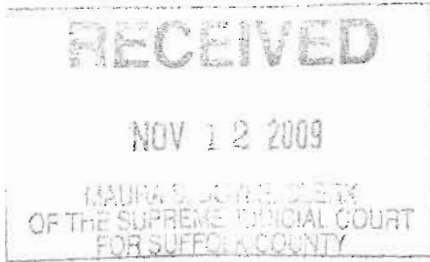


COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. SJ-2009-0557
FRAMINGHAM DIVISION
DOCKET NO. 0949CR534



COMMONWEALTH

v.

KOFI AGANA

MEMORANDUM ON STANDING IN FURTHER SUPPORT OF PETITION
FOR RELIEF PURSUANT TO G.L.c.211, §3

Despite the absence of meaningful legal analysis, the Commonwealth and defendant cite Hagen v. Commonwealth, 772 N.E.2d 32 (2004) for the proposition that Petitioner has no standing to seek redress before this Court for violation of her federal rights under the Americans With Disabilities Act (ADA).¹ They misapprehend the holding in Hagen and wrongly suggest that the case sub judice improperly asserts a legal interest in the prosecution of another.

¹ The defendant also cites Carroll v. Marzilli for the proposition that the victim here lacks standing, however, that case is inapt as it relates to the authority of a private citizen to demand that a defendant face arraignment before the prosecution can issue a nolle prosqui in a criminal matter issued by a clerk magistrate after initiation by a private person. It has nothing to do with the standing of a disabled to seek enforcement of her rights under the ADA.

1. HAGEN IS INAPT

Hagen nowhere forbids a disabled person to seek enforcement of her federal rights under the ADA in a state criminal case. To the contrary, Hagen simply denies "party standing" to private third-parties in criminal cases who seek enforcement of their rights under G.L. c.258B, the so-called "Victims' Bill of Rights".

Hardly a decision that denies all third-party standing for all purposes, the court in Hagen actually granted limited standing to the victim, expressly allowing her independently to seek enforcement of her right to a "prompt disposition". Hagen at 38. ("...victims should be permitted an opportunity to address the court directly when their fundamental right to a prompt disposition is jeopardized. If a victim is prohibited from bringing to a judge's attention that there has been a delay in the proceedings, the right afforded by the statute is essentially meaningless.") Justice Cowin's concurrence, critical of the majority, explicitly makes the point: "while conceding that the victim is not a party, nevertheless creates a *right* of victims to participate in the proceeding as a non-party" Id. (emphasis supplied).

It bears repeating that even if Hagen did forbid even limited victim standing in that case, it involved a

Massachusetts statute whose scope is both narrow and indigenous to the criminal justice system. Thus, any such limitations would have little application here where the collateral legal controversy involves violation of a victim's broad-sweeping federal rights.

2. PETITIONER CLEARLY HAS STANDING

Contrary to opponents' suggestions, Petitioner nowhere asserts an improper legal request to cause or control the prosecution of another. Indeed, the prosecutor made that discretionary decision almost a year ago. Petitioner seeks only redress of her individual rights under the ADA as set forth in her primary pleading, the substance of which has not been disputed by either the defendant or the Commonwealth. In such circumstances, Petitioner has standing which requires only that she establish that a "cognizable legal interest" is at stake. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Bennett v. Spear, 520 U.S. 154, 167 (1997). any violation of an individual's rights under the ADA is a "cognizable" legal interest.

Standing has further been defined by the United States Supreme Court in a three-part test: (1) that the plaintiff personally has suffered actual or threatened injury that is

concrete and particularized, not conjectural or hypothetical; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision from the Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998).

As set forth in her primary pleading before this Court, Petitioner has suffered actual injury to her federal rights, promulgated under the ADA. She was adjudicated incompetent, thus deemed incapable of testifying, without any accommodations for her disabilities as required by the ADA. Thus, she suffered an obvious "cognizable" legal injury that can be traced to the challenged action at issue here. A favorable decision from this Court will redress that injury.²

Although third-party standing to seek redress of collateral legal controversies in criminal matters is unusual, it is not unprecedented.

This Court and others have granted independent standing

² Even if Petitioner were not a disabled person, she would have standing in her capacity as an individual adjudicated incompetent, thus presumptively incapable of testifying in any judicial proceeding or exercising her right to seek to seek redress under state and federal law.

to third-parties in criminal cases in a variety of circumstances. See Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 600-602 (2000) and Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dep't, 403 Mass. 628, 634 (1988)(third-party media organizations seeking broader access to judicial proceedings); U.S. v. LaRouche, 841 F.2d 1176 (1988) (direct appeal by third-party recipient of defense subpoena seeking discovery of witness statements); U.S. v Lowe, 948 F.Supp. 97, 101 (D.Mass. 1996)(crime victim entitled to assert her rights independent of the prosecutor and to the appointment of private counsel to assist her in deciding whether to waive her privacy rights); Commonwealth v. Makara, 980 A.2d 138 (2009)(private third-party has standing to seek redress at trial and appellate level on collateral matter affecting third-party due process rights in criminal trial); Doe v. U.S., Clerk of the District Court, 666 F.2d 43 (4th Cir. 1981)(victim has standing both to assert her privacy rights under a rape-shield statute and, as a private third-party, to independently challenge an evidentiary ruling in a criminal case by initiating an appeal because "the remedy [of appeal] is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard"); U.S.

v. Saunders, 736 F.Supp. 698 (E.D.Va., 1990)(citing Doe and noting that victims have independent standing to appeal adverse rape-shield rulings in criminal cases because, without the right of appeal, "victims aggrieved by the court's order will have no opportunity to protect their privacy" from forbidden invasions).

The issue here is particularly appropriate for independent third-party standing because the determination of Petitioner as incompetent pertains directly and personally to her affirmative and fundamental rights as an disabled individual, unlike the more narrow scope of rights at issue in Hagen, which exist only as an adjunct to the criminal process itself.

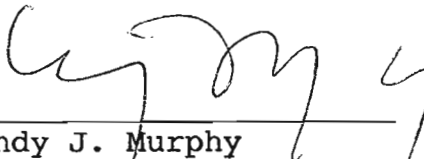
Where substantial individual rights are at stake, the victim is entitled to redress as a matter of due process. Marbury v. Madison, 5 U.S. 137, 163 (1803) ("where there is a legal right, there is also a legal remedy"). This core principle "presupposes that standing to be heard is implicit in the federal due process clause". Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

3. CONCLUSION

It should be axiomatic that a disabled person's rights under the ADA are enforceable when threatened or violated.

That such important rights could be rendered meaningless simply because the violation occurred in a criminal proceeding strains logic. Just as Petitioner could initiate legal proceedings in state court to ensure her adequate physical access to a courthouse, she may take steps to ensure that other types of accommodations are provided to ensure her communicative access.³

Respectfully submitted,



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³ If this Court declines to rule on standing grounds, relief can be sought in federal court where abstention and other limitations on federal jurisdiction erect no barrier to relief when the state declines to provide a remedy.

CERTIFICATE OF SERVICE

I, Wendy Murphy, hereby certify that on the 10th day of November, 2009, I forwarded a copy of the foregoing, MEMORANDUM ON STANDING IN FURTHER SUPPORT OF PETITION FOR RELIEF PURSUANT TO G.L.C.211, §3, by first class mail, postage prepaid, to the following counsel of record:

Robert Canty
321 Boston Post Road
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And:

Marian Ryan/Sheila Tracy
Middlesex County District Attorney's Office
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DATED: November 10, 2009

