

COMMONWEALTH OF MASSACHUSETTS SUPREME  
JUDICIAL COURT  
FOR SUFFOLK COUNTY

SUFFOLK, SS

NO. SJ-2009-0557

COMMONWEALTH

v.

KOFI AGANA

RECEIVED

MAURAS DOYLE, CLERK  
OF THE SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY

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MEMORANDUM OF LAW OF CENTER FOR PUBLIC REPRESENTATION,  
MENTAL HEALTH LEGAL ADVISORS COMMITTEE AND THE DISABILITY  
LAW CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONER RUBY  
MCDONOUGH.

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**Interest of Amici**

The Center for Public Representation (the Center) is a public interest law firm with offices in Northampton and Newton that advocates for the rights of individuals with disabilities, including those in nursing homes and other staffed facilities and programs. The Center represents the plaintiff classes in two cases alleging that individuals with disabilities have been unnecessarily placed in nursing homes. Rolland v. Cellucci, 191 F.R.D. 3, D. Mass, 2000 (Order Approving Settlement Agreement)(class of individuals with mental retardation) and Hutchinson v. Patrick, C.A. No. 07-cv-30084-MAP(class of individuals with head injuries).

The Mental Health Legal Advisors Committee (MHLAC) was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221 § 34E. MHLAC provides advice and assistance to individuals with mental illness, to their families and to other attorneys. One aspect of its obligations is to monitor legal issues before the courts affecting the interests of individuals with mental disabilities.

The Disability Law Center (DLC), a private non-profit organization, is Massachusetts' designated protection and advocacy agency for people with disabilities, pursuant to federal statutory authority. See, e.g., 42 U.S.C. § 15001 (people with developmental disabilities), 42 U.S.C. § 10801 (people with mental illness), 29 U.S.C. 794e (other persons with disabilities) and 29 U.S.C. 3004 (people with disabilities in need of assistive technology). DLC's core mission involves advocacy on issues of abuse and neglect as well as non-discrimination in the provision of government services.

The Center, MHLAC and DLC have each represented many individuals with disabilities who have been victims of abuse by their caretakers or others. Frequently, these individuals have been frustrated in their efforts to seek

redress of their complaints with their caretaker agencies, law enforcement and the courts. For the past twenty years, the Center, DLC and MHLAC have advocated for increased protections for the clients who are victims of crime. They have partnered with state agencies, including the Executive Office of Human Services, the Department of Developmental Services (formerly the Department of Mental Retardation), the Department of Mental Health and the Disabled Persons Protection Commission to increase awareness of the ability of people with disabilities to assist and participate in the arrest and prosecution of their abusers.

Amici have particular knowledge about the frequency of abuse of individuals with disabilities, about the application of federal disability discrimination laws to the courts and to resources available to the courts to assist victims with disabilities. The outcome of this action is likely to have a profound impact on the ability of many clients of the Center, MHLAC and DLC to have access to the courts, and by virtue of that access, to be protected from further abuse.

#### **Introduction**

Petitioner Ruby McDonough seeks relief from the ruling of a District Court judge that she is incompetent

to testify at the trial of the individual charged with sexually assaulting her. Ms. McDonough seeks relief pursuant to a writ of general superintendence under G.L. c. 211 § 3.

The Court's discretionary power of review under G.L. c. 211 § 3 is "extraordinary" and is thus limited to the "most exceptional circumstances." Campiti v. Commonwealth, 417 Mass. 454, 455 (1994). As set forth below, review by this Court is warranted because of the lower court's disregard of the Americans with Disabilities Act, the serious hardship imposed on a vulnerable victim, and the negative impact on the administration of justice and on disabled citizens' access to the courts. Barring Ms. McDonough's testimony on the grounds of her alleged incompetence violates the law, perpetuates the stereotypes and the stigmatization of disability and encourages crime against some of the most vulnerable people in our society.

Other than this petition, Ms. McDonough is completely without any legal recourse to protect her rights.

#### **Facts**

Amici rely on facts as they are presented in Ms. McDonough's petition (Docket [Doc.] 1) and her memorandum

in support of her petition. (Doc. 2). Approximately eight years ago, Ms. McDonough suffered a stroke that left her partly immobilized and suffering from a disability known as "expressive aphasia."<sup>1</sup> Ms. McDonough, 62, lives in a nursing home. She is a person with a disability as defined by the Americans with Disabilities Act of 1990 (hereafter "ADA"). 42 U.S.C. § 12101(2). There is no indication in the record available to the amici that, except for the trial judge's finding in this case, Ms. McDonough has ever been adjudicated incompetent. She has no guardian and, under Massachusetts law, is presumed competent. See, G.L. c. 190B § 5-101(9) (effective July 1, 2009) (defining an "incapacitated person" for purposes of guardianship);<sup>2</sup> Fazio v. Fazio, 375 Mass. 394

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<sup>1</sup> Aphasia is "a nerve defect in which there are problems with speaking or speech is lost.... There are many forms and degrees of aphasia. For example, a patient with aphasia may be able to speak but not to form words that can be understood. The patient may be able to understand speech and writing and form thoughts but not able to speak." Mosby Medical Encyclopedia, Rev. Ed. 55 (1992). Expressive aphasia is a form of aphasia in which the patient knows what she wishes to say but is unable to get the words out, and is able to perceive and comprehend both spoken and written language but is unable to repeat what she sees or hears. See [www.aphasia.org](http://www.aphasia.org).

<sup>2</sup> Importantly, Ms. McDonough's expressive aphasia could not be grounds for appointment of a guardian under the provisions of the newly adopted Massachusetts Uniform Probate Code which recognizes that a person's inability to communicate may be remediated by "appropriate

(1978) (neither institutionalization nor clinical determinations of mental disability are enough of themselves to establish incapacity); Rogers v. Commissioner of Department of Mental Health, 390 Mass. 489 (1983) (institutionalized mental patients are considered competent to refuse treatment until determined incompetent by a court).

In early 2009, Ms. McDonough alerted family, nursing home staff, and law enforcement officials that Kofi Agana (Mr. Agana), an aide at the nursing home, had sexually assaulted her. Ms. McDonough claimed that Agana had touched her genitals and breasts. Ms. McDonough described the incident answering yes and no questions and using hand gestures. Doc. 2 p. 3.

Ms. McDonough's stroke injured her brain, resulting in aphasia which impairs her ability to speak, but not her ability to understand. However, her ability to communicate, though limited, was sufficient for Framingham police to arrest Mr. Agana and for the District Attorney to charge him with "indecent assault and battery on a person over the age of 60 or with a disability." Doc. 2 p. 4.

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technological assistance" such that the individual is not incapacitated. G.L. c. 190B § 5-101(9).

## Procedural History

Prior to the hearing on Ms. McDonough's competency to testify,<sup>3</sup> a court-appointed forensic psychologist examined and concluded that Ms. McDonough was "absolutely competent" to testify. The psychologist suggested accommodations that Ms. McDonough might need to communicate her testimony effectively because of her disability. For example, the psychologist reported that she asked Ms. McDonough yes and no questions and had her point to a picture or her own body, or to gesture, or to frown or smile. Doc. 2 Ex. 2 p. 5.

A competency hearing was held in August 2009. There is no record that the hearing judge followed the psychologist's recommendations of accommodations in any way.<sup>4</sup> According to the petitioner's pleadings, during the

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<sup>3</sup> Although the judge does not refer to it in his memorandum, Doc. 2 Ex. 1, the appointment of the psychologist and the subsequent hearing may have been pursuant to G.L. c. 123 § 19 (authorizing a judge to request the Department of Mental Health to assign a psychologist or psychiatrist to determine the mental condition of a witness).

<sup>4</sup> Any suggestion that the court accommodated Ms. McDonough by "allow[ing] her to write her answers," Doc. 2, Ex. 1, p. 1, to the defense attorney's questions is unavailing. The court made no inquiry whether her expressive aphasia manifested itself, as it does for most people with the disability, in written as well as oral language limitations. While Ms. McDonough may have been unable to write answers to the questions posed, there is

90-minute hearing, the judge did not ask any questions of Ms. McDonough on behalf of the court. The time was not structured to allow Ms. McDonough to answer questions effectively. The defense spent about an hour using a traditional narrative question approach designed to elicit contradictions in testimony. The prosecution's questions were brief. Doc. 2 pp 6-8.

As a result of this hearing, Ms. McDonough was deemed incompetent to testify despite the court-appointed expert's earlier opinion. The judge thus silenced an individual who had never been under guardianship, nor previously been deemed incompetent. No jury could hear her story, whether accommodations were available or not. Instead of the chance to offer her testimony with the aid of accommodations, Ms. McDonough was barred from testifying at all.

#### **ARGUMENT**

##### **I. People with Disabilities Are Disproportionately Affected by Violent and Often Unreported Crime.**

The charges in this case are unfortunately neither rare nor anomalous. People with disabilities are more often crime victims than people without disabilities, and

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good reason to believe that she could have responded if other accommodations such as structured questioning or an interpreter had been considered.

those crimes are commonly committed by caretakers exploiting the individual's disability, their isolation and the barriers created by the criminal justice system to redress. Often, complaints do not even reach the police or the courts.

Earlier this month, on October 1, 2009, the Department of Justice (DOJ) released the first comprehensive national report on crime against persons with disabilities. Dep't of Justice, Bureau of Justice Statistics, Crime Against Persons with Disabilities, 2007 available at <http://www.ojp.usdoj.gov/bjs/abstract/capd07.pdf>. The DOJ confirmed in striking detail what amici and other disability advocates have long feared -- crimes against people with disabilities occur at much higher rates (twice as high in some age groups) than against non-disabled people.<sup>5</sup> Id. at 2, Table 2. The DOJ reports that the most frequent crimes are simple assault, aggravated assault and robbery. Id. at 4, Table 4. Women with

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<sup>5</sup> The DOJ reports that the rate of crime against people with disabilities in Ms. McDonough's age group (50-65 years old) is only slightly higher than the rate against persons without disabilities. Id. at 2, Table 2. However, the standards applied by the trial judge here would apply to all persons with disabilities which impact their ability to testify, regardless of age.

disabilities are victimized at twice the rate of women without disabilities. Id. at 3.

Other studies have shown that almost half of perpetrators of sexual abuse against women with developmental disabilities are caretakers.<sup>6</sup> In the nursing home setting, studies show that abuse of residents with disabilities is routine because of a convergence of factors. First, motivated offenders are able to carry out criminal inclinations; second, suitable targets are available to the offender; and third, targets are often unguarded or inadequately protected.<sup>7</sup>

Still other studies show that caregiver-perpetrated victimization, in particular sexual assault, goes unreported because of fear of reprisal.<sup>8</sup> This fear tends to correlate with the proximity of the relationship, where the likelihood of reporting a rape is less if the

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<sup>6</sup> Dick Sobsey, *Violence and Abuse in the Lives of Individuals with Disabilities: The End to Silent Acceptance?* 75-76 (1994). Ms. McDonough does not have a developmental disability.

<sup>7</sup> Diana K. Harris, Michael L. Benson, *Maltreatment of Patients in Nursing Homes: There Is No Safe Place* 28 (2006).

<sup>8</sup> Richard McLeary, Douglas J. Wiebe, *Measuring the Victimization Risk of the Developmentally Disabled: Methodological Problems and Solutions* 10 (1999).

perpetrator and victim are acquainted.<sup>9</sup> There is further speculation that victims fail to self-report crimes committed in their residences because the perpetrator may be within earshot of interviews.<sup>10</sup> Perpetrators often carefully select targets who, because of their disabilities, confront obstacles in voicing complaints and reports of sexual assault. Here the victim summoned the courage to report the crime, only to be denied the opportunity to testify in court.

If the case goes to trial, barring Ms. McDonough's testimony means that her accused assailant, if he so chooses, can tell his story to the jury, but that she cannot tell hers. Barring the testimony of victims with disabilities means that even if they overcome all of the obstacles described above, they do not get their day in court. Not only is this a further disincentive to coming forward, but it sends a signal to perpetrators that they can exploit such persons with relative impunity.

The fundamental error committed by the hearing judge in this instance is that there was no meaningful consideration of accommodations at all. The court applied an all-or-nothing, black-or-white competency test,

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<sup>9</sup> Id.

<sup>10</sup> Id. at 11.

without considering whether the accommodations suggested by the court's own expert would enable Ms. McDonough to effectively communicate with the court and the jury.

**II. The Americans with Disabilities Act Requires Judges to Accommodate Litigants and Witnesses with Disabilities.**

It is well established that matters of competency are particularly within the trial judge's discretion, and that the judge's determination will be rarely faulted on appellate review. Commonwealth v. Filiberto Jiminez, 10 Mass. App. Ct. 441, 443 (1980), citing Commonwealth v. Whitehead, 379 Mass 640, 656 (1980). Commonwealth v. Marshall, 211 Mass. 86, 90 (1912), and cases cited.

However, extraordinary review is warranted here because, in violation of the Americans with Disabilities Act (ADA), the court below completely ignored the distinction between being competent to testify and needing accommodations in order to effectively communicate that testimony.

The ADA expressly recognizes that persons with disabilities have been "subjected to a history of purposeful unequal treatment." 42 U.S.C. 12101(a)(7). Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits

of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Title II applies to the actions of courts and judges. Tennessee v. Lane, 541 U.S. 509 (2003); Popovitch v. Cuyahoga County Court, 276 F.3d 808 (6<sup>th</sup> Cir. 2002) (en banc); Galloway v. Superior Court of the District of Columbia, 816 F.Supp. 12 (D.D.C. 1993); Soto v. City of Newark, 72 F.Supp.2d 489 (D.N.J. 1999).

In Tennessee v. Lane, the United States Supreme Court held that states could not claim 11<sup>th</sup> Amendment immunity in suits by individuals with disabilities for damages when the state courts failed to provide reasonable accommodations necessary for the individuals to exercise their fundamental right of access to the courts. 541 U.S. at 533-34. The upper floors of Tennessee state courthouses were inaccessible to those using wheelchairs. Id. at 513-14. Plaintiff George Lane sued, alleging a violation of the ADA. In holding for Lane, the Court reasoned that because the right of access to courts was guaranteed under the Due Process Clause of the 14<sup>th</sup> Amendment, individuals could sue under the ADA to seek redress for denying them access to the court based on their disabilities. Id. at 533-34. The Court

pointedly noted the history of discrimination against disabled litigants by state courts, including failure to provide accommodations necessary for them to effectively communicate as witnesses. Id. at 525, n. 14 (gathering cases).

The ADA's regulations explicitly require public entities such as state courts to take appropriate steps to ensure that communication with a person with a disability<sup>11</sup> is as effective as communication with others. 28 Code Fed. Reg. 35.160(a). The public entity must also furnish "appropriate auxiliary aids and services" when necessary to afford a disabled person an equal opportunity to participate in and enjoy the benefits provided by a public entity. 28 Code Fed. Reg. 35.160(b)(1). Auxiliary aids and services are a broad set of solutions, interventions and technologies to assist people with disabilities to communicate, including interpreters, readers, devices, or other services and actions. 42 U.S.C. §12102(1). In this case, the accommodations suggested by the court's expert would not

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<sup>11</sup> Ms. McDonough is "qualified individual" under the ADA. 42 U.S.C. §12131(2) (defining qualified individuals as "an individual with a disability who, with or without...the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

have cost any money at all; they simply involved structured questioning to accommodate the witness's expressive aphasia.

In this case, Ms. McDonough was forced to testify at a hearing on her competency as a witness without any inquiry into her need for accommodations to enable her to effectively communicate. Despite her obvious need and the expert's recommendations, Ms. McDonough was made to testify without the aid of structured questioning. This is as though Ms. McDonough was precluded from testifying because her physical disability made it impossible for her to enter the witness box or raise her hand to take the oath.

Since Ms. McDonough only suffers from expressive aphasia and some physical paralysis, the judge could not decide the issue of competence without at least some consideration of whether Ms. McDonough could testify with appropriate accommodations. In fact, the court-appointed forensic psychologist came to the conclusion that Ms. McDonough was competent to testify. The court gave no reason for disregarding its own expert. Doc. 2 Ex. 1.

By finding Ms. McDonough incompetent to testify, the court excluded her from participation in the trial of the

man accused of sexually assaulting her and denied her right of access to the courts.

**III. The Hearing Judge Failed to Avail Himself of National Standards, Guidelines, and Laws to Accommodate the Testimony of People with Disabilities.**

Laws and guidelines exist in Massachusetts and across the Nation to help courts utilize the testimony of individuals with disabilities. The District Court apparently availed itself of none of these resources. For example, under Massachusetts law, a court may accommodate a witness with mental retardation by permitting the person to testify in court but off the witness stand or, if the proceeding is a bench trial, testimony may be taken at another location within the courthouse but outside the courtroom; or in a jury trial, testimony may be taken on videotape out of the presence of the jury or in a location chosen by the court or by agreement of the parties. G.L. c. 233 § 23E(b)(1)(ii). Although Ms. McDonough is not mentally retarded, her disability requires accommodations in order for her to effectively communicate her testimony. Section 23E could certainly have been a guide to the trial court.

The Disabled Persons Protection Commission (DPPC), G.L. c. 19C, has been a national leader in promoting and enhancing the ability of individuals with disabilities to

testify in support of the prosecution of their abusers.<sup>12</sup> The DPPC, which has a special State Police Unit attached to it, is available to assist law enforcement, prosecutors and courts to assess the ability of individuals to communicate, to arrange for interpreters and to assist in the interviewing process.

With the active assistance of Massachusetts human services administrators and the DPPC, the California District Attorneys Association has produced a two and one-half hour training available on a compact disk to law enforcement and courts. The training addresses ways that courts and prosecutors can assure that victims with disabilities are effectively interviewed and can testify.<sup>13</sup>

Similar written and video materials have been produced in Massachusetts by the Building Partnerships Initiative, which provides among other resources, on-line

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<sup>12</sup> DPPC is without jurisdiction in this case because Ms. McDonough is 62 years old. DPPC's authority to investigate abuse of persons with disabilities extends only to person 18 - 59 inclusive. G.L. c. 19C § 1 (fifth paragraph defining "[d]isabled person"). Information about the DPPC is available at [www.mass.gov/dppc](http://www.mass.gov/dppc).

<sup>13</sup> Information about the California training is available at <http://www.cdaa.org/multimedia.htm>.

training for police officers.<sup>14</sup> Massachusetts Continuing Legal Education has conducted trainings and has published *Crimes Against Persons with Disabilities: A Practical Guide to Reporting, Investigations and Prosecutions*, MCLE (2002).

The DOJ Office for Victims of Crime has addressed this issue in a useful bulletin. Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, NCJ 172838 (2008).<sup>15</sup> The DOJ says that criminal justice agencies have the responsibility to be proactive in acquiring and using assistive technologies.<sup>16</sup> Assistive technologies help disabled crime victims to be informed, heard, and understood. It is most imperative, according to the DOJ, to assist disabled victims throughout the entire process, including education and training for judges.<sup>17</sup>

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<sup>14</sup> Available at <http://www.buildingpartnershipsma.com/resources.htm#PGfCP>

<sup>15</sup> Available online at [http://www.ojp.usdoj.gov/ovc/publications/factsheets/disabl\\_e.htm](http://www.ojp.usdoj.gov/ovc/publications/factsheets/disabl_e.htm).

<sup>16</sup> *Id.*, under *Recommendations for Criminal Justice Agencies and Victim Service Programs, Direct Services*, Nos. 5, 10, 12.

<sup>17</sup> *Id.*, under *Recommendations for Criminal Justice Agencies and Victim Service Programs, Direct Services*, No. 10.

In the present case, the court has not provided accommodations or proactively assisted Ms. McDonough. The court assigned a forensic psychologist who found Ms. McDonough competent and recommended accommodations. The court disregarded her professional opinion without findings of fact or conclusions of law, or indeed any explanation. The court did not draw upon any of the various sources that could have assisted it to accommodate Ms. McDonough.

To be barred from testifying by a judge who did not even consider the possibility that reasonable accommodations would enable Ms. McDonough to communicate effectively adds the insult of discrimination to the injury perpetrated by her assailant.

#### **Conclusion**

For the foregoing reasons, this court should grant the petition and order the lower court to consider what reasonable accommodations may be necessary to allow Ms. McDonough to communicate effectively prior to reaching any conclusions on her competency to give testimony regarding her sexual assault.

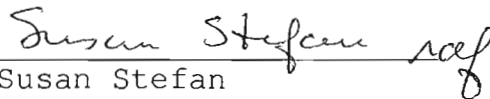
Respectfully submitted,

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Date: October 29, 2009