COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS NO. SJC-10609

COMMONWEALTH OF MASSACHUSETTS,
Respondent-Appellee

V.

KOFI AGANA,
Respondent-Appellee

RUBY MCDONOUGH.
Petitioner-Appellant

ON RESERVATION AND REPORT BY A SINGLE JUSTICE OF A PETITION FOR GENERAL SUPERINTENDENCE PURSUANT TO G.L. 211, § 3.

BRIEF OF NATIONAL APHASIA ASSOCIATION, NATIONAL DISABILITY RIGHTS NETWORK, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, HEARING LOSS ASSOCIATION OF AMERICA, CENTER FOR PUBLIC REPRESENTATION, MENTAL HEALTH LEGAL ADVISORS COMMITTEE AND THE DISABILITY LAW CENTER AS AMICI CURIAE IN SUPPORT OF APPELLANT RUBY MCDONOUGH.

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Interest of Amici

The **National Aphasia Association** (NAA) has since its establishment in 1987 been the only national consumer-focused, not for profit organization advocating for and responding to the needs of people with aphasia and their families. The mission of the organization is twofold. The first is to educate the public that aphasia describes an impairment of the ability to communicate, not an impairment of intellect. This effort is directed in part to government officials, particularly law enforcement personnel, to stress that people with aphasia have not suffered any impairment in their intelligence, only a communication impairment. In accordance with carrying out its program to educate the public, Congress has declared June "Aphasia Awareness Month."

Second, NAA works to make all people with aphasia, their families, support systems and health care professionals aware of resources to recover lost skills to the extent possible, to compensate for skills that will not be recovered and to minimize the psychosocial impact of the language impairment. The NAA envisions a society in which aphasia is commonly understood and where all persons with aphasia have

access to appropriate education and resources and in all respects have the benefit of equal protection of the law.

The **National Disability Rights Network** (NDRN) is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. All P&A agency members of NDRN advocate for the protection of persons with disabilities who are victims of abuse, including ensuring the rights of

people with disabilities to have equal access to the judicial system.

The **Judge David L. Bazelon Center for Mental Health Law** (Bazelon Center) is the nation's leading legal advocate for people with mental disabilities. The mission of the Bazelon Center is to protect and advance the rights of adults and children who have mental disabilities. The Bazelon Center envisions an America where people who have mental illnesses or developmental disabilities exercise their own life choices and have access to the resources that enable them to participate fully in their communities. The resolution of the issues raised in this case will have an impact on the abilities of persons with mental disabilities to have equal access to the courts.

The **Hearing Loss Association of America** (HLAA), a non-profit 501(c)(3) membership organization, is the nation's leading consumer organization representing people with hearing loss. There are least 36 million Americans with hearing loss, and 93 percent of the members of HLAA are so affected. The HLAA impacts accessibility, public policy, research, public awareness, and service delivery related to hearing loss on a national and global level. HLAA's national

support network includes an office in the Washington D.C. area, 14 state organizations, and 200 local chapters. The HLAA mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support.

HLAA actively advocates public policies to protect the rights of people with hearing loss and to provide access to affordable technology that enables persons with hearing loss to function in their daily lives, including having full access to all places of public accommodation. HLAA has a strong interest in seeing that people with hearing and speech disabilities are not subject to discrimination that causes them to be improperly excluded from full participation in courts of law. These millions of individuals are entitled to full and equal access to the courts and the opportunity to be heard as witnesses in the interest of justice.

The **Center for Public Representation** (the Center) is a national 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 plaintiffs in two

class actions 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 brain 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 agency members of NDRN, as well as the Center, Bazelon, MHLAC and DLC have all 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.

For more than twenty years, the Center, DLC and MHLAC have advocated in Massachusetts for increased protections for their clients who are victims of crime. They have partnered with Massachusetts state agencies to increase awareness of the ability of people with disabilities to assist and participate in the arrest and prosecution of their abusers. NAA, NDRN, HLAA and the Bazelon Center have similarly advocated in Congress, state legislatures and the courts to increase protections for persons with disabilities who are victims of abuse.

Amici have particular knowledge about the frequency of crimes against individuals with disabilities, about the application of federal

disability discrimination laws to the courts and about resources, including the variety of accommodations, 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 of amici's clients, members and constituents to have access to the courts, and by virtue of that access, to be protected from further abuse, assaults and injuries.

Statement of the Issues

In his Reservation and Report, the Single Justice framed the issues to "include" the following:

(1) Does the petitioner, Ruby McDonough, have standing to invoke the court's jurisdiction under G. L. c. 211, § 3, to seek, in the first instance, accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (Act)?

(2) If the answer to the first question is "No," how may a witness seek accommodation under the Act during the pendency of a trial; and if not successful how may a witness obtain review of an order denying accommodation?

Statement of the Case

Appellant Ruby McDonough seeks relief from an order a District Court judge that she is incompetent

to testify at the criminal trial of the individual charged with sexually assaulting her. Commonwealth v. Agana, Framingham Div. District Court Dep't, No. 0949CR534, (hereafter "the District Court case"), Findings and Order (Sept. 11, 2009), Record Appendix ("R.A.") pp. 11-12. The instant case was initiated as a petition for a writ of general superintendence under G.L. c. 211, § 3. Petition for Relief Pursuant to G.L. c. 211, § 3. ("Petition"), R.A. pp. 1-10.

The Single Justice reserved decision and reported questions to the Supreme Judicial Court for the Commonwealth on November 10, 2009. In his order the Single Justice also stayed proceedings in the District Court case until further order of the Court.

Statement of Facts

Approximately eight years ago, Ms. McDonough suffered a stroke that left her partly immobilized and suffering from a disability often known as "expressive aphasia."[1] Petition ¶ 1, R.A. p. 2. Ms. McDonough, 62, lives in a nursing home. Id. There is no indication in the record that, except for the trial judge's finding

[1] Aphasia is "a nerve defect in which there are problems with speaking or speech is lost.... There are many forms and degrees of aphasia." Mosby Medical Encyclopedia, Rev. Ed. 55 (1992).

in the District Court case, Ms. McDonough has ever been adjudicated incompetent for any purpose.[2]

In early 2009, Ms. McDonough alleged to her 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 described the incident to nursing home staff answering "yes" and "no" questions and using hand gestures. Petition ¶ 2, R.A. p. 3.

Although she has difficulty communicating, Ms. McDonough does not have receptive aphasia.[3] The forensic psychologist appointed to examine her, Rosemary Klein, Ph.D., reported no difficulty in Ms. McDonough's understanding of the questions put to her. Section 19 Evaluation, Examination of a Party or Witness Before the Court, Sept. 10, 2009, p. 5 ("Klein

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[2] Ms. McDonough's expressive aphasia alone 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 technological assistance" such that the individual is not incapacitated. G.L. c. 190B § 5-101(9) inserted by St. 2008, c. 521.

[3] The lack of ability to understand or process language is usually known as receptive or sensory aphasia. It is defined as an inability to understand spoken and/or written words. See, 19th Ed., Taber's Cyclopedic Medical Dictionary, 142 (2001)

Report") R.A. p. 17. Ms. McDonough's ability to communicate, though limited, was sufficient for Framingham police and the District Attorney to charge Mr. Agana with "indecent assault and battery on a person over the age of 60 or with a disability." Petition ¶ 3, R.A. pp. 3-4.

During pretrial proceedings in the District Court case, the defense requested a competency evaluation of Ms. McDonough pursuant to G.L. c. 123, § 19.[4] Psychologist Klein concluded that Ms. McDonough was competent to testify. Klein Report pp. 5-6, R.A. pp. 17-18. Dr. Klein makes it clear in her report that she adapted her methods of interviewing to Ms. McDonough's condition; that is, she accommodated the condition in order to ensure that the evaluation was completed as effectively and accurately as possible.

For example, the psychologist reported that she waited for Ms. McDonough to formulate an answer to a question and indicate she was finished with her answer before she asked the next question. Klein Report p. 5, R.A. p.17. In addition, Dr. Klein wrote, "I did not

[4] G.L. c. 123, § 19 authorizes a judge to request the Department of Mental Health to assign a psychologist or psychiatrist to determine the mental condition of a witness.

perceive there to be any significant problem with understanding the witness's meaning, so long as I could ask yes or no questions, allow her occasionally to point to a picture or her own body, or to gesture with her hands or make a frown or smile with her face." Klein Report p. 4, R.A. p. 17.

In addition, Dr. Klein wrote that she asked Ms. McDonough what might help her to testify in more detail, and Ms. McDonough

> indicated that she was willing to tolerate the difficult emotions and physical limitations she has to try to speak in longer sentences during whatever portion of the interview it was absolutely essential...She indicated she would like to be warned if she needed to present a fuller answer.

Klein Report p. 5, R.A. p. 18. Ms. McDonough could speak in fuller sentences if necessary, but as Dr. Klein noted, "It was my impression that the effort to speak in fuller sentences was very taxing and one needed to be very patient while she developed a short phrase before she spoke." Id.

Apparently, before the submission of Dr. Klein's written report, but after her evaluation of the witness, the District Court conducted a competency

hearing. Ms. McDonough and Dr. Klein testified.[5] There is no indication that the hearing judge followed the psychologist's recommendations of accommodations to the witness.[6] According to the Petition, during the 90-minute hearing, the judge did not ask any questions of Ms. McDonough nor did he make any effort to structure the hearing to allow Ms. McDonough to answer questions effectively. The defense spent about an hour mostly using a traditional narrative question approach designed to elicit contradictions in testimony. The prosecution's questions were brief. Petition ¶¶ 8-11, R.A. pp. 6-8.

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[5] The record does not indicate the date of the competency hearing. Dr. Klein wrote that she had access to further documents after her testimony and she relies, in part on those sources in her written report. Klein Report p. 3, R.A. p. 15. The judge wrote his Findings and Order on September 11, 2009, one day after the date of Dr. Klein's report. He does not refer to either Dr. Klein's testimony or to her report. Commonwealth v. Agana, Framingham Div., District Court Dept. No. 0949CR534, Findings and Order, (Sept. 11, 2009)("Findings and Order"), pp. 1-2, R.A. pp. 11-12.

[6] Any suggestion that the court accommodated Ms. McDonough by "allow[ing] her to write her answers," Findings and Order p. 1, R.A. p. 11, 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.

As a result, Ms. McDonough was deemed incompetent to testify despite the court-appointed expert's opinion. 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.

Summary of Argument

The fundamental error committed by the District Court judge was that he determined that a witness with a disability was incompetent to testify on the basis of her disability without first determining whether any accommodations existed that would enable her to testify competently. This violated Ms. McDonough's rights under the United States and Massachusetts Constitutions and Title II of the Americans with Disabilities Act (hereafter "the ADA").

Because Ms. McDonough's rights were violated in a way that could not be redressed through recourse to any appellate process, the G.L. c. 211, § 3 petition process was the only avenue available to vindicate her right to testify at the trial of the man accused of sexually assaulting her.

Only witnesses need to have recourse to the G.L. c. 211, § 3 process to protect their right of access to the judicial system, since the appellate process sufficiently protects the rights of the litigants. Therefore, the answer to the Single Justice's first question is "yes."

The underlying issue in this case is actually neither new nor particularly difficult for the court system. Witnesses and litigants have always presented courts with a variety of needs for accommodations--children and the elderly, people who cannot speak English, people who are deaf or mobility-impaired--and judges have always had the discretion to alter court proceedings or order accommodations to ensure that justice is served.

The difference here is that Ms. McDonough's disability, expressive aphasia, was likely not as familiar to the judge as hearing impairments or difficulties with speaking English. While the judge appropriately appointed an expert to assist him on the question of whether the witness was competent, he did not appoint an expert with specialization in communication disorders; he did not ask the expert to investigate potential accommodations; he failed to

address the expert's conclusion that the witness was completely competent; and, he ignored the expert's suggestion that the witness could benefit from certain alterations in the form of questioning to allow her to tell her story. These actions are not simply failures to appropriately use judicial discretion, they violate Ms. McDonough's rights as a person with a disability under the ADA.

This Court should take the opportunity presented by this case to underscore that judges are required to consider whether accommodations will be necessary when a witness or litigant with disabilities presents to the court, and to order reasonable accommodations as necessary. In response the Single Judge's second question, amici suggest a protocol or framework for judges to follow in to determine whether and, if so, what accommodations are appropriate for witnesses and litigants with disabilities. The proposed protocol is based on amici's review of plans from other states, numerous court rulings, and materials from the National Judicial College, the American Bar Association, and the National Center on State Courts.

The witness's disability in this case presents an unusual degree of complexity, and the amici's proposed

protocol is intended to be useful in complex cases. However, under most circumstances, both the disability and the accommodation will be readily apparent.

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 who are not disabled. Crimes against people with disabilities are commonly committed by caretakers exploiting the individual's disability, vulnerability, isolation and the barriers created by the criminal justice system to redress. Often, complaints do not even reach the police or the courts.

In October 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. Amici's Addendum (Amici's Add.) pp. 1-12. The DOJ confirmed in striking detail what amici and other disability advocates have long warned -- crimes against people with disabilities occur at much higher rates (twice as high in some age

groups) than against people without disabilities.[7] Id. at 2, Table 2, Amici's Add. p. 2. The most frequent crimes are simple assault, aggravated assault and robbery. Id. at 4, Table 4, Amici's Add. p.4. Women with disabilities are victimized at twice the rate of women without disabilities. Id. at 3. Amici's Add. p. 3.

Other studies show that in nursing homes, abuse of residents with disabilities occurs frequently 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.[8]

Other research has concluded that caregiver-perpetrated victimization, in particular sexual

[7] 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, Amici's Add. p. 2.

[8] Diana K. Harris, Michael L. Benson, Maltreatment of Patients in Nursing Homes: There Is No Safe Place, 28 (2006).

assault, goes unreported because of fear of reprisal.[9] This fear tends to correlate with the proximity of the relationship -- the likelihood of reporting a rape is less if the perpetrator and victim are acquainted.[10] Perpetrators often carefully select targets who, because of their disabilities, confront obstacles in voicing complaints and reports of sexual assault.

If the case goes to trial, barring Ms. McDonough's testimony means that her accused assailant, if he so chooses, may tell his story to the jury, but that Ms. McDonough may not tell hers. Barring the testimony of victims with disabilities who are competent to testify with or without assistance or accommodations, will mean such victims do not get their day in court. This barrier is a further disincentive to coming forward and sends a signal that perpetrators can act with relative impunity.

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[9] Richard McLeary, Douglas J. Wiebe, Measuring the Victimization Risk of the Developmentally Disabled: Methodological Problems and Solutions 10 (1999).

[10] Id.

II. THE AMERICANS WITH DISABILITIES ACT REQUIRES JUDGES TO ACCOMMODATE LITIGANTS AND WITNESSES WITH DISABILITIES TO PERMIT ACCESS TO THE JUDICIAL PROCESS.

A. Witnesses with Disabilities Have the Right to Reasonable Accommodations to Enable Them to Testify in Court.

It is well established that individuals are presumed competent to testify, and that marginal cases should be decided in favor of permitting the individual to be heard. The Evidence Guidelines establish a two part test: whether the witness has (1) the "general ability or capacity to observe, remember, and give expression to what he or she has seen, heard or experienced," and (2) an understanding of the difference between truth and falsehood. Mass. G. Evid. § 601(b) (2008-2009). See, also, Demoulas v. Demoulas, 428 Mass. 555, 564 (1998)("under the modern trend, a judge may accept as competent for testimony a witness whose reliability is, in her judgment, at most marginally sufficient")(citing cases). Thus, children as young as four have been found competent to testify, Commonwealth v. LaMontagne, 42 Mass. App. Ct. 213, 215-17 (1997), as well as people who are "insane," and have "limited intelligence." See, Guardianship of Zaltman, 65 Mass. App. Ct. 678, 688, n. 13

(2006)(collecting cases). "The tendency, moreover, except in quite clear cases of incompetency, is to let the witness testify and have the triers make any proper discount for the quality of her 'understanding.'" Commonwealth v. Whitehead, 379 Mass. 640, 656 (1980).

Some people, such as individuals who are deaf, or who speak a language other than English, are completely competent to testify (that is, their reliability is not at issue) if they receive appropriate accommodations, yet they cannot understand the proceedings or be understood by the fact-finder without those accommodations. See, United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973)(criminal defendant with imperfect command of English constitutionally entitled to interpreter).

As noted, Ms. McDonough's expressive aphasia does not limit her understanding of the questions asked her, or her competence to perceive and recall Mr. Agana's conduct; rather, it impairs her ability to tell her story on direct examination in the narrative style to which judges and juries are accustomed. However, unlike cases where the witness is deaf or speaks a language other than English, the assistance

or accommodations required by a person with aphasia is not always immediately obvious.

B. Judges Have Long Had the Discretion and Now Have the Obligation to Determine Feasible and Effective Ways for Witnesses with Impairments to Present Their Testimony and Tell Their Stories.

The right to accommodations in order to have meaningful access to and the opportunity to be heard in court is a fundamental right protected by the United States and Massachusetts Constitutions, as well as federal law. Sixth Amendment to the United States Constitution; Pt. 1, art. 11 of the Constitution of the Commonwealth (the "open courts clause"). See, Tennessee v. Lane, 541 U.S. 509, 532 (2004)(holding that the ADA's "duty to accommodate" applies to courts at least insofar as the claim implicates "the well established due process principle that 'within the limits of practicability a State must afford to all individuals a meaningful opportunity to be heard' in its courts")and Old Colony R. Co. v. Assessors of Boston, 309 Mass. 439, 449-50 (1941) (describing Article 11 as a provision that guarantees equal protection, which "implies that all litigants similarly situated may appeal to the courts both for

relief and for defense under like conditions and with like protection and without discrimination").

Accordingly, courts recognized the right to accommodations, at least for criminal defendants with disabilities, long before Congress enacted anti-discrimination laws for people with disabilities. See, e.g., Terry v. Alabama, 21 Ala. App. 100(1925), Lankton v. United States, 18 App. D.C. 348 (1901) (witness "testified by signs and these were interpreted by a servant who was familiar with them and could communicate with her").

In 1973, Congress extended the right to accommodation to all witnesses with hearing and speaking disabilities in § 504 of the Rehabilitation Act, 29 U.S.C. 794, and delegated regulatory authority to the Department of Justice. DOJ's guidance to its § 504 regulations provided that:

> [c]ourt systems receiving Federal financial assistance shall provide for the availability of qualified interpreters for civil and criminal court proceedings involving persons with hearing or speaking impairments...court witnesses with hearing or speaking impairments have the right, independent of the rights of defendants, to have interpreters available to them for their testimony.

45 Fed. Reg. 37,630-31 (June 3,1980).

In 1990, Congress greatly extended the scope of protection from discrimination to persons with disabilities in the ADA. The regulatory authority for implementing the part of the ADA, Title II, which applies to public entities (i.e., state and local governments and their programs and services) fell again to the DOJ. In its regulations, DOJ again elaborated on the obligations of public entities such as state courts to individuals with disabilities that impaired their ability to communicate:

> A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public are as effective as communications with others.
>
> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in and enjoy the benefits of, a service, program or activity conducted by a public entity.

28 C.F.R. §§ 36.160 and 36.160(a).

The right to accommodations is not unlimited. Accommodations, for example, must be "reasonable" and they are not reasonable if they constitute a "fundamental alteration" of the program. 28 C.F.R. § 35.164. For example, Ms. McDonough could not receive accommodations that violated Mr. Agana's constitutional right to a fair trial. Hussey v. Chase-

Manhattan Bank, 2005 WL 1787571 at ** 3-6 (E.D.Pa. July 27, 2005) (rejecting request of plaintiff with aphasia to testify on direct but not be cross-examined). Amici's Add. pp. 15-18. Nor is Ms. McDonough entitled to the accommodation of her choice if another accommodation would be equally effective in ensuring her right of access to courts. Motto v. City of Union, 177 F.R.D. 308 (D.N.J. 1998) (court not required to appoint an assistant for a person with a disability to understand proceedings when lawyers could be instructed to rephrase their questions).

However, the regulations make it clear that the conclusion that a proposed accommodation would be a "fundamental alteration" should not be reached lightly. The public entity, here the District Court, must find that providing an accommodation to ensure effective communication would require a fundamental alteration of the judicial system, taking into consideration "all the resources available for use in the funding and operation of the service, program, or activity." 28 C.F.R. § 35.164. If the decisionmaker still believes that the accommodation would be a fundamental alteration, the regulation requires "a written statement of the reasons for reaching that

conclusion." Id. See, Chisholm v. McManimon, 275 F.3d 315, 330-32 (3rd Cir. 2001)(reversing summary judgment for a court system that denied accommodations while failing to comply with these requirements); Gregory v. Administrative Office of the Courts, 168 F.Supp.2d 319 (D.N.J. 2001)(permitting an amended complaint against court system that had not made any efforts to show that requested accommodation was fundamental alteration). Furthermore, the court remains obligated to take any other action that would not result in such an alteration but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities received the benefits or services provided by the public entity. Id.

Since the enactment of the ADA twenty years ago, state courts have had available a plethora of guidance, trainings, and materials on how to comply with the requirements of the ADA.[11] Amici have reviewed as many of these resources as possible and nearly all emphasized that "[c]ourts must provide access in a way that integrates individuals with disabilities as much

[11] For example, extensive materials are available to any state court judge at no cost from the National Center for State Courts.

as possible into the mainstream of court activities,"[12] and that "[t]hese mandates on the courts require that the system, as a whole, must change to allow greater accessibility. In addition, judges must be flexible to individuals who need modification. These changes affect the manner of administration of our court system."[13]

C. The Trial Court Violated Ms. McDonough's Rights by Finding Her Incompetent to Testify Without Determining Whether Accommodations Existed that Would Have Enabled Her to Testify.

1. Courts have long had the authority to adjust procedures and accommodate witnesses to assure fairness.

Judges have the authority to adjust court procedures and practices to ensure fairness. Commonwealth v. Brusgulis, 398 Mass. 325, 332 (1986)("Judges have considerable latitude in devising procedures and modifying the usual rules of trial to accommodate...witnesses with special needs, so long as the defendant's fair trial rights are not violated"). See, also, Mass. G. Evid. § 611(a)(2008-2009)("The

[12] Jeanne Dooley, Naomi Karp, and Naomi Wood, Opening the Courthouse Door: An ADA Access Guide for State Courts, (American Bar Association 1992).

[13] National Judicial College, The Americans with Disabilities Act: An Instructional Guide for Judges and Court Administrators, p. 1 (1994).

court shall exercise reasonable control over the manner and order of interrogating witnesses...so as to (1) make the interrogation and presentation effective for the ascertainment of the truth,...and(3)protect witnesses from harassment or undue embarrassment.”).

Although the precise issue of whether a person with aphasia may testify appears to be one of first impression for this Court, courts in some other states have been addressing the issue for almost a century. For example, a court recognized that aphasia does not equate with incompetence as early as 1910. See, Magaw v. Huntley, 36 App. D.C. 26, 32 (1910)(physician testified that while aphasia made it difficult for decedent to express herself coherently at times, she was in full possession of her faculties); Hogg v. Hohmann, 323 Ill. 545, 552-554, 557 (1926)(detailed discussion of effects of aphasia; holding that aphasia did not affect decedent’s mental capacity); McDonald v. Standard Gas Engine, 8 Cal. App. 2d 464, 474 (1935)(a witness with aphasia “understood our language but was unable for at least two or three weeks to express himself”).

Likewise, appellate courts reversed trial court decisions that witnesses with aphasia were incompetent

to testify long before the ADA or even § 504 were enacted, see, e.g., Schneiderman v. Interstate Transit Lines, 394 Ill. 569, 573–78(1946), and continue to understand that expressive aphasia "does not affect[ ] intellect." Estate of Wrigley v. Wrigley, 104 Ill. App. 3d 1008, 1014 (1982).

2. Since the enactment of the ADA and § 504 courts have considered and made accommodations to witnesses with disabilities.

As the cases cited above demonstrate, courts have often found that a person with aphasia could be competent to understand questions and events. But prior to § 504 and the ADA, most witnesses with expressive aphasia were left to struggle to make themselves understood as best they could, or to hope for a judge to devise the accommodations to enable them to testify.

With the enactment of § 504 and ADA accommodating witness's disability is no longer only a discretionary expression of the judge's commitment to equality and fairness. It is now required by law.[14]

Accommodations for witnesses with expressive aphasia like Ms. McDonough generally involve

[14] Ms. McDonough is an individual with a disability as defined by the ADA. 42 U.S.C. § 12101(2).

alterations of the trial process that neither impair the defendant's rights nor entail expensive outlays of money for technical equipment. See, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 787 (3rd Cir. 1985)(testimony of witness with aphasia presented in summarized form to jury). A New York trial court recently required a comprehensive pre-trial conference to ensure that accommodations were in place for a defendant with aphasia. People v. Phillips, 836 N.Y.S. 2d 488, n. 2, (N.Y. Sup. Ct. 2007). See, also, Brusgulis, 398 Mass. at 357 (1986)(discussing accommodations to child witness's limited stamina and instructing that where accommodation are necessary, they should be discussed in pretrial conference). In the Phillips case, the judge instructed that "should the defendant choose to testify, attorneys should restate their questions to him in different ways, to assure that he has used the word intended in responding to their questions," and granted breaks in testimony to allow the witness to rest. Phillips, 836 N.Y.S. 2d at 488 n.2.

In her report to the judge, Dr. Klein noted that she learned to make accommodations to Ms. McDonough in the course of her interview with her. Klein Report p. 5, R.A. p. 17. Interestingly, her methods are similar to

accommodations granted by courts to people with disabilities such as expressive aphasia.

For example: (1) Dr. Klein permitted Ms. McDonough's daughter to be present, compare with, State v. Vaughn, 226 Ga. App. 318, 319-20(1997); (2) she asked a question and then waited patiently while Ms. McDonough both formed the answer and indicated that she was finished with her answer prior to asking the next question, compare with Ward v. Sternes, 334 F.3d 696, 706 (7th Cir. 2003) ("extraordinary patience" required of judge to determine whether defendant with aphasia knowingly waived his right to testify); (3) she asked "yes" or "no" questions as much as possible, compare with U.S. v. Brown, 603 F.3d 1022, 1025 (1st Cir. 1979)(no error to ask leading question of witness whose apparent lapses of memory, failure to understand what he had said on prior occasions and general confusion made his testimony difficult to comprehend), and U.S. v. Mulinelli-Navas, 111 F.3d 983, 990(1st Cir. 1997)(no error to ask leading questions of witness who showed lack of understanding when it assisted in developing coherent testimony), see, also, Mass. G. Evid. § 611(c)(2008-2009) (permitting leading questions on direct examination "when necessary to

develop the witness' testimony"[15]); (4) she permitted Ms. McDonough to point to her own body and make gestures with her hands, compare with Whalen v. Shivek, 326 Mass. 142, 147-148 (1950) (allowing jurors to consider gestures as evidence); and (5) she gave Ms. McDonough advance notice of a question which would require a longer answer.

In other cases, courts have accommodated victims with communication disabilities by allowing them to communicate through assistive technology. Commonwealth v. Tavares, 382 Pa. Super. 317 (1989)(victim of abuse with cerebral palsy permitted to testify through "speak and spell" device). See,also, G.L. c. 233, § 23E(b)(1)(ii) regarding testimony by witnesses with mental retardation.[16]

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[15] This approach may be warranted in the present case. The use of leading questions on direct examination to elicit testimony from a person with a disability does not implicate a criminal defendant's rights to confrontation and due process. People v. Augustin, 112 Cal. App. 4th 444, 451-452 (2003).

[16] G.L. c. 233, § 23E(b)(1)(ii)permits a court to accommodate a witness with mental retardation by permitting the person to testify in court but off the witness stand; provided, however, that if the proceeding is a bench proceeding, testimony may be taken at another location within the courthouse but outside the courtroom; and, provided further, that if the proceeding is a jury trial, testimony may be taken on videotape out of the presence of the jury or in a

Accommodations are individualized, of course, and, so far as we know from the record, neither Ms. McDonough nor anyone else was asked by the judge what accommodations might assist her in testifying.[17] Instead, even though the judge had before him a report from a psychologist indicating that it was difficult, both physically and emotionally, for Ms. McDonough to "develop a short phrase before she spoke" and "the effort to speak in fuller sentences was very taxing," Klein Report p. 6, R.A. p. 18, the judge did not provide, or even consider, any accommodations for extensive and complex questions by Mr. Agana's defense attorney.

In other words, the judge was fully aware that Ms. McDonough had a disability that significantly

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location chosen by the court or by agreement of the parties.

[17] The ADA regulations sensibly require first asking the person with the disability what accommodations might work best for him or her, since the individual's experience of his or her own disability and what has assisted in the past is often very helpful. See 28 C.F.R. § 35.160 The judge is not bound by the individual's preferences, and can also seek assistance from experts or other sources on accommodations for speech and communication disorders, which include computer-based aids, communications books, and numerous other possibilities. See Academy of Neurologic Communications Disorders and Sciences, Table of Research on Alternative Communication Studies. Amici's Add. pp. 25-32.

impaired her ability to respond to ordinary questioning, and, despite the interest in Ms. McDonough's being able to relate her testimony as fully as possible, made no inquiries into whether accommodations existed that would enable her to do so.

According to the psychologist who evaluated her, Ms. McDonough worked hard to form one sentence. She said, "I want to testify." Klein Report p. 5, R.A. p. 17.

III. THIS COURT SHOULD RESPOND TO THE SINGLE JUSTICE'S REPORTED QUESTIONS BY CLARIFYING THE PROCESS BY WHICH PEOPLE WITH DISABILITIES CAN ACCESS THE COURT SYSTEM.

A. Ms. McDonough Has Standing to Proceed by Chapter 211, Section 3.

As discussed above, Ms. McDonough has constitutional and statutory rights as a person with a disability to have access to courts through accommodations that will permit her to testify. As a crime victim with a disability currently barred from testifying at the trial of her assailant because a judge mistook her disability for incompetence, she and others in her situation need prompt relief if both their rights and those of the defendant are to be protected.

Unlike Commonwealth v. Oliveira, 425 Mass. 1004 (1997) and Cargill v. Commonwealth, 430 Mass. 1006, 1007 (1998), where defendants appealed findings that

they were competent to stand trial, and this Court held that any errors could be undone by vacating their convictions, the lower court's error here cannot be cured through ordinary appellate process If Mr. Agana is acquitted, his right to avoid double jeopardy will preclude retrial even if an appellate court finds that Ms. McDonough should have been allowed to testify.

Ms. McDonough's position, like that of the child in Care and Protection of Zita, 455 Mass. 272 (2009), is one where although the lower court judge has broad discretion, it is subject to constitutional and statutory limits. Ms. McDonough has no appeal rights that would safeguard important constitutional rights, id. at 284, and her situation reflects that of many vulnerable crime victims with disabilities, especially those who are in nursing homes or have disabilities that make it difficult for them to communicate.

B. The Rights of Ms. McDonough and Others Like Her Can Be Vindicated While Protecting the Rights of Defendants.

As noted above, the question of altering or accommodating court practices to meet the needs of witnesses and litigants may generally be left to the trial courts. However, trial courts may benefit from the guidance of this Court that, in the case of individuals with disabilities, such inquiries and accommodations are mandatory, not discretionary. Other than obtaining interpreters,[18] amici could find no consistent instruction to Massachusetts trial courts on how to structure inquiries into the need for accommodations.

There are many available resources to guide such an endeavor. Shortly after the ADA was passed, the National Judicial College published a 446 page manual, The Americans with Disabilities Act: An Instructional Guide for Judges and Court Administrators (1994)("NJC Manual"), to assist judges and court administrators in fulfilling their obligations under the ADA. Many state court systems have developed ADA plans, and added

[18] See Mass. R. Crim. P. 41, 378 Mass. 918 (1979), Mass. R. Civ. P. 43(f), 365 Mass. 806 (1974), and Standards and Procedures of the Office of Court Interpreter Services, 973 Mass. Reg. 3-70 (May 2003).

court rules regarding witnesses, litigants, attorneys, and members of the public with disabilities.[19] The scope of the ADA's requirements has also been the subject of a number of court cases[20] and investigations by the DOJ.[21] Based on these sources and on the experience of amici collectively in representing or assisting thousands of individuals with a variety of physical and mental disabilities in hundreds of court cases and elsewhere, we suggest for the court's consideration the following process as a structure for handling potential needs for accommodations by

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[19] See, e.g., Oregon Uniform Trial Court Rules 7.060 and Maryland Rules of Procedure 1-332 (setting out examples of accommodations, such as a quiet room, recesses at intervals, scheduling changes, etc). See also Maryland Guardianship Benchbook, 2001, Court Accessibility for Specific Populations, MGB MD-CLE 77 at 10 (discussing accommodations for people with speech related disabilities, including altering witness boxes to accommodate assistive devices, eliminating background noise, listening without interrupting and providing auxiliary aids.)

[20] See, e.g., Tennessee v. Lane, 541 U.S. 509 (2004); Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002)(en banc); Chisholm v. McManimon, 275 F.3d 315 (3rd Cir. 2001); Galloway v. Superior Court of the District of Columbia, 816 F.Supp. 12 (D.D.C. 1993); Gregory v. Administrative Office of the Courts, 168 F.Supp.2d 319 (D.N.J. 2001).

[21] See, e.g., U.S. v. Massachusetts, C.A. No. 03-CV-10246 (PBS)(D. Mass.)(Settlement Agreement Jan. 8, 2004)(access to services, programs and activities of courts and registry of deeds). Amici's Add. pp. 33-47.

witnesses and litigants with disabilities, especially in cases where the need for accommodations may conflict with a defendant's fair trial rights:

1. Upon notice from attorneys, the individual with a disability, or otherwise, that a litigant or witness has a disability that may affect the individual's ability to equally and effectively access the judicial system,[22] including any motion to evaluate an individual or to exclude his or her participation or testimony, and prior to ruling on any such motion, the court will make inquiry on the record of the litigant through his or her attorney or of the witness directly as to whether he or she has a disability that requires an accommodation, and, if so, what accommodations might enable him or her to have effective access to the judicial system. If the individual indicates that there is no need for accommodations, no further inquiry into the disability for purposes of accommodations will be made.

NOTE: In many cases, both the disability and the corresponding reasonable accommodation will be obvious, and will not affect the rights of other parties. In those cases, the court will order the accommodation and the process will end after this step.

2. If the inquiry referred to in (1) cannot be made without accommodations, the judge will order the provision of any reasonable accommodations necessary to make the inquiry.

[22] Many of the materials promulgated to assist courts in complying with the requirements of the ADA suggest that the court enact uniform rules requiring attorneys to notify the court immediately, if they represent a litigant or intend to call a witness who may require courtroom accommodations. See, e.g., NJC Manual pp. 106.

3. In support of his or her request for accommodations, an individual may submit documentation such as a report from his or her own treating physician or examining expert, served on the court and all parties.

4. When necessary to determine whether a witness or litigant has a disability and/or what accommodations are necessary to enable the individual to have equal and effective access to the judicial system, the court may appoint an independent expert to assess the individual's impairment and its impact on the individual's ability to access the judicial system, as well as the accommodation[s], if any, which would provide equal and effective access to the judicial system, including any accommodations requested by the individual.

5. The purpose of the assessment must be explained to the individual, and that the assessment may not be confidential, if any other party's rights are implicated by the accommodations. The individual may refuse to participate in the assessment. In that case, the expert will make the report based on the facts in the record, including the individual's documentation, if any.

6. After completion and distribution to the parties of the expert report, or if no expert is appointed, the court will ask all affected parties to either (a) agree to the proposed accommodations or (b) file memoranda in response to the request for accommodations, addressing any issues presented by the individual's disability and/or request for accommodations.

7. If necessary, the court will hold a hearing for all affected parties, take evidence, and make findings of fact and conclusions of law on the following issues:
   a. whether the individual has a disability;

b. whether the individual needs an accommodation to have equal and effective access to the judicial system;
c. whether the accommodation requested by the individual and any alternatives proposed by the expert will provide effective access to the judicial system;
d. whether the accommodations will have an impact on the parties' rights to a fair trial;
e. if there is any means of providing access while not violating fair trial rights; and
f. a decision on which accommodations, if any, will be provided.

8. If accommodations are provided that will be obvious to a jury, the judge will ask the parties to provide any proposed instructions to the jury explaining the nature of the accommodations prior to beginning the trial, rule on the instructions, and provide any clarifying explanation or instructions to the jury prior to trial.

9. When devising accommodations, the court will take into consideration the necessity of preserving a record for appeal; e.g. if an individual is allowed to point or gesture, this will either be videotaped or described on the record.[23]

10. A party aggrieved by the court's decision may pursue the usual avenues of appeal. A witness aggrieved by the court's decision may pursue a petition under G.L. c. 211, § 3.

In Ms. McDonough's case the court was apparently first made aware of the existence of a witness with a

[23] This method was suggested in People v. Caldwell, 603 N.Y.S.2d 713-14 (N.Y. City Crim. Ct. 1993) (accommodations for blind juror).

disability upon the filing of Mr. Agana's motion requesting an examination of her competency to testify. At that point, the court should have inquired whether the condition raising the issue of competency to testify was a disability that might require accommodations to access the judicial system, including (but not limited to)the victim's ability to testify, since that inquiry had a central bearing on the motion before the court.

The ADA also required the trial judge to inquire what Ms. McDonough's preferred accommodations, if any, might be. 28 C.F.R. § 35. 160(c). Since the judge would likely be ordering an expert evaluation because of the defendant's competence motion, the judge may have appointed an expert in communication disorders to report to the court on the interlocking questions of accommodations and competence, with instructions to the expert to ascertain Ms. McDonough's preferred accommodations. The expert would be instructed to disclose to Ms. McDonough, as Dr. Klein did, the purpose of the evaluation and the fact that the results of the report would not be confidential.

The judge would have received a report suggesting potential accommodations for Ms. McDonough, and would

hold the competence hearing while relying on the suggested accommodations. This process would operate as a "trial run" for the accommodations. If the judge found Ms. McDonough competent to testify with the accommodations, he would have solicited the response of the parties to these proposed accommodations for trial. If Mr. Agana objected and his objections were denied, he would have preserved his objection for appeal.

If the judge found Ms. McDonough incompetent to testify, he would make written findings about her disability, the proposed accommodations, and his reasons for finding her incompetent to testify despite the attempt to accommodate her disability, as well as any proposed alternative accommodations that had been considered and rejected. Ms. McDonough would be free to appeal this decision through G.L. c. 211, § 3.

Conclusion

Amici therefore suggest that the appropriate relief is for this court to remand this case to the Single Justice to enter an order with instructions regarding the process which the trial court is to follow to inquire regarding potential accommodations that do not violate the rights of the defendant, and

to ensure that Ms. McDonough receives those accommodations which enable her to have as equal and effective access to the judicial system as possible to vindicate her right to be heard in court.

Respectfully submitted,

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