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BRISTOL, SS SUPERIOR COURT
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MARC J. SANTO, SSC.
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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

REQUEST FOR JURY INSTRUCTION

NOW COMES THE COMMONWEALTH in the above-captioned matter and respectfully requests that The Court instruct the jury as follows on the following areas of instruction.

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true. When we refer to moral certainty, we mean the highest degree of certainty possible in matters relating to human affairs -- based solely on the evidence that has been put before you in this case.

I have told you that every person is presumed to be innocent until he or she is proved guilty, and that the burden of proof is on the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

In this case the Commonwealth has charged the defendant with the crimes of murder, unlawful possession of a firearm and unlawful possession of ammunition.

To each of these charges the defendant has pleaded not guilty.

Your decision as to one charge should not control your decision as to another. Each charge is entitled to your individual determination.

The Commonwealth is not required to prove that the defendant himself performed the act that caused Odin Lloyd's death or that the defendant personally possessed a firearm or ammunition. However, to establish that a defendant is guilty of any of the offenses charged, the Commonwealth must prove two things beyond a reasonable doubt. First, the Commonwealth must prove that the defendant knowingly participated in the commission of the crime of murder, or unlawful possession of a firearm. Second, the Commonwealth must prove that he did so with the intent required to commit the crime.

Such knowing participation by the defendant may take many forms. It may take the form of personally committing the acts that constitute the crime or of aiding or assisting another in those acts. It may take the form of the defendant asking or encouraging

another person to commit the crime or of helping to plan the commission of the crime. Alternatively, it may take the form of the defendant agreeing to stand by at, or near, the scene of the crime to act as a lookout, or to provide aid or assistance in committing the crime, or in escaping, if such help becomes necessary. An agreement to help if needed does not need to be made through a formal or explicit written or oral advance plan or agreement; it is enough if the defendant and at least one other person consciously acted together before or during the crime with the intent of making the crime succeed. In considering this matter, please remember that the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant was present at the scene of the alleged crimes and not somewhere else at the time. The defendant has no duty to call witnesses or produce evidence on this or any other element of a crime. If you have a reasonable doubt about whether the defendant was present at the time and place of the alleged offenses or about any other element of the crimes charged, then you must find him not guilty.

The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of each of the crimes charged, he possessed or shared the intent required for that crime. You are permitted, but not required, to infer the defendant's mental state or intent from his knowledge of the circumstances or any subsequent participation in the crime. The inferences you draw must be reasonable, and you may rely on your experience and common sense in determining the defendant's knowledge and intent.

Mere knowledge that a crime is to be committed is not sufficient to convict the defendant. The Commonwealth must also prove more than a mere association with the

perpetrator of the crime, either before or after its commission. It must also prove more than a failure to take appropriate steps to prevent the commission of the crime.

Mere presence at the scene of the crime is not enough to prove a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and that he had or shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that he knew about it in advance.

Where an element of an offense is that a person who committed the crime possessed, carried or used a weapon, the Commonwealth must prove beyond a reasonable doubt either that the defendant himself possessed a weapon or that the defendant knew that a person with whom he participated in the commission of the crime was armed with a weapon. However, mere knowledge that a participant in the crime was armed is not sufficient to hold the defendant liable for the acts of that participant. The Commonwealth must also prove that the defendant knowingly participated in the commission of the crime with the intent required to commit the crime.

Before, I discuss the elements of each of the offenses with which the defendant is charged, let me instruct you that motive is not an element of any of the crimes charged. The Commonwealth is not required to prove motive.

Murder is the unlawful killing of a human being. There are two different degrees of murder: murder in the first degree and murder in the second degree.

The Commonwealth alleges that the defendant committed murder in the first degree on the following theories: murder with deliberate premeditation and/or murder with extreme atrocity or cruelty. You are to consider each of these theories, and may find the defendant not guilty, or guilty on one [or two] of these theories. Your verdict must be unanimous, whether it be "not guilty" or "guilty" of one or more theories of murder. To find the defendant guilty on any of these theories of murder, you must be unanimous, that is, all the deliberating jurors must agree that the Commonwealth has met its burden of proving every required element of that theory beyond a reasonable doubt. You should check the appropriate block or blocks on the verdict slip as to each theory on which you agree unanimously.

I will begin by instructing you on the elements for each of these theories of murder in the first degree. I will next instruct you on murder in the second degree.

A. MURDER WITH DELIBERATE PREMEDITATION

I will first define the elements of murder in the first degree with deliberate premeditation. To prove the defendant guilty of murder in the first degree with deliberate premeditation, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. The defendant caused the death of Odin Lloyd.
2. The defendant intended to kill Odin Lloyd, that is, the defendant consciously and

purposefully intended to cause Odin Lloyd's death.

3. The defendant committed the killing with deliberate premeditation, that is, he

I will now discuss each of these requirements in more detail. The first element is that the defendant caused the death of Odin Lloyd. A defendant's act is the cause of Odin Lloyd's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

The second element is that the defendant intended to kill Odin Lloyd, that is, the defendant consciously and purposefully intended to cause Odin Lloyd's death.

The third element is that the defendant committed the killing with deliberate premeditation, that is, he decided to kill after a period of reflection. Deliberate premeditation does not require any particular length of time of reflection. A decision to kill may be formed over a period of days, hours, or even a few seconds.

The key is the sequence of the thought process: first the consideration whether to kill; second, the decision to kill; and third, the killing arising from the decision. There is no deliberate premeditation where the action is taken so quickly that a defendant takes no time to reflect on the action and then decides to do it.

B. MURDER WITH EXTREME ATROCITY OR CRUELTY

Next I will define the elements of murder in the first degree with extreme atrocity or cruelty

You shall consider this theory of murder in the first degree regardless whether or not you find that the Commonwealth has proved murder in the first degree with deliberate

premeditation.

To prove the defendant guilty of murder with extreme atrocity or cruelty, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant caused the death of Odin Lloyd;
2. The defendant either:
 - a. intended to kill Odin Lloyd; or
 - b. intended to cause grievous bodily harm to
Odin Lloyd; or
 - c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.
3. The killing was committed with extreme atrocity or cruelty.

I will now discuss each of these requirements in more detail. The first element is that the defendant caused the death of Odin Lloyd. A defendant's act is the cause of Odin Lloyd's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

The second element is that the defendant:

- a. intended to kill Odin Lloyd; or
- b. intended to cause grievous bodily harm to Odin Lloyd; or
- c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

As you can see, this second element has three sub-elements, which I shall call prongs, and the Commonwealth satisfies its burden of proof if it proves any one of the three prongs

beyond a reasonable doubt.

The first prong -- the defendant intended to kill -- is the same as the second element of murder in the first degree with deliberate premeditation. The second and third prongs are different from any element of murder in the first degree with deliberate premeditation.

The second prong is that the defendant intended to cause grievous bodily harm to Odin Lloyd. Grievous bodily harm means severe injury to the body.

The third prong is that the defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. Let me help you understand how to analyze this third prong. You must first determine whether the defendant intended to perform the act that caused the victim's death. If you find that he intended to perform the act, you must then determine what the defendant himself actually knew about the relevant circumstances at the time he acted. Then you must determine whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result.

The third element is that the killing was committed with extreme atrocity or cruelty. Extreme atrocity means an act that is extremely wicked or brutal, appalling, horrifying, or utterly revolting. Extreme cruelty means that the defendant caused the person's death by a method that surpassed the cruelty inherent in any taking of a human life. You must determine whether the method or mode of a killing is so shocking as to amount to murder with extreme atrocity or cruelty.

The inquiry focuses on the defendant's action in terms of the manner and means of inflicting death, and on the resulting effect on the victim. In deciding whether the Commonwealth has proved beyond a reasonable doubt that the defendant caused the death of the deceased with extreme atrocity or cruelty, you must consider the following factors:

1. whether the defendant was indifferent to or took pleasure in the suffering of the deceased;
2. the consciousness and degree of suffering of the deceased;
3. the extent of the injuries to the deceased;
4. the number of blows delivered;
5. the manner, degree and severity of the force used;
6. the nature of the weapon, instrument, or method used; and
7. the disproportion between the means needed to cause death and those employed. This seventh factor refers to whether the means used were excessive and out of proportion to what would be needed to kill a person.

You cannot make a finding of extreme atrocity or cruelty unless it is based on one or more of the factors I have just listed.

MURDER IN THE SECOND DEGREE

In order to prove murder in the second degree, the Commonwealth must prove the following elements:

1. The defendant caused the death of Odin Lloyd.
2. The defendant:
 - a. intended to kill Odin Lloyd; or

- b. intended to cause grievous bodily harm to Odin Lloyd; or
- c. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

I will now discuss each of these requirements in more detail. The first element is that the defendant knowingly participated in the commission of an act that caused the death of Odin Lloyd. Please apply all the instructions I have already given to you as to the meaning of the phrase "knowing participation." Once again, a defendant's act or the act of a person with whom the defendant is knowingly participating is the cause of Odin Lloyd's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

The second element is that the defendant:

- a. intended to kill Odin Lloyd; or
- b. intended to cause grievous bodily harm to Odin Lloyd; or
- c. intended to participate in the commission of an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

As you can see, this second element has three sub-elements, called prongs, which I have previously defined for you in my instruction on extreme atrocity or cruelty.

As a general rule, you are permitted (but not required) to infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person, or cause him grievous bodily harm, or intends to do an act which, in the circumstances known to him, a reasonable person would know creates a plain and strong likelihood that death would result.

A firearm is a dangerous weapon as a matter of law. You cannot draw such an inference unless the Commonwealth has proved that the defendant himself used a firearm on another person or that he knew that a person with whom he was knowingly participating was armed with a firearm, that this individual intended to use and did use the firearm on another person, and that the defendant shared the intent that it be so used.

If the evidence convinces you beyond a reasonable doubt that the defendant is guilty of a criminal offense, you have a duty to find the defendant guilty of the most serious offense that the Commonwealth has proved beyond a reasonable doubt. If the evidence does not prove beyond a reasonable doubt that the defendant is guilty of murder in the first degree with deliberate premeditation or murder in the second degree, you must find him not guilty of this charge.

RESPECTFULLY SUBMITTED,

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