville murder. [See, e.g., JA:191-92].

This understanding of the scope of information sought is reflected in this Court’s opinion in *In re: Request*, see 685 F.3d at 3 (noting that the subpoenas were “part of an investigation . . . into the 1972 abduction and death of Jean McConville” and that the second set of subpoenas “sought *any* information related to the death or

abduction of McConville”) (emphasis added), and was not challenged by Boston College in this appeal. [See Br.34 (arguing only that the district court used the “wrong test” in determining what documents should be disclosed in response to subpoenas “seek[ing] information about the abduction or death of Jean McConville”)]. It is also confirmed by the *ex parte* documents filed by the government in the case, which establish beyond dispute that the request for assistance and the government’s application in the district court were not limited to a search for documents bearing on Price’s personal culpability. [See generally D.2 & Exhibits; see also S.App.3-4]. Against this backdrop, Boston College’s claim that this Court should infer a narrower scope of the investigation based merely on the district court caption is untenable.

Because the investigation was not limited to seeking materials for the purpose of prosecuting Price, Boston College’s treaty-based argument, which relies on that mistaken premise, cannot succeed. In any event, this argument also fails on the merits, for two reasons. First, the treaty provision on which Boston College relies is not, in fact, implicated in this case. The request in this case was made pursuant to Article 1 of the US-UK MLAT, which, in conjunction with Article 19, provides that “Parties shall provide for mutual legal assistance . . . for the purpose of proceedings” that include “any measure or step taken in connection with the investigation or

prosecution of criminal offenses.” *See* US-UK MLAT, Arts. 1, 19. Article 1*bis* expands the obligation to provide assistance under Article 1 to include instances where assistance is requested by a “national administrative authority,” but limits this expanded authority to circumstances where the administrative authority is conducting an investigation “with a view to a criminal prosecution” or a referral to investigation or prosecution authorities. *See* US-UK MLAT Art.1, §1*bis*. That provision, and its limitations, does not apply here. [*See* D.2, p.1].

Second, as this Court affirmed in *In re: Request*, the US-UK MLAT by express terms precludes a private party from refusing to comply with a request for production of documents on the ground that the requirements of the treaty have not been followed. *See* 685 F.3d at 12-13. Thus, even if Price’s death did call into question whether the United States was still required to provide the documents to the UK pursuant to the treaty, which it does not, that would not absolve Boston College of its obligation to provide the documents to the United States and this appeal would remain viable.

In light of the above, Boston College has not met its burden of establishing that the government has no “legally cognizable interest in the outcome” of this appeal. *Connectu LLC*, 522 F.3d at 88. To the contrary, the government is entitled to enforcement of its subpoenas as provided for in the district court’s order. Thus,

unless Boston College wishes to simply comply with that order, the appeal presents a live case or controversy and is not moot.

CONCLUSION

For the foregoing reasons, the government respectfully requests that Boston College's motion to dismiss its appeal as moot be denied.

Respectfully submitted,

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Certificate of Service

I, Randall E. Kromm, AUSA, hereby certify that on February 11, 2013, I served a copy of this document on the following registered participant of the CM/ECF system:

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