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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CRIMINAL #2013-983

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR
TRANSFER FROM THE BRISTOL COUNTY JAIL AND HOUSE OF CORRECTION
TO ANOTHER COUNTY JAIL LOCATED CLOSER TO BOSTON**

INTRODUCTION

On May 28, 2014, Defendant Aaron Hernandez ("Hernandez") was arraigned on indictments returned by a Suffolk County Grand Jury charging him with two counts of first degree murder and related offenses. The instigation of these charges in Suffolk County require Hernandez's defense counsel – all of whom maintain offices in the City of Boston – to meet with their client far more frequently than when Hernandez had only been subject to charges pending in Bristol County. Round trip travel to the Bristol County Jail and House of Correction ("Bristol County HOC") in North Dartmouth, Massachusetts from Boston in favorable traffic conditions takes two hours. In adverse traffic conditions on some of Eastern Massachusetts' most congested roadways (the Southeast Expressway, Route 128, and Route 24), a round trip can take up to four hours. In order for Hernandez to consult regularly with his counsel and assist in preparing effectively for trial in two murder cases simultaneously, he needs to be housed in a county jail other than one located in North Dartmouth, specifically, one located closer to his

lawyers and held under conditions which better facilitate confidential lawyer/client communication.

Throughout the period of Hernandez's pre-trial detention at the Bristol County HOC, the Sheriff of Bristol County ("Sheriff") has collaborated closely with the Office of the District Attorney to hunt for and generate evidence that could potentially be used against Hernandez in his homicide case. The Sheriff, an individual charged with the simple task of safely holding Hernandez prior to trial, has acted not as a professional, disinterested jailer, but rather as an active member of the prosecution team and full-time agent of the District Attorney. In assuming such a partisan role, the Sheriff has impinged upon the due process rights of his detainee, Hernandez.

Recently, the Sheriff joined forces with the District Attorney in bringing additional criminal charges against Hernandez based on two alleged jailhouse infractions that had already been fully addressed internally through the Bristol HOC's disciplinary procedures. Significantly, one of these charges alleges that Hernandez uttered a verbal threat to kill a correctional officer and/or his members of his family when he is released. This charge—which has been refuted by an eyewitness and vigorously contested by Hernandez—raises serious concerns about Hernandez's personal safety while housed at the Bristol HOC and doubts about the ability of that facility's staff to treat Hernandez fairly and professionally while he is completely under their control. The Sheriff clearly has an actual conflict of interest. Charged with ensuring Hernandez's safety and well-being as a pretrial detainee, he is now Hernandez's accuser and alleged victim!

Ever since Hernandez was delivered into the custody of the Sheriff one year ago, his presence at the Bristol County HOC has been relentlessly exploited and his privacy violated by a

vigorous campaign of self-aggrandizement and self-promotion conducted by the Sheriff. This highly-inappropriate, unprofessional media campaign, which has continued unabated despite this Court's entry of a gag order designed to curb prejudicial pretrial comments by the parties and their agents, has jeopardized Hernandez's constitutional right to a fair trial. Having chosen to conduct a sensational, endless media campaign that has focused public attention on every conceivable aspect of Hernandez's detention at the Bristol County HOC, the Sheriff has demonstrated an inability to discharge his duties with respect to this pretrial detainee in a detached and professional fashion.

In sum, in order to protect and enforce Hernandez's constitutional rights to due process and effective assistance of counsel, to ensure his safety and well-being, preclude his further exploitation in the media, and as a matter of fundamental fairness, this Court should order Hernandez transferred to another county jail closer to Boston forthwith pending trial. The Court clearly has the authority to order such a transfer on such grounds.

I. STATEMENT OF RELEVANT FACTS.

A. Current Impediments to Effective Assistance of Counsel.

Hernandez has been held at the Bristol County HOC since his arraignment on June 26, 2013 on a charge of first degree murder and firearms charges. This facility is located in North Dartmouth, Massachusetts, roughly 60 miles from the offices of his attorneys in Boston. According to MapQuest, a round trip to the Bristol County HOC from downtown Boston, where all of Hernandez's counsel are located, traverses approximately 120 miles. *Affidavit of Michael K. Fee* (hereinafter "*Fee Affidavit*") at ¶2 and Exhibit 1. In favorable traffic conditions on some of Eastern Massachusetts' most congested roadways (the Southeast Expressway, Route 128, and Route 24), the round trip take roughly two hours. In unfavorable traffic conditions – congestion,

construction, delays due to accidents -- the round trip can, and has taken up to four hours. *Fee Affidavit* at ¶2.

On May 28, 2014, while awaiting trial in Bristol County, Hernandez was arraigned in Suffolk County Superior Court on distinct and unrelated charges brought by a Suffolk County Grand Jury. Those charges consist of two counts of first degree murder and related offenses. *Fee Affidavit* at ¶3 and Exhibit 2. The institution of charges against Hernandez in Suffolk County has placed him and his counsel in the highly-unusual and almost unprecedented position of having to prepare for trial in two murder cases in different counties simultaneously. As a result, counsels' need for frequent and meaningful access to Hernandez has expanded exponentially. *Affidavit of James L. Sultan* (hereinafter "*Sultan Affidavit*") at ¶2.

Besides sheer distance, a number of other aspects of Hernandez's detention at the Bristol County HOC seriously impede his meaningful interaction with his counsel. For example, because of the distance between North Dartmouth and Boston, Hernandez often must speak with his attorneys over the phone. The facilities he is required to use, however, make it impossible to conduct these conversations in private. *Fee Affidavit* at ¶4. As outlined in a letter counsel for Hernandez sent to the Sheriff on October 4, 2013, it is virtually impossible to hear Hernandez when he calls. *Fee Affidavit* at ¶5 and Exhibit 3. If Hernandez shouts so that his counsel can hear him over the telephone, guards and other detainees can hear his side of the conversation, compromising confidentiality. *Fee Affidavit* at ¶4.

Despite counsel's raising the issue nearly eight months ago, the Sheriff has not taken any steps to enable Hernandez to have audible, private telephone conversations with his attorneys. Especially considering the practical constraints his detention in distant North Dartmouth places

on in-person meetings, Hernandez's inability to conduct audible, private conversations with his attorneys imposes a particularly significant burden on his access to counsel.

Still other circumstances, never before seen by counsel, raise troubling questions about the ability of Hernandez to effectively communicate with his lawyers and prepare a defense to two separate murder prosecutions while housed at the Bristol County HOC. Hernandez's attorney visits are generally required to take place in a specified contact visiting room, Room A, one of the five or so rooms available for use by counsel at the Bristol County HOC. Room A is the one closest (approximately four feet) to the desk where a corrections officer is always located. *Fee Affidavit* at ¶6. This limitation on the location for attorney-client visits applies only to Hernandez, with other inmates seemingly allowed to use any of the contact visiting rooms that happen to be available. On at least one occasion, a Bristol County HOC staff member relocated an attorney who was using the pre-designated room to another room so that Hernandez and his counsel could be placed there. *Fee Affidavit* at ¶7. When queried about this, guards have told Hernandez's counsel that they are under orders to restrict the location of Hernandez's counsel visits to the room located immediately adjacent to the correctional officer's desk. *Fee Affidavit* at ¶8. There is, in fact, a written order to this effect which counsel have seen taped to the correctional officer's desk located in the Contact Visiting Area. *Fee Affidavit* at ¶8. This unique limitation – one which forces Hernandez and his counsel to speak in hushed whispers when they meet -- necessarily raises the possibility that Hernandez's private meetings with counsel are

being subject to intentional or unintentional monitoring by jail staff.¹

B. The Sheriff Is Serving as an Active Member of the Prosecution Team.

Throughout the one-year period of Hernandez's detention, the Sheriff has collaborated closely with the District Attorney in gathering evidence to be used against Hernandez in this criminal case and has functioned as an agent of the prosecution. At a discovery meeting held on January 17, 2014 at the District Attorney's Office in New Bedford, Hernandez's counsel were informed that the Sheriff was unilaterally and voluntarily forwarding Hernandez's mail to the prosecution team for review. *Fee Affidavit* at ¶10. Defense counsel also learned at this conference that the Sheriff had invited members of the prosecution team to come to the jail to listen to recordings of Hernandez's phone calls and visits in the absence of any court order. *Id.* Thereafter, at a hearing held on February 7, 2014, ostensibly to assess the merits of the Commonwealth's motion for a subpoena to obtain the recordings of all Hernandez's phone calls while he was confined at the Bristol County HOC, the Commonwealth revealed that it already possessed such recordings! They had already been furnished courtesy of the Sheriff without any subpoena or court order. *Fee Affidavit* at ¶11.

Discovery subsequently furnished to the defense revealed frequent emails between the District Attorney's Office and the Sheriff's staff in which the prosecutors asked for details,

¹ Counsel's concerns about the sanctity of their attorney-client communications at Bristol HOC are well-grounded. The Bristol County HOC has a history of not respecting the confidentiality of communications between inmates at the Bristol County HOC and their attorneys. In a widely-publicized incident in March 2012, the Bristol County Sheriff's Office furnished a recording of an attorney's telephone calls with his client, a pre-trial detainee at the Bristol County HOC who was awaiting trial on a homicide charge. The recording was subsequently introduced as evidence before a Bristol County Grand Jury. (See "Murder Case in Jeopardy After Error by Prosecutor," *Massachusetts Lawyers Weekly*, March 5, 2014, attached as Exhibit 4 to the *Fee Affidavit* at ¶9.)

recordings, and documents respecting Hernandez's visits, correspondence, identity of inmates on his cell block, and a host of other subjects. The Sheriff eagerly and invariably complied with these requests. *Fee Affidavit* at ¶12 and Exhibit 5. The breathtaking lode of information furnished by the Sheriff has included:

- all of Hernandez's Bristol County HOC Disciplinary Reports
- a list of inmates residing in Hernandez's unit
- copies of letters sent to and from Hernandez
- a list of all of Hernandez's visitors
- a list of Hernandez's approved persons for telephone calls
- a list of all attorneys visiting Hernandez
- copies of all visitation request forms
- video/audio of Hernandez's visits

See Fee Affidavit at ¶13.

In some of his innumerable interviews with the media, the Sheriff has explained that his actions are motivated, not by concern for security at the facility he is charged with operating, but rather undertaken to further "public safety." For example, in one interview, the Sheriff boasted of his role as an adjunct partner to the prosecution team stating, as reported by *The Taunton Gazette*:

Anything an inmate says that the prosecution and police detectives would find interesting is often passed along to those authorities, Hodgson said. "We have every legal right to do so." He said "There is no reason why we wouldn't share that information with law enforcement and prosecutors. Public safety is our job."

Fee Affidavit at ¶14 and Exhibit 6.

C. By Instigating Criminal Charges Accusing Hernandez of Threatening a Correctional Officer at the Jail, Hernandez's Custodian Has Become his Accuser and Alleged Victim.

According to Jail disciplinary records, on November 1, 2013, Hernandez was accused of verbally threatening to kill a correctional officer when he is released. *Fee Affidavit* at ¶15 and Exhibit 7. The allegation, which Hernandez denied, was addressed via the Bristol County HOC disciplinary process and resolved in 2013. Many months later, on April 15, 2014, the gossip website TMZ.com reported in an "Exclusive" story that Hernandez had threatened a correctional officer at the Bristol County HOC. *Fee Affidavit* at ¶16 and Exhibit 8. The same story quoted an ex-inmate from the Bristol County HOC as stating Hernandez had never threatened a correctional officer. *Id.* After a spate of further publicity following the TMZ report, a grand jury "investigation" was commenced on April 30, 2014 and on May 1st, Hernandez was indicted by a Bristol County Grand Jury for the alleged November 1st threat. *Fee Affidavit* at ¶17 and Exhibit 9.²

D. The Sheriff has Relentlessly Exploited Hernandez's Presence at the Bristol County HOC Via a Self-Aggrandizing Publicity Campaign.

By now, it is self-evident that the Sheriff viewed Hernandez's arrival at the Bristol County HOC as fabulous opportunity for self-promotion, the likes of which have never been seen before in this Commonwealth. A simple Google search conducted recently using the terms "Hernandez, Hodgson and Bristol" returned 4,490,000 results. *Fee Affidavit* at ¶18 and Exhibit 10. The Sheriff's systematic exploitation of Hernandez has been apparent from the first day Hernandez arrived at the Bristol County HOC. The Sheriff has gone on television or radio to

² Hernandez was also indicted for allegedly assaulting another inmate on February 25, 2014. That allegation had also been fully addressed via the Jail's disciplinary process.

discuss what Hernandez eats, what he does in his cell, what he reads, whom he speaks with, and his alleged disciplinary transgressions, among numerous other topics.

It would be virtually impossible to chronicle in this Memorandum or in a supporting affidavit all of the interviews conducted by the Sheriff about Hernandez with countless media outlets of every stripe. Two recent media commentaries on the Sheriff's behavior, however, sum up the situation well. First, in an article entitled "Big House, Big Mouth," published in the May 2014 issue of *Boston Magazine*, the Sheriff's obsession with using Hernandez for self-promotion is described:

[W]ith Hernandez under his care, he has more opportunity to make his views heard. Since last summer, he has appeared on ESPN *Sports Center*, WEEI and Fox 25 and has been quoted in articles all over the country. After Hernandez's [jailhouse] fight, Hodgson said, he spent a day and a half on the phone talking with the press.

Fee Affidavit at ¶19 and Exhibit 11.

Second, an editorial in the May 1, 2014, issue of *Massachusetts Lawyers Weekly* entitled "Sheriff Should Cease Media Exposure at Inmate's Expense," echoes the concerns shared by Hernandez's defense team and others in the legal community about the impact of the Sheriff's insatiable lust for publicity at Hernandez's expense. *Fee Affidavit* at ¶20 and Exhibit 12. The Sheriff's unrelenting media campaign has continued even in the face of this Court's February 15, 2014 order addressing prejudicial pre-trial publicity by the parties and their agents. *Fee Affidavit* at ¶21 and Exhibit 13.

II. SUMMARY OF APPLICABLE LAW.

Unlike inmates who have been convicted of a crime, pre-trial detainees can be held only for safety reasons or to ensure their eventual appearance at trial. *See Bell v. Wolfish*, 441 U.S. 520, 534-37, 584 (1979) (conditions of pretrial confinement may not be punitive). They thus

retain several rights and interests relevant to the conditions of their confinement that are not fully available to convicted and sentenced inmates. Foremost among these is an enhanced interest in the constitutional right to the effective assistance of counsel. See, e.g., *McDougall v. Commonwealth*, 447 Mass. 505, 511 (2006); *Cobb v. Aytch*, 43 F.2d 946, 957 (3d Cir. 1981).

The right to the assistance and advice of an attorney is “indispensable to the fair administration of our adversary system of criminal justice.” *Brewer v. Williams*, 430 U.S. 387, 398 (1977). It is a fundamental constitutional right protected by the Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article 12 of the Massachusetts Declaration of Rights. See *Commonwealth v. Anderson*, 448 Mass. 548, 553-554 (2007). A defendant’s right to consult with his counsel provides “innumerable benefits” that are “essential to the effective representation [of the accused].” *Commonwealth v. Johnson*, 85 Mass. App. Ct. 505; 509 (2011). The right to counsel attaches at the time that a proceeding is commenced—in this case, on the return of the indictment. See *Commonwealth v. Torres*, 442 Mass. 554, 570 (2004).

Access to counsel is particularly critical in the pre-trial period. See *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (“[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”) It is during this period that a defendant must investigate the accusations against him and prepare for the proceedings that will determine his guilt or innocence. The “vital need” for unfettered access to counsel during this time was succinctly noted by the Supreme Court in an oft-quoted passage from *Powell v.*

Alabama:

[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

See Brewer v. Williams, 430 U.S. 387, 398 (1977), quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Courts have consequently recognized that when access to counsel “is inadequately respected during pre-trial confinement, the ultimate fairness of [the] eventual trial can be compromised.” *Johnson-El v. Schoemehl*, 878 F.2d 1043,1051 (8th Cir. 1989).

Inherent in the constitutional right to counsel is a criminal defendant’s ability to consult with his attorneys and aid in the preparation of his defense. *See Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978) (“[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense.”), *rev’d on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979). It is well-accepted that conditions of confinement which limit a criminal defendant’s ability to consult with his or her attorney may constitute constitutional violations and are a proper subject of court review. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 419 (1974). Thus, pre-trial detention at a distant facility may breach a detainee’s right to counsel by making it unduly difficult for the detainee to participate in the preparation of his defense. *See Cobb*, 643 F.2d at 957-58 (pre-trial detention at distant facility implicates constitutional concerns); *Covino v. Vt. Dept. of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) (remanding and directing district court to determine whether detention at facility 56 miles from original location of detention constituted a Sixth Amendment violation).

Limitations on a detainee’s ability to consult with counsel in confidence may similarly constitute a Sixth Amendment violation. “It is clear that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.” *Johnson-El*, 878 F.2d at 1052-53. *See also Benjamin v. Fraser*, 264 F.3d 175, 187-188 (2d Cir. 2001); *Ching v. Lewis*, 895 F.2d 608,609 (9th Cir. 1990).

Courts have similarly ruled that conditions of confinement which do not allow detainees to participate in confidential telephone conversations with their counsel are constitutionally infirm. *Id.* In the same vein, prison officials' review of a detainee's legal mail implicates Sixth Amendment concerns. *See, e.g., Guarjardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) (“[a] practice of prison officials reading mail between a prisoner and his lawyer in a criminal case would raise serious issues under the Sixth Amendment. *See also Ching*, 895 F.2d at 609 (9th Cir. 1990) (“The opportunity to communicate privately with an attorney is an important part of that meaningful access [to the courts].”); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1313-14 (S.D.W. Va. 1981) (attorney-client meeting facilities that were not sufficiently private were constitutionally flawed).

In considering the propriety of a restriction on a detainee's rights, “the extent to which [those rights are] burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration.” *Johnson-El*, 878 F.2d at 1052; *see also Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001). But where a prisoner alleges that a particular restriction imposed by prison officials impinges on his exercise of constitutionally-guaranteed rights, it is incumbent upon the Court to carefully scrutinize the effect of those restrictions. *Roberts*, 239 F.3d at 113. Indeed, courts have held that burdens on the right to counsel are so serious that they do not require a showing of a separate “actual injury” to be subject to challenge—the infringement itself is a constitutional ill sufficient to justify relief. *See Benjamin v. Fraser*, 264 F.3d 175, 184-85 (2d Cir. 2001); *see also Henry v. Perrin*, 609 F.2d 1010, 1013 (1st Cir. 1979) (“The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”).

While there are no reported cases found by undersigned counsel specifically addressing jailers who choose to act as agents of the prosecution, accusers, or self-aggrandizing publicists at the expense of their pretrial detainees, the International Corrections and Prisons Association Code of Ethical Conduct (“ICPACEC”) is highly instructive. Section 5 of that Code states: “Correctional officials shall not behave in a manner that might impair faith in their impartiality.” Section 6 states: “Correction and prison personnel shall refrain from entering into any formal or informal agreement which presents a conflict of interest or is inconsistent with the conscientious performance of duties, or that lend themselves to undermining trust in the service.” Section 10 of the American Corrections Association Code of Ethics (“ACACOE”) is to the same effect.

As for the sharing of private information about pretrial detainees with the public, Section 3 of the ICPACEC states: “Correctional officials shall preserve the integrity of private information....He or she shall refrain from revealing non-public information unless expressly authorized to do so.” Section 15 of the ACACOE is to the same effect. See also Section 8 of the ACACOE: “Members shall refrain from using their positions to secure personal privileges or advantages.”³

Pursuant to statute (M.G.L. c.276, sec.52A), this Court clearly has the authority to order the transfer of a pretrial detainee from one county jail to another. Moreover, as the Supreme Judicial Court has repeatedly stated, Massachusetts courts have inherent power to do what is necessary to insure that the accused receive a fair trial. *E.g. O’Coin’s Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 509-510 (1972); *Crocker v. Justices of Superior Court*, 208 Mass. 162, 179 (1911). Indeed, this very power has been recently employed by a Superior Court Judge in another county who ordered such a transfer on the defendant’s motion just last

³ For the Court’s convenience, copies of the ICPACEC and ACACOE are appended to the *Fee Affidavit* as Exhibits 14 and 15 respectively. *Fee Affidavit* at ¶22.

month on the grounds that the client's place of detention was distant from his counsel. *Commonwealth v. Alberto Sierra*, No. WOCR2014-0345 (Ricciardone,J.) (Copy of motion and docket sheet appended as Exhibits 1 and 2 to *Sultan Affidavit*). *Sultan Affidavit* at ¶3.

III. APPLICATION OF LAW TO FACTS.

The highly-unusual combination of circumstances presented here makes it imperative that the Court order Hernandez to be transferred from the Bristol HOC to another county jail closer to Boston. First and foremost, the need for Hernandez and his lawyers to prepare to defend against murder charges in two different counties simultaneously requires far more frequent confidential attorney/client meetings. It is simply not feasible to do so, given the physical distance involved as well as the conditions imposed by the Bristol HOC. In order to receive effective assistance of counsel, Hernandez must be transferred.

Second, it is grossly unfair for Hernandez to be involuntarily held in the custody of a jailer who is actively using said detention as a vehicle for collecting evidence to be used against Hernandez by the prosecution at trial. In assuming the role of a partisan and agent of the Commonwealth sweeping up and delivering to the prosecution every bit of information relating to Hernandez, the Sheriff has improperly exceeded his appropriate responsibilities and impinged upon Hernandez's constitutional rights of due process.

Third, since Hernandez has been formally charged with threatening to kill a Bristol HOC correctional officer, it is not safe for him to be held at that facility pending trial. The Sheriff (and his staff) are now Hernandez's accusers and alleged victims. They cannot be expected to safeguard his health and safety in the face of such a clear conflict of interest.

Finally, the Sheriff's unprecedented and grossly inappropriate campaign of public self-aggrandizement at Hernandez's expense should no longer be tolerated. The constant stream of

information provided to the media about Hernandez and his confinement invades his personal privacy, violates basic standards of human decency, and flies in the face of the Court's order prohibiting the parties and their agents from spawning prejudicial pretrial publicity.

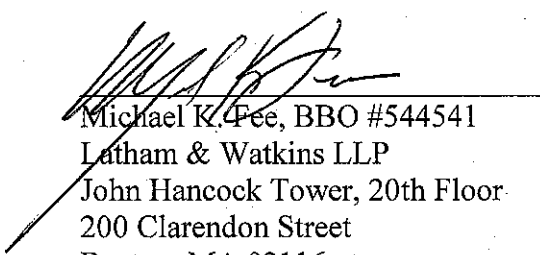
CONCLUSION

For all of these reasons, considered individually or cumulatively, the defendant's motion to be transferred to another county jail located closer to Boston should be allowed.

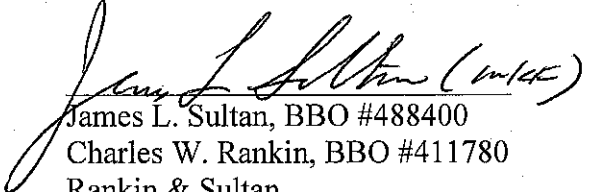
Respectfully submitted,

AARON HERNANDEZ

By his attorneys,



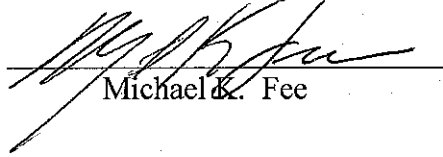
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by e-mail and by delivering a copy thereof, by first class mail, to Roger Michel, Assistant District Attorney, Bristol County, 218 South Main Street, Suite #101, Fall River, MA 02720 on June 19, 2014.


Michael R. Fee