

**MACDL**  
**Amicus Committee Report**

As of June 2, 2015

**I. Recent amicus projects - cases decided since January 1, 2015**

**A. *Kevin Bridgeman v. District Attorney for Suffolk County***

1. main issue(s) in the case: When, on behalf of the Commonwealth, one of its employees repeatedly, systematically, and in bad faith falsifies evidence against criminal defendants to induce plea agreements or guilty verdicts, is the Commonwealth required to timely disclose its misconduct to the affected defendants, or their counsel, if it wants to avoid having the convictions vacated and the underlying charges dismissed with prejudice?
2. source of amicus inquiry: NACDL and Center for Public Representation.
3. amicus brief writer(s): Jean-Jacques Cabou , Esq. (NACDL) and Liza Lunt, Esq. (MACDL).
4. status: #SJC-11764. The SJC issued its decision on May 18, 2015. (“For the reasons that follow, we now conclude that (1) a defendant who has been granted a new trial based on Dookhan's misconduct at the Hinton drug lab cannot be charged with a more serious offense than that of which he or she initially was convicted under the terms of a plea agreement and, if convicted again, cannot be given a more severe sentence than that which originally was imposed; (2) the motion to intervene filed by CPCS is allowed; (3) a so-called "global remedy" will not be implemented at this time; (4) a lawyer who represented a Dookhan defendant at the plea stage of criminal proceedings is not barred by the advocate-witness rule from subsequently representing that defendant and testifying at an evidentiary hearing on the defendant's motion to withdraw a guilty plea; (5) the scope of cross-examination of a Dookhan defendant at a hearing on a motion to withdraw a guilty plea is left to the broad discretion of the motion judge; and (6) the testimony of a Dookhan defendant at a hearing on a motion to withdraw a guilty plea is only admissible at a subsequent trial for impeachment purposes if the defendant chooses to testify.”).

**B. *Commonwealth v. Diachenko***

1. main issue(s) in the case: Whether juveniles serving life sentence are entitled to the representation of counsel at Parole Board hearings.
2. source of amicus inquiry: The issue was not addressed in other amicus filings in the case.
3. amicus brief writer(s): Afton M. Templin, Esq.
4. status: #SJC-11688. The SJC issued its decision on March 23, 2015 (“Specifically, Gregory Diatchenko and Jeffrey S. Roberio, each of whom was convicted of murder in the first degree many years ago for a crime committed when he was seventeen years old, argue that in order to ensure that their opportunity for release through parole is meaningful, they must have, in connection with a petition for release before the parole board (board), access to counsel, access to funds for counsel and for expert witnesses because they are indigent, and an opportunity for judicial review of the decision on their parole applications. For the reasons discussed below, we agree in substance with Diatchenko and Roberio.

**C. *Commonwealth v. Okoro***

1. main issue(s) in the case: Whether juvenile charged with murder is entitled to present expert evidence on, and have jury consider, his youth as a factor negating malice; whether a juvenile convicted of murder in second degree, and sentenced to statutorily mandated term of life with possibility of parole after 15 yrs, suffers constitutional violation because sentencing judge has no opportunity to consider juvenile’s youth.
2. source of amicus inquiry: SJC solicited amicus briefs on June 17, 2014.
3. amicus brief writer(s): Laura B. Banwarth, Esq.
4. status: #SJC-116859 The SJC issued its decision on March 23, 2015 (“we conclude that the defendant's sentence does meet the requirements of the Eighth Amendment and art. 26, as well as other constitutional rights, and we reject the defendant's challenges to his underlying conviction.”)

**D. *Commonwealth v. Evelyn***

1. main issue(s) in the case: Whether defense counsel's concession in opening and closing statements of a lesser-included offense that the defendant had pleaded not guilty to and had not consented to the concession, and had not had a plea colloquy regarding was a violation of his constitutional due process rights.
2. source of amicus inquiry: CPCS
3. amicus brief writer(s): Donald Harwood, Esq. (CPCS) and David Lewis, Esq. (MACDL).
4. status: #SJC-11643. The SJC issued its decision on March 2, 2015 ("We conclude that, in these circumstances, no colloquy between the judge and the defendant is required. We note that the defendant in this case expressly did not claim ineffective assistance of counsel and there is nothing in the record to suggest that the defendant did not consent to his attorney's strategic concession.")

**E. *Commonwealth v. DiCicco***

1. main issue(s) in the case: Whether the trial court judge erred and abused his discretion in excluding the defense expert's opinions regarding the use of a low-level DNA allele to exclude the defendant under *Daubert-Lanigan* and denying the defendant funds.
2. source of amicus inquiry: CPCS Innocence Project.
3. amicus brief writer(s): Ira Gant, Esq. & Lisa Kavanaugh, Esq. (CPCS Innocence Project) and Elizabeth Lunt, Esq. (MACDL)
4. status: #SJC-11672. The SJC issued its decision on February 26, 2015 ("[We] conclude that the motion judge did not abuse her discretion in determining that, under *Commonwealth v. Lanigan*, 419 Mass. 15, 25-26 (1994), Carita's opinion was not sufficiently reliable to be placed before a jury, and the defendant's motion for a new trial was properly denied.")

**F. *Commonwealth v. Santiago***

1. main issue(s) in the case: Whether the SJC should recognize target standing under Article 14.
2. source of amicus inquiry: The ACLUM was a co-signatory.
3. amicus brief writer(s): Michael K. Fee, Esq. & P.R. Goldstone, Esq. (ACLUM) and Alex G. Philipson, Esq. (MACDL)
4. status: #SJC-11619. The SJC issued its decision on February 4, 2015 ("We conclude that this is not an appropriate case in which to consider the adoption of target standing. Accordingly, we reverse the order allowing the defendant's motion to suppress.")

## II. Amicus briefs filed by MACDL and currently pending.

### A. *Commonwealth v. Jones*

1. main issue(s) in the case: Whether the closure of the court room to the public, including the defendant's family and friends, over the defendant's objection, during a voir dire of a witness purportedly conducted pursuant to the rape shield statute, G. L. c. 233, § 21B, was structural error that deprived the defendant of a public trial.
2. source of amicus inquiry: SJC solicited amicus briefs on December 1, 2014.
3. amicus brief writer(s): Brad A. Compston, Esq.
4. status: #SJC-11775. The amicus brief was filed on February 17, 2015. Oral argument was held on March 2, 2015. The case remains pending.

### B. *Commonwealth v. Kostka*

1. main issue(s) in the case: Whether, in a prosecution for murder in the first degree, Mass. R. Crim. P. 17 (a) (2) and the Fourth Amendment permit the compelled production of a saliva sample from a third party who is the defendant's twin brother, where the Commonwealth argues that the sample is necessary to determine whether he and the defendant are fraternal or identical twins. See *Commonwealth v. Draheim*, 447 Mass. 113 (2006).
2. source of amicus inquiry: Jack Cunha, Esq.
3. amicus brief writer(s): B.J. Trach, Esq., Laura Carey, Esq., Peter Roni Goldstone, Esq., Chauncey B. Wood, Esq. (MACDL). ACLUM may sign on.
4. status: #SJC-11766. The amicus brief was filed on January 23, 2015. The Court heard oral argument on February 3, 2015. The case remains pending.

**C. *Commonwealth v. Brewer***

1. main issue(s) in the case: Whether a defendant is deprived of due process and his right to present a defense when the prosecutor obtains a grant of immunity for a witness whose testimony is important to the prosecution, but refuses to request immunity for a potential defense witness whose testimony allegedly would have directly contradicted that of the immunized prosecution witness; whether this case presents unique circumstances that required the granting of some form of defense witness immunity.
2. source of amicus inquiry: SJC amicus announcements.
3. amicus brief writer(s): Kirsten Brewer, Esq., Anthony Biagioli, Esq., Chauncey B. Wood, Esq. (MACDL).
4. status: #SJC-11819. Amicus brief filed on March 30, 2015. Oral argument held on April 6, 2015. Case currently pending.

**D. *Commonwealth v. Augustine***

1. main issue(s) in the case: Whether the motion judge erred in allowing the defendant's motion to suppress cell site location information.
2. source of amicus inquiry:
3. amicus brief writer(s): Kevin S. Prussia, Esq., Kelly E. Halford, Esq., Elizabeth A. Lunt, Esq., Chauncey B. Wood, Esq.
4. status: #SJC-11803. Amicus brief filed on March 20, 2015. Oral argument held on April 9, 2015. The case remains pending.

### III. Amicus briefs signed onto by MACDL and currently pending.

#### A. *Lavrinenko v. Horgan, et al.*

1. main issue(s) in the case: Whether due process requires that detained noncitizens be provided with: (1) a hearing where the government must justify detention by clear and convincing evidence; (2) subsequent periodic hearings to consider whether continued detention is justified; and (3) adequate procedural safeguards to make these hearings meaningful.
2. source of amicus inquiry: NACDL and Center for Public Representation.
3. amicus brief writer(s): James J. Farrell, Esq., James H. Moon, Esq., and Nathan M. Saper (NACDL), Robert Fleischner, Esq (Center for Public Representation), and Chauncey M. Wood, Esq. (MACDL).
4. status: First Circuit, #14-1627. The amicus brief was filed in the First Circuit on October 14, 2014. Oral argument is scheduled for February 2, 2015.

#### B. *Commonwealth v. Clark*

1. main issue(s) in the case: whether the judge erred in interpreting G.L. c. 278A, § 7(b) to require proof of a reasonable possibility that biological material is present on the crime scene item, where neither the plain language nor the legislative history of the statute support such a requirement and where imposing such a requirement ignores important scientific and policy lessons gleaned from cold case investigations and past DNA exonerations.
2. source of amicus inquiry: CPCS Innocence Project.
3. amicus brief writer(s): Lisa Kavanaugh, Esq., Ira Gant, Esq. (CPCS IP) and Chauncey M. Wood, Esq. (MACDL).
4. status: #SJC-11815. The amicus brief was filed on February 17, 2015. The Court heard oral argument on March 2, 2015. The case remains pending.

**C. *Reid v. Donelon***

1. main issue(s) in the case: Whether the immigration system provides constitutionally mandated procedural safeguards required under common principles of due process to the class of individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months without an individualized bond hearing.
2. source of amicus inquiry: CPCS Innocence Project.
3. amicus brief writer(s): James Farrell, Esq., James H. Moon, Esq., and Nathan M. Saper, Esq. (Bazelon Center for Mental Health) and Chauncey Wood, Esq. (MACDL).
4. status: #14-1270, 14-1803, and 14-1823. The amicus brief was filed on March 5, 2015. The case remains pending.

**D. *Commonwealth v. Wallace***

1. main issue(s) in the case: (1) whether the Court should presume prejudice for a violation of the defendants' speedy trial rights, and (2) whether defendants' failure to demand a speedy trial can be held against them when they were neither informed of the pending indictment nor informed of their right to request a speedy trial. The case is related to the ACLUM amicus in *Commonwealth v. Arzola*, SJC-11679 (argument heard in Nov. 2014): Whether the extraction of DNA evidence from an item seized without a warrant constitutes a separate search for which a warrant is required prior to conducting any testing of the DNA evidence.
2. source of amicus inquiry: ACLUM.
3. amicus brief writer(s): Jesse Rosman, Esq. (ACLUM).
4. status: #SJC-11705 & SJC-11707. The amicus brief was filed on January 16, 2015. The Court heard oral argument on February 4, 2015. The case remains pending.

**E. *Sara Johnson v. United States of America***

1. main issue(s) in the case (from explanation in amicus brief)(Amicus group is approximately 20 criminal defense associations nationwide): Whether *Apprendi* and its progeny apply to restitution and thus require that any facts necessary to impose or determine the amount of restitution be found by a jury, rather than a judge. That question is of immense importance not only to criminal defendants like Petitioner who are prosecuted under federal law, but also to the states and to thousands of defendants who are prosecuted under state law each year. The states, like the federal government, have supplanted defendants' constitutional rights to have juries determine the facts

necessary to increase their punishments with a virtually one-sided, haphazard process. Amici, whose members routinely represent clients in federal and state proceedings across the country, believe that this Court's intervention is needed to resolve confusion among state courts regarding Apprendi's application to restitution.

2. source of amicus inquiry: see below.
3. amicus brief writer(s): Numerous (case cover states: "Brief of Amici Curiae Criminal Defense Attorneys of Michigan, Arizona Attorneys for Criminal Justice, Arkansas Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice, and Seventeen other Defender Organizations in Support of Petitioner.")
4. status: #14-1006. The amicus brief was filed on January 16, 2015. The Court requested a response from the Government which has been filed. The case remains pending.

#### **IV. Pending projects - amicus briefs not yet filed.**

##### **A. *Commonwealth v. Boucher***

1. main issue(s) in the case: Whether the SJC should adopt an intent requirement to elevate a murder from 2nd degree to 1st degree based on extreme atrocity or cruelty.
2. source of amicus inquiry: Appellate defense counsel (Leslie O'Brien, Esq).
3. amicus brief writer(s): Paul Nemser, Esq. (Goodwin Proctor).
4. status: #SJC-11605. The appellant filed a reply brief on May 4, 2015.