10-1974

Costarelli v. Massachusetts

Lewis F. Powell Jr.

Response (C.J.)
Repeats JCJ's conclusion
D & D.

D & D

Noted
& Junis
Postponed
10/7

Dismiss and Deny
gcg

PRELIMINARY MEMORANDUM

Summer List 4, Sheet 1

No. 73-6739

App from Municipal Ct
of City of Boston

COSTARELLI

State criminal

v.

MASSACHUSETTS

Timely

This would-be appellant was convicted in municipal court of unauthorized use of a motor vehicle, an offense carrying a maximum possible sentence of two years' imprisonment. The municipal court is not a court of record, and trial by jury is unavailable. Under the state's two-tiered system, however, appellant has the right to a de novo trial in a court of record before a jury. Appellant has not exercised his right to de novo review but seeks to appeal directly from municipal court to raise

his claim of a constitutional right to trial by jury at that stage. This Court is without jurisdiction for appellant has not secured a judgment "by the highest court . . . in which a decision could be had . . . ." I would dismiss and deny.

There is no response.

Jeffries Order in Pet App

7/12/74

DK

Conference 10-7-74

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 73-6739

Submitted ....., *19*... *Announced* ....., *19*...

COSTARELLI

vs.

MASSACHUSETTS

Noted + Postponed

D + D

(But after further discussion case was relisted at Potter's Request)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
.....														
Rehnquist, J.						D	D							
Powell, J.						D	D							
Blackmun, J.						D	D							
Marshall, J.				Noted	+ Postponed									
White, J.						D.	D.							
Stewart, J.				Note	+ Postponed									
Brennan, J.				Note	D + D	+ postponed								
Douglas, J.				Note	+ postponed									
Burger, Ch. J.														

Conferer 10-18-74

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 73-6738 ~~or is it~~ 73-6739

Submitted ....., *19*... *Announced* ....., *19*...

COSTARELLI

vs.

MASSACHUSETTS RELIST

Noted & Postponed

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.														
Powell, J.								Same vote						
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.						D+A								

JK/gg 3-11-75

MEMORANDUM

TO: Mr. Justice Powell DATE: March 11, 1975

FROM: Joel Klein

Make Copy for file on Ludwig v. Mass (75-377)

No. 73-6739, Costarelli v. Massachusetts

Appellant attacks the Massachusetts "two-tier" criminal justice system on the ground that the first tier denies him his constitutional right to a jury trial as articulated in Callan v. Wilson, 127 U.S. 540 (1888). Prior to a discussion of the merits, I will first address the serious jurisdictional issue in this case.

1. Jurisdiction -- I would suggest that this appeal be dismissed because it is not a "final judgment by the highest court of a state in which a decision could be had." Subsequent to the Court's noting of this case - at that time it postponed consideration of jurisdiction - the Massachusetts Supreme Judicial Court held that a defendant convicted in the first tier could appeal the failure to give a jury trial by way of a motion to dismiss prior to trial in the second tier. Whitmarsh v. Commonwealth, 316 N.E. 2d 610 (1974). The Court went on to note that "if his motion were denied, and if he were thereafter tried in Superior Court (the second tier) and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as a matter of right." Id. at 613.

Thus, this issue would be appeablable unless the defendant were acquitted in Superior Court. That fact, it seems to me, is not sufficient to confer jurisdiction on this Court.

To be sure, such a jurisdictional dismissal is a bit hollow in this case since the Mass. J.C. went on in Whitmarsh to issue an advisory opinion stating that the two-tier system did not violate a defendant's constitutional right to trial by jury. Hence, requiring further review in state court is futile. Nevertheless, as a formal matter, I see no way to surmount the plain jurisdictional requirements of § 1257. The "futility doctrine" has never justified skipping appellate remedies in state court prior to seeking review here.

2. Merits. - If you do reach the merits I think the case is more difficult than might appear at first blush. Much is made in the briefs about whether Duncan v. Louisiana and its progeny "incorporate" Callan. In view of your position in Johnson v. Louisiana, where you expressly rejected the "incorporation" approach in this area, we need not be concerned with this debate, although it will certainly present problems for the remainder of the Court.

Turning then to the substance of the matter, the issue may be stated simply: Whether a two-tier criminal justice sytem in which a jury trial is unavailable at the first tier but available in the trial de novo violates due process? My initial instinct was to answer this question in the negative

in light of Colten v. Kentucky and my view that a two-tier system is a reasonable effort at combining efficiency with the procedural rigors traditionally required in a criminal trial. Upon reflection, however, I am not confident that such a holding will wash.

The state's interest in the two-tier system is purely one of efficiency. This much is made clear in Colten, 407 U.S. at 114, and appellee's brief herein, Br. at 36, n. 43. While this is a reasonable goal when the defendant does not seek a jury trial at the outset, the rationale disappears when, as here, he does seek such a trial. If he wants a jury trial it is hardly efficient to require him to go through an initial trial which must be redone. The only purpose to requiring the initial trial is to pressure him, perhaps by imposing a lenient sentence, to waive his jury trial.*

---

* This pressure was made explicit in the present case when the trial court told appellant, "Take your pick, one year suspended with no appeal, or one year with appeal."

Of course, as a practical matter it is precisely these kinds of factors that influence plea bargaining. For good reason, however, the courts never explicitly articulate this consideration. It is troubling for a court to say that we are willing to give a defendant a lesser sentence if he is willing to forego his constitutional rights. I would hesitate to subscribe to such an analysis here.

Upholding appellant's claim need not significantly disrupt the procedures of those states using a two-tier system. All the state need do is allow the defendant to "waive" the first tier and seek a jury trial in the second tier. My guess is that many defendants will not waive their initial trial, precisely because they want a peek at the prosecution's case, a second chance at acquittal, and an opportunity to assess the initial sentence. But those who do not want this should get a jury trial at the outset.

I am confirmed in ~~this~~ my view by the fact that Massachusetts, unlike most two-tier states - e.g., Kentucky, Virginia and Texas - ~~do~~ does not allow a defendant to plead guilty and then seek a trial de novo. Thus, in Massachusetts, a defendant must actually go through the initial trial and may, if a witness disappears, subsequently be bound by the testimony given thereat. Moreover, since he must go through a trial the non-indigent defendant must pay lawyers fees, and frequently

in these relatively petty cases, lose a day from work. Moreover, in Massachusetts, immediately upon conviction in the first tier, a defendant such as appellant, who is tried for unauthorized use of a motor vehicle, loses his driver's license for a year or until his conviction is reversed at the de novo trial. Thus, at least in Massachusetts, requiring a defendant to go through the first tier is not imposition of a costless formality.*

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* I also note that in Colten, itself, the defendant could get a jury trial in the first tier, in that case he waived it.

3/18/75 jk/ss

MEMORANDUM

TO: Mr. Justice Powell DATE: March 18, 1975

FROM: Joel Klein

No. 73-6739, Costarelli v. Massachusetts

I have looked at Largent v. Texas, 318 U.S. 418 (1943), and I do not think it controls the present case. In Largent, appellant was convicted in the first tier of Texas' two-tier system and then appealed for a trial de novo in the second tier. In the second tier she introduced evidence showing that she was denied a permit to distribute religious literature. She argued that the denial was a violation of her First Amendment rights. Her argument was rejected, and she was convicted and fined $100.00. In Texas, at that time, (and I think even now, see Ellis v. Dyson), there was no right of appeal from a $100 fine imposed by the second tier of the two-tier system. The only source of relief was by collateral attack where the statute could be tested on its face but not as applied to appellant. In that situation, since there was no further appeal on the record, and only collateral relief remained, the Court found jurisdiction.

In the present case, appellant can directly appeal the failure to give him a jury trial in the first tier. As Whitmarsh makes clear, he can raise the issue in the second tier and in the Massachusetts appellate courts. Further, he can raise this issue in precisely the same posture in the

Massachusetts courts as he raises it in this Court. No record is needed. Indeed, in Largent itself the Court allowed an appeal only after the second tier of the system had been exhausted even though the trial in the second tier was on a de novo record. Hence, I still think jurisdiction is lacking here.

I would feel differently about this case if appellant could not raise his jury claim on direct appeal in Massachusetts but rather was required to seek collateral relief. But that is not so according to Whitmarsh.

I also note that I have shepardized Largent and so far as I can tell it has never been cited as a jurisdictional holding in any subsequent case. Clearly it was not meant to play the expansive role suggested by the parties in this case. If it were, as I indicated earlier, all constitutional rulings in the first tier of these two-tier systems would be eligible for cert if not appealable to this Court. A rather unfortunate result I should think.

One final word to round out the picture. It may be that even though the judgment is not now final, as a practical matter all appellant need do is raise the issue in a pretrial motion in the second tier. Since the harm he alleges is, arguably, being tried twice, it could be claimed that once the second tier denies his motion, the judgment is final for purposes of this Court's review. See Harris v. Washington, 404 U.S. 55 (1971). This is a difficult finality issue and need not be answered hypothetically, but I thought I should call it to your attention.

No. 73-6739 COSTARELLI v. MASSACHUSETTS Argued 3/17/75

Attack on two-tier court system as denial of jury trial. Appeal directly from Dist. Ct

~~Standing~~

Issue of jurisdiction is probably determinative. § 1257(2) requires that there be a "final judgment ~~in~~ by the highest court of a State in which a decision could be had --".

Four courts in Mass { Dist Ct / Superior Ct / Appeals Ct / Sup Jud Ct

Argent v. Texas not controlling, as it was an appeal from a conviction in this Ct at the "2nd tier" level & fined $100. There was NO appeal in Texas on the record from the 2nd conviction — only collateral attack.

Not relevant on merits

Under Whitmark, the issue can be raised on 2nd trial & on appeal.

X X

If we reach merits, I think Δ should be allowed to waive 1st tier (or plead guilty) & go directly to 2nd tier.

Hagopian (for Peters)

(Nothing very helpful)

Mills (Asst AG of Mass)

~~[illegible]~~ Judgment is not final.
Nor has it been rendered by highest court in which it may be heard.

~~[illegible]~~

The Superior Ct. could have considered the jury trial issue; also the Appeals Ct could have decided it; & on discretionary review, it could ~~[illegible]~~ be renewed in Sup. Jud. Ct.
Those reviews are available quite independly of whatmough
(Read Brief on this)

Rehnquist commented that Mills position would require overruling Largent v Texas, 318 U.S. 418, 421-22.
Mills ventually conceded this.

No. _____, Dismiss on Juris - 8-0

73-6739 COSTARELL v. MASSACHUSETTS Conf. 3/19/75

The Chief Justice ~~Affirm~~ Dismiss or WANT Juris.

~~It~~ Issue is whether there is an appeal under 1257.

Largent does not control.

In Mass., Petr. plainly has way of presenting his issue in higher ~~S~~ state courts.

~~Petr~~

There is no longer any judgment of any kind outstanding against Petr. since he has appealed.

~~Hst~~ Whitmark is controls.

x x x

Expressed no view on merits.

Even if there is a judgment it does not meet standards of 1257.

Douglas, J.

Dismiss or Juris 8-0

Out

Brennan, J. Dismiss

Disagree with C J as to absence of ~~any presented~~ judgment.

~~As to whether~~

Agree to dismiss ~~as~~ under 1257.

I'm not sure Bill said exactly this

Would reverse Largent if we can't distinguish it.

Not clear what Whitmark says & means. Whatever it says, we are bound by it.

Stewart, J. Dismiss

Agree with Brennan.

Only issue we need address is whether there is juris under 1257.

Whitmark has now prescribed a way for a party to litigate issue in Mass.

We should write a P C relying expressly on Whitmark

White, J. Dismiss

On Whitmarsh

Largent can be distinguished. He (she) had no where to go except H/Corpus.

There is one difficult sentence - but it is irrelevant.

Dismiss

Marshall, J. Dismiss

On Whitmarsh

Dismiss

Blackmun, J. Dismiss

Speed Trial & D/Jeopardy also raised but we needn't reach them

Powell, J. Dismiss

On Whitmarsh

Largent distinguishable.

Rehnquist, J. Dismiss

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: APR 17 1975

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-6739

Steven Costarelli, Appellant, *v.* Commonwealth of Massachusetts.	On Appeal from the Municipal Court of the City of Boston, Massachusetts.

[April —, 1975]

PER CURIAM.

Under Massachusetts procedure, a "two-tier" system is utilized for trial of a variety of criminal charges. The initial trial under this system is in a county district court or the Municipal Court of the City of Boston. No jury is available in these courts, but persons who are convicted in them may obtain a *de novo* trial, with a jury, in the appropriate superior court by lodging an "appeal" with that court.[1] At the *de novo* trial, all issues of law and fact must be determined anew and are not affected by the initial disposition. In effect, the taking of the appeal vacates the district or municipal court judgment, leaving the defendant in exactly the position of defendants in other States which require the prosecution to present its proof before a jury.[2]

Reviewed
LFP
4/18
Join

[1] See Mass. Gen. Laws c. 218, § 27A (1975 Supp.); c. 278, §§ 18 (1975 Supp.), 18A (1972).

Unlike the situation in *Colten* v. *Kentucky*, 407 U. S. 104 (1972), the initial trial cannot be avoided by a plea of guilty without also waiving the right to a jury trial in superior court.

[2] Appellant argues that in several respects the district or municipal court judgment remains in effect despite the lodging of an appeal. In particular, he points to the facts that if a defendant defaults in superior court, the first-tier judgment becomes the legal basis for imposing sentence, and that appeal does not eliminate such

In January 1974, appellant Costarelli was charged with knowing unauthorized use of a motor vehicle, an offense under Mass. Gen. Laws c. 90, § 24 (2)(a) (1975 Supp.). The offense carries a maximum sentence of a $500 fine and two years imprisonment, and is subject to the two-tier system described above. Prior to trial in the Municipal Court, Costarelli moved for a jury trial. The motion was denied and the trial before the court resulted in a judgment of guilty. A one year prison sentence was imposed. Costarelli thereupon lodged an appeal in the Superior Court for Suffolk County.

Without awaiting proceedings in Superior Court, Costarelli took this appeal to this Court,[3] seeking to establish that the Sixth Amendment requires that a jury be available in his first trial, whether it be in the Municipal Court or the Superior Court. He also raised speedy trial and double jeopardy contentions as bars to his retrial before a jury. We noted probable jurisdiction on October 21, 1974. —— U. S. ——. We now dismiss for want of jurisdiction. Title 28 U. S. C. § 1257 limits our review to the judgment of the highest state court in which a

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collateral consequences as revocation of parole or of a driver's permit. These matters do not affect the result we announce today, and merit no further discussion.

[3] There is some question as to whether review should have been sought by way of a petition for certiorari rather than appeal. Under 28 U. S. C. § 1257 (2), we have appellate jurisdiction when the constitutional validity of a state statute is drawn in question and the decision is in favor of its validity. In the present case it is not clear that the denial of a jury in the first-tier trial resulted from the operation of a statute rather than of custom and practice. We need not resolve the issue, because it cannot affect our disposition—if not properly denominated an appeal, we would treat the papers as a petition for certiorari, 28 U. S. C. § 2103, and the highest state court requirement of § 1257 applies to petitions for certiorari as well as to appeals.

decision could be had, and we conclude that this is not such a judgment.

That a decision of a higher state court might have been had in this case is established by a recent decision of the Supreme Judicial Court of Massachusetts, *Whitmarsh* v. *Commonwealth*, —— Mass. ——, 316 N. E. 2d 610 (1974), in which another criminal defendant sought relief from Massachusetts' two-tier trial system. After conviction without a jury in the first tier, Whitmarsh took his appeal to the superior court, but thereupon sought immediate review of his constitutional contentions in the Supreme Judicial Court. As one potential basis of that court's jurisdiction, he asserted its power of "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein *if no other remedy is expressly provided.*" Mass. Gen. Laws c. 211, § 3 (1958) (emphasis added). The Supreme Judicial Court rejected this basis of jurisdiction on the ground that another remedy was in fact expressly provided. It stated:

> "The constitutional issue the plaintiff now asks us to decide is the same issue which he raised in the District Court, and in the Superior Court by his motion to dismiss. If his motion were denied, and if he were thereafter tried in the Superior Court and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto." —— Mass., at ——, 316 N. E. 2d, at 613.

It is thus clear that Costarelli can raise his constitutional issues in Superior Court by a motion to dismiss, and can obtain state appellate review of an adverse decision through appeal to the state high court. That the issue might be mooted by his acquittal in Superior Court is of

course without consequence, since an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved. Cf. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67 (1948); *Gorman* v. *Washington University,* 316 U. S. 98, 100–101 (1942).

Costarelli argues that resort to the remedy outlined in *Whitmarsh* should be unnecessary, because it cannot produce the relief to which he believes he is entitled. He is of the opinion that if the Superior Court denied his motion to dismiss, he would have no alternative but to proceed to trial before a jury. Once this occurred the error would, he fears, have been cured, or at least mooted.

But we think this contention confuses an argument of substantive constitutional law with an argument relating to the application of 28 U. S. C. § 1257. *Whitmarsh* undoubtedly contemplates that in the event the Superior Court were to deny Costarelli's motion, he would then have to proceed to trial. But just as surely it contemplates that in the event that judgment were adverse to him, he could appeal to the Supreme Judicial Court and raise before it precisely the constitutional question which had been raised by the motion to dismiss in the Superior Court. Whether the fact that he was afforded a jury trial in the Superior Court proceeding "cured" or "mooted" his federal constitutional claim is a matter of federal constitutional law, for determination initially in state courts and ultimately by this Court. That the state courts might conclude that the second-tier trial terminated his claim does not mean that Costarelli may draft his own rules of procedure in order to raise the claim only before those Massachusetts courts which he deems appropriate. Massachusetts affords him a method by which he may raise his constitutional claim in the Superior Court, and a method by which he may, if

necessary, appropriately preserve that claim for assertion in the Supreme Judicial Court. The Supreme Judicial Court of Massachusetts, therefore, is "the highest court of a State in which a decision could be had" on his claim. Since no decision has been had in that court, we lack jurisdiction of this case.

Appellant relies on language from *Largent* v. *Texas*, 318 U. S. 418 (1943), to support a contrary result. In that case we reviewed a judgment of the County Court of Lamar County, Texas. We did so because under Texas law the state court system provided no appeal from that judgment of conviction. We noted that state habeas corpus was available to test the constitutionality on its face of the ordinance under which Mrs. Largent had been convicted, but that it was not available to test its constitutionality as applied in her particular case.

We then stated:

> "Since there is, by Texas law or practice, no method which has been called to our attention for reviewing the conviction of appellant, *on the record made in the county court*, we are of the opinion the appeal is properly here under § [1257 (2)] of the Judicial Code." *Id.*, at 421 (emphasis added).

Appellant argues that because the proceeding in Massachusetts Superior Court would not be a review on the record made in Municipal Court, the *de novo* proceeding in Superior Court is a collateral proceeding which need not, under *Largent*, be utilized to satisfy the highest court requirement.

Appellant's reliance is misplaced. In *Largent*, we went on to say:

> "The proceeding in the county court was a distinct suit. It disposed of the charge. The possibility that the appellant might obtain release by a subse-

> quent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant. Cf. *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14; *Bryant* v. *Zimmerman,* 278 U. S. 63, 70." *Id.,* at 421–422.

The present case is plainly distinguishable. Here the Municipal Court proceeding did not finally dispose of the charge, and the proceeding in Superior Court is not a distinct suit or proceeding. It is instead based on precisely the same complaint as was the Municipal Court trial. In *Largent,* the available review on habeas corpus was not based on the record in county court for the reason that habeas review was sharply limited in scope. Similarly, in *Bandini Co.,* cited in *Largent,* the "distinct suit" was a proceeding for a writ of prohibition in which the only litigable issue was lower court jurisdiction.

Here, on the contrary, the review is not circumscribed so as to be narrower than normal appellate-type review on the record made in an inferior court, but is instead so broad as to permit *de novo* relitigation of all aspects of the offense charged, whether they be factual or legal. It is because of the *breadth* of appellate review, not its *narrowness,* as in *Largent,* that the record is not the basis of review in superior court. Greater identity of proceedings in two different courts would be difficult to imagine, and it would be strange indeed to class the Superior Court trial as a form of "collateral" review of the Municipal Court judgment in the same sense as habeas corpus is traditionally thought of as a "collateral attack" on a judgment of conviction.

The appeal is dismissed for want of jurisdiction.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 18, 1975

73-6739 - Costarelli v. Massachusetts

Dear Bill,

If you would consider substituting "Sixth and Fourteenth Amendments" for "Sixth Amendment" in the 3rd line of the second paragraph on page 2, I would be glad to join the Per Curiam you have circulated in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 18, 1975

Re: No. 73-6739 - Costarelli v. Massachusetts

Dear Bill:

Please join me in the per curiam you have prepared for this case.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 18, 1975

Re: No. 73-6739 - Costarelli v. Massachusetts

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

April 18, 1975

No. 73-6739 Costarelli v. Massachusetts

Dear Bill:

Please join me in your Per Curiam opinion for the Court.

I think it is important enough to be a signed opinion.

Sincerely,

Mr. Justice Rehnquist

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 21, 1975

Re: No. 73-6739 -- Steven Costarelli v. Commonwealth of Massachusetts

Dear Bill:

I agree with your suggested Per Curiam in this case.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1975

Re: 73-6739 - Costarelli v. Massachusetts

Dear Bill:

I join your per curiam opinion dated April 21, 1975.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
								3/31/75
Join WHR 4-23-75		Agree 4-17-75		Join WHR 4-18-75	Join WHR 4-21-75	Join WHR 4-18-75	Join WHR 4-18-75	PC 1st draft 4-17-75 2nd draft 4-22-75 3rd draft 4-23-75
					73-6739 Costarelli v. Mass			