

Mass. Appellate Briefs

Supreme Judicial Court

Oral Argument Guide

Scheduled arguments for May 3-7, 2010

This Guide is based on the public docket, supplemented with detailed outlines from Mass. Appellate Briefs where available. It is published by Jack Cushman, a private appellate attorney, and not affiliated with the Supreme Judicial Court. For more information, see <http://jackcushman.com/mab/>.

Cases for Monday, May 3

**SJC-10556: MASSACHUSETTS BOARD OF
REGISTRATION IN MEDICINE vs. JOHN
DOE, M.D.**

Nature: Declaratory judgment • *Case Type:* Civil • *Route:* Sua Sponte
Transfer from Appeals Court • *Lower Court Judge:* Peter M.
Lauriat, J.

Parties:

Plaintiff/ **Mass Board of Registration in Medicine**
Appellee Daniel J. Hammond, A.A.G.
Defendant/ **John Doe, M.D.**
Appellant Paul Cirel, Esquire, Ingrid Martin, Esquire, Azure
Abuirmeileh, Esquire

Amicus Request:

“Whether the Board of Registration in Medicine was entitled to subpoena the records of twenty-three patients treated by the doctor, where the doctor invoked the psychotherapist-patient privilege.”

**SJC-10584: STEPHEN ANZALONE vs.
ADMINISTRATIVE OFFICE OF THE TRIAL
COURT & another**

Keywords: CJAM • Employment • Mandamus • Probation •
Summary Judgment

Nature: Miscellaneous • *Case Type:* Civil • *Route:* Sua Sponte
Transfer from Appeals Court • *Lower Court Judge:* Raymond J.
Brassard, J.

Parties:

Plaintiff/ **Stephen Anzalone**
Appellant Kevin G. Powers, Esquire, Linda Evans, Esquire
Defendant/ **Admin. Office of the Trial Court, Robert A.**
Appellee **Mulligan**
Ronald F. Kehoe, A.A.G.

Mass. Appellate Briefs Analysis:

Question Presented: Whether the Chief Justice for Administration and Management (CJAM) acted within his authority in rejecting the appointment of a probation officer.

Facts: Plaintiff Stephen Anzalone was certified for appointment as a probation officer by the Commissioner of Probation. Six months later, the CJAM rejected Anzalone's appointment without explanation. Anzalone filed claims for: (1) damages; (2) mandamus relief; (3) wrongful interference with a prospective advantageous relationship; and (4) detrimental reliance.

Although Anzalone disclosed in his application that his father, sister, and uncle were already probation officers, he did not disclose that three of his cousins were probation officers as well. In its combined Rule 12(c) and summary judgment motion, the CJAM averred that Anzalone's nondisclosure was the reason for rejection. The judge held that that reason was sufficient and dismissed the case, declining to specify whether he did so pursuant to Mass. R. Civ. P. 12(c) or 56.

Issues:

1. G.L. c. 211B, § 8. Under § 8, the CJAM promulgates standards for appointment of probation officers, and has the power to reject any appointment “within fourteen days” if and only if it does not comply with those standards. The Court must resolve one or more of the following: whether a private citizen has standing to challenge the CJAM's performance under that statute; whether the fourteen day limit is mandatory or precatory; whether the trial judge could evaluate the CJAM's basis for rejecting the application at the Rule 12(c) phase of trial; and, finally, whether the CJAM's basis fell within its statutory authority.
2. Wrongful interference with a prospective advantageous relationship. The primary issue as to this count is whether Anzalone sufficiently alleged the malice element of wrongful interference, when he alleged that the CJAM's delay was “unconscionable.”
3. Detrimental reliance. Anzalone claims he forewent other employment in reliance on his appointment. The primary issue as to this count is whether any named defendant made a representation to Anzalone, and if so whether it was one on which he could have reasonably relied.

Discussion: Anzalone's claims for damages are unlikely to succeed. His claim for mandamus is more interesting, requiring the Court to decide whether private citizens affected by the CJAM's performance should be able to present their claim in court, and whether the CJAM is free to ignore its statutorily imposed deadline for rejection of an appointment. At bottom, however, the Court likely pulled this case

sua sponte from the Appeals Court because it relates to oversight of the court system, rather than for any compelling issue of law.

**SJC-10617: COMMONWEALTH vs.
CARLOS FERNANDEZ**

Keywords: Criminal Procedure • Expert Testimony • Search and Seizure

Nature: Crim: drug case • *Case Type:* Criminal • *Route:* Direct Appellate Review • *Lower Court Judge:* Mitchell J. Sikora, Jr., J.

Parties:

Plaintiff/ **Commonwealth**

Appellee Robert J. Bender, A.D.A.

Defendant/ **Carlos Fernandez**

Appellant David M. Skeels, Esquire, John J. Roemer, Esquire,
Brownlow M. Speer, Esquire

Amicus Request:

“Whether police, conducting a search of an apartment pursuant to a warrant, lawfully searched without a warrant the defendant's car parked in the common driveway; whether the Commonwealth was required to establish the scientific reliability of field tests for the presence of cocaine in trash from the defendant's residence before the results were admissible at trial.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether a driveway technically belonging to three apartments, but actually only used by one apartment, is on that apartment's curtilage; whether the judge had sufficient evidence that a field test for cocaine was widely accepted in other jurisdictions.

Facts: Police obtained a search warrant for the defendant's home after a field test indicated that bags found in the defendant's trash were

dusted in cocaine. The defendant's girlfriend told police, while they executed the warrant, that the defendant kept drugs in a "hide" in his car, parked in the 3-family apartment's common driveway. Police searched the car without a warrant, finding a baggie of cocaine and a hollowed-out magic marker commonly used as a hiding place.

The judge denied the defendant's motion to suppress fruits of the warrantless search of the car, and the defendant was convicted of distribution of cocaine. The defendant appeals the denial and the conviction.

Issues:

1. Warrantless search of the car.

(A) Curtilage. The judge held that the car was on the curtilage of the defendant's apartment, and therefore covered by the search warrant for his home. The defendant argues that common spaces, such as group parking lots, are not on the curtilage of any one renter's apartment. The Commonwealth responds that a fact-specific analysis is appropriate; although the defendant did not have sole legal access to the driveway, residents of his apartment were the only ones who accessed or had any reason to access the driveway.

(B) Automobile Exception. The judge found in the alternative that the automobile exception supported warrantless search of the car based on probable cause. The defendant argues that the automobile exception applies only to automobiles in "public places," and that the driveway was not public. The Commonwealth responds that "public places" are merely those to which police have lawful access, and include shared parking lots. The defendant is subject to Catch 22 -- his car must either have been on his curtilage and within the warrant, or subject to the automobile exception.

2. Admission of the field test results. The judge permitted a police officer to testify, over objection, that some 47 plastic bags in the defendant's trash tested positive for cocaine. The officer did not know how the test worked, or what its error rate was.

Scientific tests are admissible without expert testimony if substantial authority from other jurisdictions shows they are reliable. Commonwealth v. Whynaught, 377 Mass. 14 (1979). The judge found that the reliability of the field test was sufficiently satisfied by a New York case, People v. McIntyre, 185 Misc. 2d 58 (N.Y. Crim. Ct. 2000), which in turn accepted the representation of an assistant district attorney that the test was over 99% reliable and was in use by law enforcement in all fifty states. The defendant argues that this is insufficient corroboration to satisfy Whynaught. The Commonwealth argues that a judge's finding of scientific reliability is reviewed for abuse of discretion, Canavan's Case, 432 Mass. 304, 311 (2000), and that no such abuse occurred where field tests in general are widely admitted.

Discussion: As to the search of the car, the Commonwealth is probably correct as a practical matter that the defendant must pick his poison -- the car was searchable either under the warrant, or the automobile exception, depending whether it was on his curtilage.

The interesting theoretical question is whether curtilage should be judged by the factual test the Commonwealth suggests, or the per se rights-based test advocated by the defendant. Given the Fourth Amendment touchstone of reasonable expectations of privacy, the Commonwealth's position seems more persuasive. Nor will it be universally objectionable to defendants -- most will advocate the enlargement rather than curtailment of their curtilage. Indeed, it is easy to imagine a defendant in this defendant's precise situation, but where the police lacked a search warrant for the house, arguing that his neighbor's technical access to the driveway should not change his subjective understanding of the driveway as private.

As to the field test, there are two lines to be drawn here -- how much deference should an appeals court pay to a trial judge's decision to

admit scientific testimony based on legal cases from other jurisdictions, and how much evidence of that practice is required? The evidence relied on by the judge in this case is scant, and may require the Court to consider both questions.

**SJC-10637: ZONING BOARD OF APPEALS OF
AMESBURY vs. HOUSING APPEALS
COMMITTEE & another**

Keywords: Administrative Law • Affordable Housing • Local Government • Zoning

Nature: Zoning appeal: c 40A • *Case Type:* Civil • *Route:* Sua Sponte Transfer from Appeals Court • *Lower Court Judge:* Raymond J. Brassard, J.

Parties:

| | | |
|-------------------|---|---|
| <i>Plaintiff/</i> | Zoning Bd of App Amesbury | |
| <i>Appellant</i> | Jonathan D. Witten, Esquire, Barbara Huggins, Esquire | |
| <i>Defendant/</i> | Housing Appeals | Attitash Views LLC |
| <i>Appellee</i> | Committee | Theodore C. Regnante, David A. Guberman, A.A.G. Esquire, David J. Gallagher, Esquire, Paul G. Crochiere, Esquire |

Amicus Request:

“Whether the Housing Appeals Committee properly struck permit conditions imposed by a board of appeals on a comprehensive permit application under G. L. c. 40B.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether the Housing Appeals Committee had power to strike down conditions imposed by a zoning board of appeals, on the ground that the board lacked authority to impose the conditions.

Facts: Attitash, a developer, applied to the zoning board of appeals for the city of Amesbury for a comprehensive permit to develop low income housing. The board granted the application with a number of conditions. The conditions would essentially put the board in an oversight position, overlapping with the position ordinarily occupied by the state-level subsidizing agency (in this case MassHousing).

Attitash appealed to the Housing Appeals Committee ("HAC"), which struck the offending conditions, ruling that they were not within the board's lawful authority to impose. The board appealed, a Superior Court judge upheld the HAC's decision, and the SJC transferred the board's appeal sua sponte from the Appeals Court.

Issues:

1. HAC's authority to strike unlawful conditions. The central issue is whether the HAC is empowered to strike conditions where the board exceeded its lawful authority.

"The committee is empowered to 'order [the] board to modify or remove ... [a] condition or requirement' only when the board's decision 'makes the building or operation of such housing uneconomic *and* is not consistent with local needs' (emphasis added)." Woburn v. Housing Appeals Committee, 451 Mass. 581, 593 (2008), quoting G.L. c. 40B, § 23. The board argues that the question of its lawful authority to impose the conditions at issue is simply irrelevant to the HAC's review, and thus an improper basis for the HAC's decision.

The HAC argues, essentially, that it can only review decisions properly issued, and so the question of the board's authority is a

necessary preliminary determination, implied by the structure of the statute. The HAC raises the specter of a board imposing racially discriminatory conditions and escaping review.

2. Alternative basis for the HAC's decision. If the Court determines that the HAC does not have power to strike conditions on the independent basis that they exceed the board's authority, it will have to determine whether remand is necessary, or whether the HAC validly and independently determined that the requirements made the proposed development uneconomic and were not consistent with local needs.

3. The board's authority. Conversely, if the Court determines that HAC does have the power to strike unlawful conditions, it will have to determine whether the board has the power to issue the conditions at issue, pursuant to G.L. c. 40b, § 21. The HAC argues that the board can only impose conditions that might be imposed by the local boards and officials it supersedes, and that the conditions here do not meet that test.

Discussion: This case is a power struggle, on the one hand, between the city of Amesbury's board and the HAC, and on the other hand, between the board and MassHousing. The board is likely to win its battle with the HAC: G.L. c. 40B, § 23 explicitly limits the HAC's review, and the recent case of Woburn acknowledges that limit. Unlawful conditions remain appealable to the Superior Court, and it would be up to the Legislature to shift responsibility to the HAC if it chose. The most probable outcome is therefore remand to the HAC to consider the board's decision within proper boundaries.

The longterm outcome of the power struggle between the board and MassHousing is less clear. The board claims that the state agencies are ineffective at enforcing affordable housing rules, and that it is legitimately attempting to strengthen those rules. The developer claims that the board is trying to make affordable development

entirely impossible by intruding on areas of state expertise with an extra layer of bureaucracy. If MassHousing refuses to finance projects with the board's limitations (as it has indicated it will do), the HAC can justifiably find that the projects are rendered economically unviable. It will then have to decide whether the limitations are consistent with local needs -- which may in turn require it to decide whether the board is correct that MassHousing's oversight is insufficient.

SJC-10635: COMMONWEALTH vs. LEONARD C. SZERLONG

Keywords: Criminal Procedure • Domestic Violence • Evidence
• Hearsay

Nature: Crim: nonhomicide nondrug • *Case Type:* Criminal • *Route:*
Sua Sponte Transfer from Appeals Court • *Lower Court Judge:*
Gregory L. Phillips, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee David B. Mark, A.D.A., Rachel Eisenhaure, A.D.A.
Defendant/ **Leonard C. Szerlong**
Appellant Neil L. Fishman, Esquire

Mass. Appellate Briefs Analysis:

Question Presented: Whether a defendant forfeited the right to object to prior statements made by the alleged victim of a crime, where he married her in order to allow her to claim the marital privilege against testifying.

Facts: The alleged victim, the defendant's then-girlfriend, told her best friend and her sister that the defendant attempted to strangle her, and, while brandishing a knife, threatened to kill her or himself. The police began an investigation at the sister's request. The alleged

victim and the defendant were married less than one month later, without telling her family and apparently without prior plans to marry. The alleged victim later told both her best friend and sister that she and the defendant married so that she could avoid having to testify against him.

The judge granted the Commonwealth's motion to admit the alleged victim's statements to her sister and her best friend, pursuant to the doctrine of forfeiture by wrongdoing. The alleged victim did not testify at the hearing, possibly out of concern that the testimony itself would waive the privilege. However, the defendant submitted an affidavit from the alleged victim denying that she married the defendant to avoid testifying against him.

A jury convicted the defendant largely on the basis of the alleged victim's out-of-court statements. The SJC transferred the defendant's appeal sua sponte.

Issues: The issue is whether the defendant's marriage constituted "wrongdoing" forfeiting his right to object to hearsay statements by the alleged victim.

"[A] defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability. A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." Commonwealth v. Edwards, 444 Mass. 526, 540 (2005).

The defendant argues that there is insufficient evidence that he colluded with the alleged victim to procure her unavailability; that portions of Edwards could be read not to require intent on the part of the defendant, which would violate Federal constitutional law under

the Confrontation Clause; that Edwards errs in requiring only a preponderance of the evidence; and that application of Edwards to the marital privilege unconstitutionally interferes with the right to marry.

Discussion: On the limited record available, this case seems to fall firmly into the Edwards definition of forfeiture by wrongdoing. Nor do the defendant's constitutional challenges to Edwards -- which is recent and carefully reasoned -- seem persuasive. The Court is therefore likely to find that the forfeiture by wrongdoing doctrine applies to the marital privilege (but, hopefully, to caution against too eager explorations of a defendant's decision to marry).

One outstanding question is whether the proposed witness may testify about his or her good faith decision to marry, without waiving the privilege. Although the parties do not substantially brief the issue, as a matter of policy judges should have this testimony available to them in ruling on forfeiture by wrongdoing, and it would behoove the Court to provide a definitive answer.

Cases for Tuesday, May 4

SJC-10569: BOSTON HOUSING AUTHORITY vs. NATIONAL CONFERENCE OF FIREMEN AND OILERS, LOCAL 3

Keywords: Arbitration • Employment • Labor Unions •
Public Employees

Nature: Arbitration • *Case Type:* Civil • *Route:* Direct Appellate
Review • *Lower Court Judge:* Linda E. Giles, J.

Parties:

Plaintiff/ **Boston Housing Authority**
Appellant Kay H. Hodge, Esquire, John Simon, Esquire
Defendant/ **National Conference of Firemen &**
Appellee Ira Sills, Esquire, Nicole Horberg Decter, Esquire

Mass. Appellate Briefs Analysis:

Question Presented: Whether an “evergreen clause” extending a collective bargaining agreement (CBA) for public employees beyond three years is enforceable.

Facts: A CBA in force from 2001 to 2004 required the Boston Housing Authority (BHA) to maintain a staff of 16 firemen, despite the fact that, by the year 2000, the BHA no longer maintained heating systems for which licensed firemen were required. The CBA contained an evergreen clause specifying that it would remain in force during any period of negotiations until a new agreement was signed. Negotiations continued, sporadically, from 2004 to 2006. When budget cuts in 2006 resulted in a 20% shortfall in the BHA's overall budget, it terminated the employment of all 16 firemen.

An arbitrator held that the agreement was still in force under the evergreen clause, and that termination therefore violated the minimum staffing provision. A Superior Court judge upheld the decision.

Issues:

Maximum length of CBAs under G.L. c. 150E, § 7(a): CBAs for public employees “shall not exceed a term of three years.” G.L. c. 150E, § 7(a). The judge found that this language did not bar evergreen clauses, which are widely used to prevent disruption in the period between agreements. The BHA argues that the statute's plain language forbids enforcement of a minimum staffing term five years after the CBA was signed, and that public policy of “prevent[ing] governing bodies from tying the hands of their successors” supports such a limit.

Nondelegable managerial prerogatives: “Job security provisions in a municipal collective bargaining agreement are enforceable for periods not exceeding one fiscal year.” *Billerica v. Int'l Assoc. of Firefighters, Local 1495*, 415 Mass. 692, 694 (1993). The judge found that this public policy limitation applies only where the employee's salaries are provided by a yearly line item appropriation, and therefore a function of the political process. The BHA argues that the line item distinction is irrelevant, and that the one-year limitation has applied even where an employer had the power to allocate its own budget. See *Boston Teachers Union, Local 66 vs. Sch. Comm. of Boston*, 386 Mass. 197, 212 (1982)

Discussion:

This case presents the odd situation where an employer sought to abolish an entire category of employee two years after expiration of a CBA and was unable to do so. If the BHA is correct that it had no avenue to simply end negotiation (and thus the evergreen clause) prior to termination, then public policy would seem to argue against the result reached below.

As the judge observed, however, evergreen clauses are widespread and serve a useful purpose. The Court may therefore read G.L. c. 150E, § 7(a) narrowly, to bar only contract *terms* that exceed three years. The Court could then moderate the contract at issue here through some narrower public policy limitation – whether that limitation relates to managerial prerogative, length of negotiation, or elimination of an entire class of employee.

**SJC-10626: CLEALAND B. BLAIR & others vs.
MASSACHUSETTS DEPARTMENT OF
CONSERVATION AND RECREATION**

Keywords: Constitutional Law • Environmental Law • Takings

Nature: Administrative law • *Case Type:* Civil • *Route:* Sua Sponte
Transfer from Appeals Court • *Lower Court Judge:* Francis R.
Fecteau, J.

Parties:

Plaintiff/ **Clealand B. Blair, Nancy J. Blair, 7 Maple Springs**
Appellant **Ext. Realty Tr**
George Kiritsy, Esquire
Defendant/ **MA Department of Conservation and Recreation**
Appellee Seth Schofield, A.A.G.

Amicus Request:

“The issue presented, among others, is whether the Watershed Protection Act, G. L. c. 92A 1/2, ss. 1-20, which prohibits altering land that borders on drinking water sources, effects a regulatory taking under art. 10 of the Massachusetts Declaration of Rights or art. 49 as amended by Amendment Art. 97 of the Constitution of the Commonwealth.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether enforcement of the Massachusetts Watershed Management Act, GL. c. 92A½, effects a regulatory taking requiring just compensation under the Massachusetts Constitution.

Facts: The Watershed Management Act of 1992 prohibits alterations to land within 200 feet of a lake. GL. c. 92A½. However, the Act allows construction of a single family dwelling on lots existing prior to 1992, or other development if a variance is granted stating that the development will not affect the public water supply. *Id.*, § 5.

The appellants were permitted to build a single-family home on their lakefront property in 1994. However, they were denied a variance to make other alterations, such as an enlarged beach, removal of trees, and a brick path. An expert for the Commonwealth apparently testified that any removal of trees on the property would result in decreased water quality, despite other mitigation procedures.

Issues: The essential issue of this case is how the Court should evaluate the complete regulatory deprivation of economically beneficial use of a small part of a property.

Under the Federal constitution, a regulation constitutes a categorical taking, requiring just compensation, in "the extraordinary circumstance when no productive or economically beneficial use of land is permitted," looking at the parcel as a whole. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002). If some part of the parcel remains viable, the Federal Constitution employs a more flexible test considering the economic impact of the regulation, the property owner's reasonable expectations, and the character of the government action. Penn Central Transp. Co. v. New York, 438 u.s. 104 (1978).

The appellants raise the novel claim that, under the Massachusetts Constitution, it is a categorical taking to deprive them of economically beneficial use of even a small part of their property. The appellants ground their claim for greater protection on Article 10 of the

Declaration of Rights, which (unlike the Federal Constitution) specifies that "*no part* of the property of any individual" can be taken without just compensation.

Discussion: The defendant's claim is unlikely to succeed. The problem of regulatory takings is tricky -- it is clear on the one hand that the government must be able to regulate harmful land use, and on the other hand must not be able to forbid all use of property without compensation. There is no definitive way to draw a line between those two important principles, and the compromise crafted by the Supreme Court is not necessarily the best one for the Commonwealth.

The appellants fail to offer a viable alternative, however. Rather, they suggest that they must be compensated for any part of their property they are not permitted to develop. As the Commonwealth observes, this rule would have a dramatic impact on a wide range of land use regulations, such as zoning requirements that a house be set back a certain distance from the street. The Court is unlikely to go so far. Nor does Article 10 require it to. It is already settled law under both constitutions that *physical* taking of any part of an individual's property requires compensation; the Court need not read the "no part" language in Article 10 to also apply to regulatory takings.

**SJC-10628: JENNIFER DIRICO & others vs.
TOWN OF KINGSTON & others**

Keywords: Administrative Law • Environmental Law • Local Government • Zoning

Nature: Miscellaneous • *Case Type:* Civil • *Route:* Sua Sponte Transfer from Appeals Court • *Lower Court Judge:* Karyn F. Scheier, J.

Parties:

Plaintiff/ **Jennifer DiRico, Helen K. Gavin, Mildred M.**
Appellant **Leonardi**
William S. Abbott, Esquire

Defendant/ **Mary O'Donnell, Keon C. Town of Kingston, Paul**
Appellee **O'Donnell, Thorndike L. Armstrong**
Development Corp Jason R. Talerman, Esquire
Howard G. Guggenheim,
Esquire, David B. Mack,
Esquire

Amicus Request:

“Whether a Land Court judge properly granted summary judgment to municipal defendants in a challenge to the town’s adoption of a zoning amendment under G. L. c. 40R, that created a “smart growth” zoning overlay district to enable the construction of a large project; whether the town had a duty to supplement its application to the Department of Housing and Community Development upon becoming aware that a portion of the acreage in question was designated by the Massachusetts Division of Fisheries and Wildlife as rare species habitat.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether a Town of Kingston zoning amendment should be invalidated if the town failed to comply with the procedure for creating a "smart growth" zoning overlay district pursuant to G.L. c. 40R.

Facts: At the request of a developer, the Town of Kingston submitted an application to the Department of Housing and Community Development ("DHCD") for approval of a smart growth overlay district. "Smart growth" is "a principle of land development" that emphasizes mixing uses, affordable housing, compact design, distinctive communities, preservation of open space and critical environmental areas, public transportation, and collaboration in development decisions. G.L. c. 40R, § 1. Once approved by DHCD,

smart growth zoning districts qualify for a variety of state incentives.

The proposed Kingston district would modify a commercial/industrial area to permit development of mixed residences, retail, and commercial space. After some interaction between DHCD and the town, DHCD granted initial approval of the district. There followed a great deal of public debate and negotiation between the town and the developer, and the town voted to enact the zoning amendment.

The application certified that some 64% of the district constituted "developable land." At some point after the town's application, but prior to initial approval by DHCD, the Division of Fisheries and Wildlife issued a survey of rare species that may have pushed the percentage of developable land down to as low as 50%. The town did not notify DHCD of the change, either when it learned about it or in an annual report it was required to file some months after it voted to approve the zoning amendment.

A group of citizens living near the new district filed suit, claiming that the town's zoning amendment constituted arbitrary and unreasonable exercise of zoning power. A land court judge granted summary judgment for the defendants, and the SJC pulled the case sua sponte from the Appeals Court.

Issues: The broad issue in this case is how courts should review chapter 40R smart growth zoning amendments. The narrow issue is whether DHCD approval was improperly obtained, and if so what effect that should have on the zoning amendment.

The general rule of zoning review is that zoning should stand unless it is arbitrary and unreasonable or substantially unrelated to the public health, safety, or general welfare. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 50 (2003). Because zoning is a legislative process, the amendment should be upheld if its reasonableness "is even fairly debatable." Id.

The plaintiffs argue, essentially, that c. 40R zoning must also be reviewed for substantial relation to the goals of "smart growth." Here,

the town had a duty to update its application prior to final DHCD approval, and failed to do so. That failure demonstrates an arbitrary or unreasonable process, and the amendment must be undone.

The defendants argue that c. 40R zoning should be reviewed under a more, not less, deferential standard, because the chapter represents a legislative declaration that such zoning is per se related to the public welfare. The town's process was eminently reasonable, and any duty to update the application arose only *after* enactment of the zoning amendment.

Discussion: As the defendants observe, the plaintiffs suffer here because their complaint began as a garden-variety challenge to the zoning process; their theory regarding the inaccurate DHCD application was apparently developed only later, when it became clear the process itself was reasonable. The plaintiffs therefore attempt to fit a challenge of the DHCD approval into a challenge of the town's zoning process, which does not lead to a useful analysis. Because it seems any duty the town owed to update its application arose only after the enactment, and the zoning amendment process itself was reasonable, the plaintiffs are unlikely to succeed.

The more interesting question is what effect it should have if the DHCD's initial approval -- which is a necessary prerequisite to the zoning amendment -- was itself invalid (due, perhaps, to deliberate fraud on the part of a town combined with dereliction of duty on the part of DHCD). The Court is unlikely to reach that hypothetical situation in this case.

**SJC-10641: JOHN HALEBIAN vs. ELLIOT J.
BERV & others**

Keywords: Business Judgment Rule • Corporations • Derivative Suits

Nature: Contract dispute • *Case Type:* Civil • *Route:* Direct Entry:
Certified Question

Parties:

Plaintiff/ **John Halebian**
Appellant Michelle H. Blauner, Esquire
Defendant/ **Elliot J. Berv, Donald M. Carlton, A. Benton**
Appellee **Cocanougher, Mark T. Finn, Stephen R. Gross,
Diana R. Harrington, Susan B. Kerley, Alan G.
Merten, R. Richardson Pettit, Citifunds Trust III**
James S. Dittmar, Esquire, Paul E. Nemser, Esquire

Mass. Appellate Briefs Analysis:

Question Presented: Whether a shareholder derivative suit must be dismissed if the board of directors determines in good faith *after* the suit was filed that it is not in the best interests of the corporation.

Facts: The plaintiff, Halebian, is a shareholder in a mutual fund managed by the defendant CitiTrust. CitiTrust had contracts with another Citigroup subsidiary for asset management. In 2005, Citigroup sold the subsidiary to a third party, Legg Mason. CitiTrust terminated its old contract and entered a new contract for asset management with Legg Mason on the same terms. The CitiTrust shareholders approved the new agreement with Legg Mason using a procedure called "echo voting," in which service agents would vote unvoted shares in the same proportion as the votes they had received.

Halebian sent a demand letter, arguing that the Board of CitiTrust should have sought to negotiate lower fees from Legg Mason or put the contract up for competitive bids. The letter also challenged the voting method used, apparently on the basis that echo voting was not permissible. The Board created a committee to review the demand.

When the committee did not respond within 90 days, Halebian filed (1) a derivative claim that the Board failed to act in the best interests of CitiTrust in entering the new agreement, and (2) a direct claim that voting procedures were improper, because the proxy statement failed to disclose that (a) the Legg Mason contract was unfair and (b) echo voting procedures are illegal. Six weeks later, the Board voted

that the action was not in the best interests of CitiTrust. A federal district court concluded that the action must therefore be dismissed under Massachusetts law.

On appeal, the Second Circuit certified the following question to the SJC:

Under Massachusetts law, can the business judgment rule, established under Mass. Gen. Laws ch. 156D, § 7.44, be applied to dismiss a derivative complaint filed timely under section 7.42 but prior to a corporation's rejection of the demand that serves as the basis for the suit?

Issues:

1. Application of the business judgment rule. Under Massachusetts law, "A derivative proceeding commenced *after rejection of a demand* shall be dismissed by the court on motion by the corporation," if the independent directors find that the suit is not in the best interests of the corporation. G.L. c. 156D, § 7.44(1). The question is whether this rule applies if the derivative suit is filed *before* rejection of the demand.

The district court held that § 7.44 should also apply to derivative suits filed before rejection, on the basis of statutory commentaries, and also because the contrary rule would render meaningless the corporation's ability to request a stay while it investigated the demand, pursuant to G.L. c. 156D, § 7.43. The Second Circuit was skeptical that the plain language of § 7.44 could be so easily overridden. It suggested that, reading the two sections harmoniously, rejection of a demand should bar suit only if the corporation actually does request a stay while it considers the demand.

2. Halebian's direct claims. The Second Circuit held that Halebian's first direct claim, that the proxy voting statement should have disclosed that the Legg Mason contract was unfair, was a derivative claim in disguise, and must be dismissed because it did not comply with the procedures for filing a derivative claim.

**SJC-10571: GHODRAT FARAHANI vs. BRISTOL
COUNTY SUPERIOR COURT & others**

Nature: Superintendence, c211, s3 • *Case Type:* Civil • *Route:* Direct
Entry: Appeal from Single Justice Order/Judgment • *Lower Court*
Judge: Margot Botsford, J.

Parties:

Pro Se **Ghodrat Farahani**
Plaintiff/
Appellant
Defendant/ **Bristol County Superior Court, Barbara Rouse,**
Appellee **Bristol Superior Court Judges, Mark Santos**
 Christine Baily, A.A.G.

**SJC-10493: STEFANO PICCIOTTO & others vs.
APPEALS COURT**

Nature: 249.4 • *Case Type:* Civil • *Route:* Direct Entry: Appeal from
Single Justice Order/Judgment • *Lower Court* *Judge:* Margot
Botsford, J.

Parties:

Pro Se **Stefano Picciotto, Judith Picciotto, Melita Picciotto**
Plaintiff/
Appellant
Defendant/ **Mark V. Green, Andrew R. Grainger, Hon. R.**
Appellee **Malcolm Graham**
 Maryanne Reynolds, A.A.G.

**SJC-10494: STEFANO PICCIOTTO & others vs.
APPEALS COURT**

Nature: 249.4 • *Case Type:* Civil • *Route:* Direct Entry: Appeal from
Single Justice Order/Judgment • *Lower Court Judge:* Margot
Botsford, J.

Parties:

Pro Se **Stefano Picciotto, Judith Picciotto, Melita Picciotto**
Plaintiff/
Appellant
Defendant/ **Mark V. Green, Andrew R. Grainger, R. Malcolm**
Appellee **Graham**
Maryanne Reynolds, A.A.G.

**SJC-10495: STEFANO PICCIOTTO & others vs.
APPEALS COURT**

Nature: 249.4 • *Case Type:* Civil • *Route:* Direct Entry: Appeal from
Single Justice Order/Judgment • *Lower Court Judge:* Margot
Botsford, J.

Parties:

Pro Se **Stefano Picciotto, Judith Picciotto, Melita Picciotto**
Plaintiff/
Appellant
Defendant/ **Mark V. Green, Andrew R. Grainger, R. Malcolm**
Appellee **Graham**
Maryanne Reynolds, A.A.G.

**SJC-10600: STEFANO PICCIOTTO & others vs.
MARK V. GREEN & others**

Nature: 249.4 • *Case Type:* Civil • *Route:* Direct Entry: Appeal from
Single Justice Order/Judgment • *Lower Court Judge:* Francis X.
Spina, J.

Parties:

Pro Se **Stefano Picciotto, Judith Picciotto, Melita Picciotto**
Plaintiff/
Appellant
Defendant/ **Mark V. Green, Andrew R. Grainger, R. Malcolm**
Appellee **Graham**
Maryanne Reynolds, A.A.G.

**SJC-10601: STEFANO PICCIOTTO & others vs.
MARK V. GREEN & others**

Nature: 249.4 • *Case Type:* Civil • *Route:* Direct Entry: Appeal from
Single Justice Order/Judgment • *Lower Court Judge:* Francis X.
Spina, J.

Parties:

Pro Se **Stefano Picciotto, Judith Picciotto, Melita Picciotto**
Plaintiff/
Appellant
Defendant/ **Mark V. Green, Andrew R. Grainger, R. Malcolm**
Appellee **Graham**
Maryanne Reynolds, A.A.G.

**SJC-10602: STEFANO PICCIOTTO & others vs.
MARK V. GREEN & others**

Nature: 249.4 • *Case Type:* Civil • *Route:* Direct Entry: Appeal from
Single Justice Order/Judgment • *Lower Court Judge:* Francis X.
Spina, J.

Parties:

Pro Se **Stefano Picciotto, Judith Picciotto, Melita Picciotto**
Plaintiff/
Appellant
Defendant/ **Mark V. Green, Andrew R. Grainger, R. Malcolm**
Appellee **Graham**
Maryanne Reynolds, A.A.G.

**SJC-10570: COMMONWEALTH vs. JIMMY
ROMAN ROSARIO**

Nature: intapp • *Case Type:* Criminal • *Route:* Direct Entry: Single
Justice Allows Interloc Appeal • *Lower Court Judge:* Roderick L.
Ireland, J.

Calendar Notes: Reserve Case

Parties:

Plaintiff/ **Commonwealth**
Appellee Jane Davidson Montori, A.D.A.
Defendant/ **Jimmy Roman Rosario**
Appellant Joseph F. Krowski, Esquire

Cases for Thursday, May 6

SJC-10650: COMMONWEALTH vs. JOSEPH W. MENDES

Keywords: Criminal Procedure • District Court • Search and Seizure
• Warrants

Nature: Crim: drug case • *Case Type:* Criminal • *Route:* Sua Sponte
Transfer from Appeals Court • *Lower Court Judge:* Gary A.
Nickerson, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Robert D. Moriarty, A.D.A.
Defendant/ **Joseph W. Mendes**
Appellant Robert J. Galibois, II, Esquire

Amicus Request:

“The issue presented is whether a clerk-magistrate of the Barnstable (Barnstable County) District Court could properly issue search warrants for premises located in the town of Bourne, which lies within the jurisdiction of the Falmouth (Barnstable County) District Court. See G.L. c. 276, s. 1; G.L. c. 218, ss. 32, 33; G. L. c. 218, s. 1.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether a district court clerk-magistrate may issue a search warrant for premises falling outside the district court's jurisdiction, but within the district court's county.

Facts: The Barnstable Police Department investigated the defendant and his family, who were allegedly running a drug distribution enterprise, from 1999 to 2007. By 2007, the defendant had moved to

the town of Bourne, allegedly to escape the investigation. Barnstable police obtained a search warrant from the Barnstable District Court for the defendant's Bourne apartment. Bourne is in the jurisdiction of the Falmouth District Court, rather than the Barnstable District Court. Both courts are in Barnstable County.

The seized evidence led to conviction of the defendant on some ten drug and firearm charges, the defendant appealed, and the SJC transferred the case sua sponte from the Appeals Court.

Issues: The issue is whether the clerk-magistrate could issue a search warrant for an apartment in Bourne, which is outside the Barnstable District Court's jurisdiction but within Barnstable County.

The defendant argues that district courts may issue search warrants only within their jurisdiction, resting almost entirely on a venerable -- but not controlling -- text: Grasso & McEvoy, *Suppression Matters Under Massachusetts Law* § 7-3(a) (2008). The Commonwealth rests on a statute: G.L. c. 218, § 32, which states that "District courts may receive complaints and issue warrants and other processes for the apprehension of persons charged with crime and *found within their county* ... returnable before a court of the county having jurisdiction of the trial." The Commonwealth argues that, there being no other jurisdictional limit on the specific authority of clerks to issue search warrants (*see* G.L. c. 218, § 33), their authority too must run county-wide.

Discussion: The Commonwealth seems to have the better of this argument; if the district court can issue warrants for persons found within their county, it is hard to see why a district court clerk should not be able to issue search warrants, and the defendant cites no statute that explicitly imposes a narrower limit. It is not clear whether the warrant was in fact returned "before a court of the county having jurisdiction of the trial" (or even exactly how to read that language), but any defect in the return is likely insufficient to assist the defendant at this stage.

On a side note, the defendant apparently obtained a five-year sentence in this case by stipulating to entry of the police report at a bench trial, effectively pleading guilty but retaining the right to appeal the validity of the warrant. If that is the case, it's an interesting example of a defendant obtaining some measure of grace from the prosecutor while still preserving appeal of his most viable argument.

SJC-10609: COMMONWEALTH vs. KOFI AGANA

Keywords: Criminal Procedure • Disabilities • Judicial Review

Nature: Superintendence, c211, s3 • *Case Type:* Criminal • *Route:* Direct Entry: Single Justice Reservation & Report • *Lower Court Judge:* Francis X. Spina, J.

Parties:

| | | |
|-------------------|---|---------------------------------|
| <i>Plaintiff/</i> | Ruby McDonough | |
| <i>Appellant</i> | Wendy J. Murphy, Esquire | |
| <i>Defendant/</i> | Commonwealth | Kofi Agana |
| <i>Appellee</i> | Casey E. Silvia, A.D.A., James W. Sahakian, A.D.A. | Richard B. Klibaner, Esquire |

Amicus Request:

“The issues presented are whether a disabled complainant in a sexual assault case diagnosed with “expressive aphasia” and determined to be competent by her personal physician and a forensic psychologist, must be afforded accomodation under the Americans with Disabilities Act, 42 U.S.C. s. 12101 et seq., when testifying in court; whether a District Court judge correctly ruled that the witness was incompetent to testify; whether the witness had standing under G. L. c. 211, s. 3, to seek review of the judge's finding or to seek accomodation.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether a witness with a speech-related disability has the right to challenge her exclusion as a witness during trial; whether the judge properly excluded her testimony for inability to give narrative answers.

Facts: The appellant is the alleged victim in the criminal trial of Kofi Agana. The alleged victim suffers from expressive aphasia, a condition that permits her to understand language, but to speak and write only with great difficulty. She communicates largely through the words "yes" and "no," and through gestures. Using these means, she alleged that the defendant sexually assaulted her.

The judge appointed an expert examiner who reported that the alleged victim was mentally competent, and was understandable so long as questions were phrased to her in yes or no form. The judge then held a live competency hearing, in which the defense attorney examined her for over an hour. The attorney asked a series of questions calling for narrative answers, which the witness was unable to answer. The judge ruled that she was not competent to testify, apparently largely on the ground that she was unable to provide narrative answers, and that her yes or no answers to some of the questions resulted in confusion.

The witness sought interlocutory review of the judge's ruling from the single justice, pursuant to G.L. c. 211, § 3, claiming that the Americans with Disabilities Act ("ADA") requires the judge to make reasonable accommodations for her disability, and that she could testify competently with accommodations. Such accommodations would apparently include permission for the prosecutor to ask leading questions in direct testimony, and an interpreter or facilitator who could interpret questions and her answers. A single justice reserved and reported the case to the full court.

Issues:

1. Availability of relief. The preliminary procedural question is whether the witness has standing to bring this challenge. In general, it is a "fundamental principle" that "the victim of a crime does not have a judicially cognizable interest in the prosecution of another." Hagen v. Commonwealth, 437 Mass. 374, 380 (2002). Thus it is the state, rather than the alleged victim, that generally has standing to appeal from exclusion of a victim's testimony. The witness argues, however, that she is seeking to assert not her rights as a victim, but as a disabled person; because double jeopardy would bar retrial, she is unable to vindicate her rights to reasonable accommodation under the ADA, other than through interlocutory review.
2. Feasibility of reasonable accommodations. The substantive question is whether the witness would be competent to testify, given reasonable accommodations. It is well settled that a physically disabled witness has a right to accommodations to be able to enter the court room, and that a witness who does not speak English may use an interpreter. In this case, however, the requested accommodation is a different *kind* of evidence, in which the witness answers yes or no questions rather than using her own words. The judge ruled that such questions amounted to leading the witness, and were impermissible. The witness argues that competency to testify does not require the ability to give narrative answers, but *expressive* answers, see Mass. G. Evid. § 601(b), and that leading questions are permissible where necessary, such as with child or elderly witnesses, see Mass. G. Evid. § 611(c) & note.

Discussion: There are powerful principles at stake here: on the one hand, a woman has been declared mentally competent by an independent physician, and consistently alleges that she has been sexually assaulted, but is not permitted to bring her accusation to court. On the other hand, if she is permitted to testify, the defendant's attorney will not be able to directly challenge his accuser, but instead will have the form of his questions and their answers filtered through a third party interpreter. (Understandably, but troublingly, the witness offered a family member as interpreter at the hearing -- hardly a neutral party).

As general principles, the witness's arguments seem sound: she has an important statutory right to reasonable accommodations, distinct from the rights occasionally asserted and rejected by victims, and she will be unable to vindicate that right other than through interlocutory review. However, it is ultimately up to the trial judge, not the SJC, to ensure that the witness rather than the interpreter would be the one testifying. In this case, a fair result might be to remand the case to the trial judge with instructions to hold a hearing with a translator, and make findings as to the fairness of such an accommodation to the defendant.

Going forward, the amici National Aphasia Association, et al., suggest that Massachusetts should adopt judicial guidelines for evaluation of disability accommodations, as other states have. While their proposed guidelines seem appropriate, the Court is likely to refer the suggestion to a judicial committee, rather than explicitly adopt it via the decision in this case.

**SJC-10613: BAR COUNSEL vs.
STEPHEN HRONES**

Nature: miscndct • *Case Type:* Civil • *Route:* Direct Entry: Single
Justice Reservation & Report • *Lower Court Judge:* Roderick L.
Ireland, J.

Parties:

Plaintiff/ **Bar Counsel**
Appellee Susan A. Strauss Weisberg, Ass't Bar Counsel, Constance
Vecchione, Bar Counsel
Defendant/ **Stephen Hrones**
Appellant Elizabeth N. Mulvey, Esquire

**SJC-10642: FANEUIL INVESTORS GROUP,
LIMITED PARTNERSHIP vs. BOARD OF
SELECTMEN OF DENNIS & another.**

Keywords: Affordable Housing • Local Government • Real Property

Nature: Governmental/municipal • *Case Type:* Civil • *Route:* Further
Appellate Review • *Lower Court Judge:* Keith C. Long, J.

Parties:

| | | |
|-------------------|--------------------------------------|-----------------------------|
| <i>Plaintiff/</i> | Faneuil Investors Group, Ltd. | |
| <i>Appellant</i> | Dana Alan Curhan, Esquire | |
| <i>Defendant/</i> | Dennis Housing | Dennis Board of |
| <i>Appellee</i> | Authority | Selectmen |
| | Kathleen Fowler, Esquire, | Ilana M. Quirk, Esquire, |
| | John R. Costello, Esquire | Jeffery D. Ugino, Esquire, |
| | | Kathleen O'Donnell, Esquire |

Amicus Request:

“Whether the grant of a mortgage on certain real property is a conveyance such as would trigger a reverter provision in the deed that required written consent for any subsequent conveyance or transfer of the property.”

Mass. Appellate Briefs Analysis:

Question Presented: Whether a mortgage of real property is a "conveyance" triggering a reverter clause in the deed; whether the Board of Selectmen's authorization to enter a deed requiring reverter on misuse of the property also authorized it to require reverter on conveyance.

Facts: The Board of Selectmen of the town of Dennis deeded a property to the Dennis Housing Authority (DHA) for the sum of \$1, to be used for affordable housing. The deed provided for a possibility of reverter to the Town if the DHA conveyed or transferred the property

without written consent. The DHA immediately obtained a mortgage on the property from Citizens Bank. Four years later, the Board exercised its power of reverter and repossessed the property, on the basis that the mortgage constituted a conveyance of the property.

When the Board deeded the property to the DHA, it did not have explicit authorization from the town meeting to require reverter in the case of conveyance. However, it did have authorization to require reverter "in the event the property ceases to be used for [affordable housing]."

The current holder of the mortgage, Faneuil, sought a declaratory judgment that the town could not properly exercise the reverter clause, because a mortgage was not a conveyance. A Superior Court judge dismissed the claim, the Appeals Court agreed, see 75 Mass. App. Ct. 260, and the SJC granted the plaintiff's request for further appellate review.

Issues:

1. Mortgage as a "conveyance." Massachusetts follows the minority "title theory" of mortgage, in which legal title to a property passes to the mortgagee until the mortgage is satisfied. The trial judge therefore found that the property was "conveyed" when it was mortgaged, and the reverter clause was triggered. The plaintiff argues that this gives the legal fiction of title theory too much power; that the parties would have specifically referred to mortgage if they intended that form of conveyance to trigger a reverter; and that the more reasonable rule in a title theory state would be to trigger reverter on mortgage *default*, rather than creation. The Board of Selectmen responds that the title theory is well settled in Massachusetts, and does what it says it does; any reasonable title search would have disclosed the condition to Citizens, and Citizens should have known to request written permission from the Town, so there is no unreasonable hardship in applying the reverter clause.
2. Permission for the Board to create the deed. The plaintiff argues that the town meeting authorization for the Board to create a deed

providing for reverter in case the property was no longer used for affordable housing did not authorize it to provide for reverter in case of transfer. The Appeals Court acknowledged that the Board could not create a deed "different in a substantial respect" from what was authorized, but held that the prohibition on transfer was implicitly necessary to accomplish the goals authorized by the town meeting, and therefore permissible.

Discussion: Neither party offers the Court substantial guidance on the question of whether a mortgage should trigger a conveyance clause. Both agree that in Massachusetts, a mortgage is a conveyance; the plaintiff merely observes that the title theory doctrine is something of a fiction, and that other states follow more relaxed rules. The fact that the Court was willing to take appeal of a published Appeals Court decision -- and is seeking amicus briefs solely on this aspect of the appeal -- therefore suggests that at least some on the Court may be questioning a strict adherence to title theory. It will be interesting to see whether the Court indeed moves to some extent away from that theory. On a naive view, at least, a shift away from title theory would have the potential to benefit property owners at the expense of mortgage companies.

SJC-10540: IN THE MATTER OF JUSTICE GARY KATZMANN

Nature: Superintendence, c211, s3 • *Case Type:* Civil • *Route:* Direct
Entry: Appeal from Single Justice Order/Judgment • *Lower Court*
Judge: Judith A. Cowin, J.

Parties:

Pro Se **Lawrence Watson**
Plaintiff/
Appellant
Defendant/ **Gary Katzmann**
Appellee Annapurna Balakrishna, A.A.G.

**SJC-10565: IN THE MATTER OF JUSTICE
WILLIAM MEADE**

Nature: Superintendence, c211, s3 • *Case Type:* Civil • *Route:* Direct
Entry: Appeal from Single Justice Order/Judgment • *Lower Court*
Judge: Judith A. Cowin, J.

Parties:

Pro Se **Lawrence Watson**
Plaintiff/
Appellant
Defendant/ **William Meade**
Appellee Annapurna Balakrishna, A.A.G.

**SJC-10603: IN THE MATTER OF JUSTICE
MITCHELL SIKORA**

Nature: Superintendence, c211, s3 • *Case Type:* Civil • *Route:* Direct
Entry: Appeal from Single Justice Order/Judgment • *Lower Court*
Judge: Judith A. Cowin, J.

Parties:

Pro Se **Lawrence Watson**
Plaintiff/
Appellant
Defendant/ **Mitchell Sikora**
Appellee

**SJC-10591: COMMONWEALTH vs.
HENRY SAMUELS**

Nature: Superintendence, c211, s3 • *Case Type:* Criminal • *Route:*
Direct Entry: Appeal from Single Justice Order/Judgment • *Lower*
Court Judge: Robert J. Cordy, J.

Parties:

Plaintiff/ **Commonwealth**
Appellant Kris C. Foster, A.D.A.
Defendant/ **Henry Samuels**
Appellee Michelle Menken, Esquire

**SJC-10657: COMMONWEALTH vs.
JOSEPH BEATRICE**

Keywords: Confrontation Clause • Constitutional Law •
Criminal Procedure

Nature: Crim: nonhomicide nondrug • *Case Type:* Criminal • *Route:*
Further Appellate Review - Limited • *Lower Court Judge:* James F.X.
Dinneen, J.

Calendar Notes: Reserve Case

Parties:

Plaintiff/ **Commonwealth**
Appellee Robert C. Thompson, A.D.A., Kristen Stone, A.D.A.
Defendant/ **Joseph Beatrice**
Appellant Carlo A. Obligato, Esquire, David M. Skeels, Esquire

Mass. Appellate Briefs Analysis:

Question Presented: Whether admission of a 911 call made by the alleged victim of an assault and battery from a neighbor's house violated the defendant's right of confrontation.

Facts: After a physical fight between the defendant and the alleged victim, his girlfriend, the victim ran to a neighbor's house and made a 911 call. On the call, the victim was out of breath, and said that her boyfriend just beat her up. In answers to the dispatcher's questions, she gave the defendant's name, said that he was still in her apartment and that she needed an ambulance, and asked the dispatcher to "send the cops now before he leaves."

The prosecutor did not call the victim to testify, but played her 911 tape to the jury, over objection. The defendant appealed, the Appeals Court upheld the conviction, and the SJC granted the defendant's request for further appellate review. 75 Mass. App. Ct. 153.

(Note that the defendant's Appeals Court brief, carried over to the SJC, addresses various other arguments; the SJC granted review only of issues relating to the 911 call.)

Issues: The defendant does not directly challenge the trial judge's finding that the 911 tape was admissible as an excited utterance. He argues, however, that the tape was testimonial, dealing with a past event rather than a present emergency, and therefore violated his right to confront those testifying against him, citing *Davis v. Washington*, 547 U.S. 813 (2006). The Appeals Court held, considering the factors in *Davis*, that the 911 call was primarily meant to meet an ongoing emergency rather than secure testimony: it was reasonable to infer from the limited call that the victim was still in danger from the defendant; the questions were oriented at securing the scene rather than gathering evidence; and the conduct of the interview was informal.

Discussion: On balance, the Appeals Court conclusion that the 911 call was intended to stabilize an ongoing emergency, rather than

obtain evidence of a prior crime, seems reasonable. It will be interesting to see what feature of that decision prompted the Court to grant further review.

As a side note, the legal fiction of past convictions for impeachment wore particularly thin in this case. In a prosecution for assault and battery, the Commonwealth was apparently permitted to impeach the defendant's character for *truthfulness* -- but not, of course, demonstrate his propensity for *committing assault and battery* -- by introducing testimony that he had been convicted of assault and battery three years earlier. Unless there is some mitigating fact not in the defendant's brief (which may well be, because the defendant did not object on appeal), this seems like a case where the use of prior convictions for impeachment was blatantly prejudicial. Such impeachment is difficult to challenge on appeal, of course, being within the sound discretion of the judge.

Cases for Friday, May 7

SJC-09935: COMMONWEALTH vs. CHRISTOPHER M. McCOWEN

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Gary A. Nickerson, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Julia K. Holler, A.D.A.
Defendant/ **Christopher M. McCowen**
Appellant Robert A. George, Esquire, Gary G. Pelletier, Esquire

SJC-09669: COMMONWEALTH vs. JEROME McNULTY

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Howard J. Whitehead, J.

Parties:

Plaintiff/ **Commonwealth**
Appellee Kenneth E. Steinfield, A.D.A.
Defendant/ **Jerome McNulty**
Appellant Sharon Fray-Witzer, Esquire

SJC-10292: COMMONWEALTH vs. JIMS BENECHÉ

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Patrick F. Brady, J.

Parties:

Plaintiff/ **Commonwealth**

Appellee Anna E. Kalluri, A.D.A.

Defendant/ **Jims Beneche**

Appellant Greg T. Schubert, Esquire, David H. Mirsky, Esquire

**SJC-10523: COMMONWEALTH vs. CALVIN
CARNES, JR.**

Nature: Murder1 appeal • *Case Type:* Criminal • *Route:* Direct Entry:
Murder 1 • *Lower Court Judge:* Margaret R. Hinkle, J.

Parties:

Plaintiff/ **Commonwealth**

Appellee David D. McGowan, A.D.A.

Defendant/ **Calvin Carnes, Jr.**

Appellant Ellen J. Zucker, Esquire, Shannon Frison, Esquire