

MACDL
Amicus Committee Report

As of January 9, 2015

I. Recent amicus projects - cases decided since November 4, 2014

A. *Commonwealth v. Gomes*

1. main issue(s) in the case: “On appeal, the defendant claims that the judge erred by giving the model jury instruction regarding eyewitness identification that we adopted in *Commonwealth v. Rodriguez*, 378 Mass. 296, 310-311 (Appendix) (1979), rather than the instruction he requested, which would have informed the jury about various scientific principles regarding eyewitness identification. We conclude that the judge did not err by declining to instruct the jury about these principles where the defendant offered no expert testimony, scholarly articles, or treatises that established that these principles were “so generally accepted that . . . a standard jury instruction stating [those principles] would be appropriate.” *Commonwealth v. Santoli*, 424 Mass. 837, 845 (1997), citing *Commonwealth v. Hyatt*, 419 Mass. 815, 818-819 (1995). Therefore, we affirm the convictions of mayhem and of breaking and entering. However, now that we have the benefit of the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence (Study Group Report), and the comments in response to it, we conclude that there are scientific principles regarding eyewitness identification that are “so generally accepted” that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence. We include as an Appendix to this opinion a provisional jury instruction regarding eyewitness identification evidence, and we invite comments regarding its content and clarity before we declare it a model instruction. This provisional instruction should be given, where appropriate, in trials that commence after issuance of this opinion until a model instruction is issued.
2. source of amicus inquiry: The issue was not addressed in other amicus filings in the case.
3. amicus brief writer(s): Lisa Steele, Esq.
4. status: #SJC-11537. Decision issued January 12, 2015.

II. Amicus briefs filed by MACDL and currently pending.

A. *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 amicus brief was filed on August 16, 2014. Oral argument was held on September 3, 2014. The case remains pending.

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 amicus brief was filed on October 16, 2014. Oral argument was held on November 6, 2014. Attorney Templin filed a post-argument letter on MACDL's behalf on November 26, 2014. The case remains pending.

C. *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 amicus brief was filed on September 22, 2014. The Court heard oral argument on October 7, 2014. The case remains pending.

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

A. *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 amicus brief was filed on September 24, 2014. The Court heard oral argument on November 4, 2014. The case remains pending.

B. *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 amicus brief was filed on October 21, 2014. The Court heard oral argument on November 3, 2014. The case remains pending.

C. *Laurinenko 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 Fleischer, 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.

IV. Amicus briefs filed by MACDL since November 4, 2014

A. None.

V. Amicus briefs signed onto by MACDL since November 4, 2014

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 amicus brief was filed on December 23, 2014. The Court heard oral argument on January 8, 2015. The case remains pending.

VI. Pending projects - amicus briefs not yet filed

A. *Commonwelath 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): BJ Trach, Esq. (MACDL). ACLUM may sign on.
4. status: #SJC-11764. The Court has given notice of February argument.

B. *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 Court has given notice of February argument.