

OPINION

Flaw in criminal justice system needs to be fixed

By C. Peter R. Gossels



As residents of Massachusetts, we can take pride in the protections afforded to us all by Part 1, Article XII of the Declaration of

Rights embodied in our constitution, which provides in part:

"... every subject shall have the right to produce all proofs, that may be favorable to him ... and to be fully heard in his defence [sic] by himself, or his council [sic]."

We also enjoy the protection of the 14th Amendment to the U.S. Constitution, which provides in part that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

As Supreme Judicial Court Justice John M. Greaney stated in *Commonwealth v. Burgess*, 450 Mass. 366 (2008) at 373:

"Article 12 [of the Massachusetts Declaration of Rights] has always been considered as embodying the due process protections at least parallel to those granted by the Fourteenth Amendment." Citing *Commonwealth v. Alvarez*, 413 Mass. 224, 228 (1992).

And the SJC held in *Commonwealth v. Bailiro*, 349 Mass. 505 (1965) at 516, that "... counsel for a defendant should be accorded, as of right, an opportunity to interview prospective witnesses [even if they are held in custody of the commonwealth]. Witnesses belong neither to the Commonwealth nor to the defence [sic]. They are not partisan and should be available to both parties in the preparation of their cases."

A similar sentiment was expressed by Judge Hughes H. Bowmes in *United States v. Arbole-*

da and others, 929 F.2d 848, 868 (1st Cir., 1991), when he held that "[t]he equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts." Citing *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir., 1981, cert. denied 456 U.S. 980 (1982)).

But the noble principles enunciated above are not available, in practice, to defendants in criminal cases because of Mass. R. of Crim. P. Rule 35(a), which requires the defendant to file a motion containing facts to persuade a judge to find that "exceptional circumstances and a showing of materiality and relevance [as well as] ... the interests of justice [demand] that the testimony of a prospective witness ... be taken and preserved."

No standards are contained in the rule to guide the judge or the parties in determining what those "exceptional circumstances" and "the interests of justice" are or mean. Even if those criteria have somehow been satisfied, the judge may order the testimony requested to be taken by deposition. He is not bound to enter such an order. So, the only remedy available to a defendant, whose motion may have been denied, is to charge the judge with having abused his discretion; a difficult task, indeed, for a defendant.

Although the following account may be deemed merely anecdotal in nature, it illustrates, I submit, how our criminal justice system sometimes operates to deny defendants their constitutional rights, costs them extraordinary time, and burdens them with unnecessary expense.

My client, whom we shall call Sally, has the misfortune of living next door to Ruth (not her real name), a neighbor from hell who has been engaged in a vendetta against Sally and others in Putnam. One day, Sally was in the process of

backing down her driveway as Ruth was about to drive by Sally's house on Elm Street. Ruth blew her horn loudly as she passed by and disappeared down the street.

Shortly thereafter, Ruth called the dispatcher at the Putnam police station, asking that a police officer come to her home right away and saying that Sally had backed out of Sally's driveway (not true) and scared the living daylight out of Ruth.

What harm would come to our system of criminal justice if the provisions governing depositions in civil cases were to be made available to those accused of violating our criminal laws?

The dispatcher responded by sending two cruisers to Ruth's home. One was driven by Officer Lewis, the other by Officer Clark (not their real names). The officers listened to Ruth's story and proceeded to Sally's house. Sally denied that she had aggressively backed out of her driveway to frighten Ruth as she was driving by. In fact, Sally told the officers that she had not left her driveway and did not see Ruth until Ruth drove by.

After hearing the stories of both parties, Officer Lewis got back into his cruiser, saying that it was simply a case of "she said/she said," and drove off. Neither officer cited Sally nor arrested her.

Officer Clark took a "victim witness statement" from Ruth and filed the same with the local district court. Sally was not indicted nor given a probable cause hearing before a fifth assistant clerk issued a complaint charging Sally with a felony, namely assault with a dangerous weapon (an automobile)

against Ruth, punishable by incarceration in state prison for not more than five years without demanding a sworn statement from Ruth or Clark as required by Mass. R. of Crim. P. Rule 3(g)(1).

Sally's motion to dismiss the complaint was denied, even though she had not been indicted by a grand jury. *Commonwealth v. Bright*, 463 Mass. 421, 445 (2012), and *Commonwealth v. Barbosa*, 421 Mass. 547, 549 (1995).

As he prepared her defense, Sally's attorney summoned Officer Lewis, who had taken a new job in the town of Seneca, to attend a deposition and sent a copy of the notice to the district attorney prosecuting the case. Officer Lewis responded by email, saying he would be willing to testify at his deposition if Sally would pay him for the time that he would lose by doing so.

When the district attorney received Sally's notice of deposition, he called Officer Lewis' new chief of police in Seneca. Although we don't know exactly what the DA told the chief, Lewis notified Sally shortly thereafter that his chief had ordered him not to attend the deposition she had noticed, unless Sally obtained an order from the court that he do so.

As a result, Sally filed a motion with the court for an order that Lewis' testimony be taken by deposition. After hearing the DA argue against Sally's motion, the judge denied her motion, saying that she

could summon Lewis to testify at the trial, but that she would not order him to testify at a deposition.

When Sally asked the Clerk's Office for such a summons, however, she was told: "It is not the practice of this court to issue such summonses," despite the fact that Mass. R. of Crim. P. Rule 17(a)(1) expressly provides that "[a] summons shall be issued by the clerk ..."

As a result, Sally filed an application for leave to appeal with a single justice of the SJC saying that her constitutional rights to a fair trial had been violated by the judge, the DA and the clerk of the court. In support of her application, Sally also cited Rule PF 3(b), promulgated by the SJC at 382 Mass. 799 (1980), which provides:

"A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel."

The single justice, nevertheless, denied her application without stating her reasons therefor.

Sally now finds herself unable to summon a principal witness, who may help her to defend herself, after spending an enormous amount of time and money to obtain a fair trial, because the prosecution has persuaded Lewis' chief to forbid him to testify and because the court will not order him to do so, even though Lewis is a willing witness.

By way of contrast, the state, represented by prosecutors and police officers financed by public funds, can summon, detain, arrest and otherwise take statements from virtually any prospective witness they wish to interview without the approval of any court and often without the participation of the defendant or his attorney.

In order to comply with the provisions of Article XII of our Declaration of Rights cited above, as well as the 14th Amendment to the U.S. Constitution, I recommend that Mass. R. of Civ. P. Rule 30, which governs depositions in civil cases, be substituted for Mass. R. of Crim. P. Rule 35 in order to protect the rights of defendants to due process, the equal protection of the laws and a fair trial.

Such a change would go a long way to protect the constitutional rights of defendants and reduce much of the time and expense that the courts and parties to criminal proceedings must spend to administer and comply with the provisions of Rule 35.

What harm would come to our system of criminal justice if the provisions governing depositions in civil cases were to be made available to those accused of violating our criminal laws? Are they not entitled to the equal protection of our laws?