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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

DEFENDANT'S REQUESTS FOR JURY INSTRUCTIONS

Pursuant to Massachusetts Rule of Criminal Procedure 24(b), defendant Aaron Hernandez hereby requests that the Court instruct the jury in its final charge as set forth below. Hernandez respectfully reserves the right to supplement these requests as necessary.

REQUEST NO. 1 -- REASONABLE DOUBT.

Hernandez requests that the Court instruct the jury on the Commonwealth's burden to prove his guilt beyond a reasonable doubt in accordance with the Supreme Judicial Court's recent decision in *Commonwealth v. Russell*, 470 Mass. 464 (2015):

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charges made against him.

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.

REQUEST NO. 2 -- MERE KNOWLEDGE, PRESENCE, OR ASSOCIATION.

In order to convict him on the charge of murder, the jury must find beyond a reasonable doubt that Hernandez knowingly participated in the commission of the crime and that he had or shared the required criminal intent. *Commonwealth v. Simpkins*, 470 Mass. 458, 22 N.E.3d 944, 946 (2015), interpreting *Commonwealth v. Zanetti*, 454 Mass. 449, 454 (2009). Mere knowledge, presence, or association is insufficient. *Id.* at 947-948. If knowing participation is based upon an alleged agreement to help commit the crime, there must be evidence of an "express or implied agreement by the defendant before or during the commission of the crime to act in concert during or after the shooting." *Id.* at 948 (evidence insufficient under *Zanetti* despite close proximity of shooters to defendant's home prior to shooting, shooters's flight to defendant's home after shooting, and defendant's concealment of guns; Commonwealth "presented no fact which could prove beyond a reasonable doubt that such involvement was contemplated prior to the shooting"). Hernandez requests that the Court give the following instruction, derived from the SJC's decision in *Simpkins* and its Model Jury Instructions on Homicide (2013), at pages 13-17:

The Commonwealth is not required to prove that the defendant himself performed the act that caused the victim's death. However, to establish that the defendant is guilty of murder, 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. 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. It may take the form of the defendant agreeing in advance 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. Yet, you must find that the Commonwealth has proved beyond a reasonable doubt the existence of an agreement by the defendant before or during the commission of the crime to act in concert during or after the crime. The agreement does not have to be explicit or formal; but, the defendant must have consciously acted together with at least one other person before or during the crime with the intent of making that crime succeed.

The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime, 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 common sense. However, you may not speculate about the defendant's knowledge and intent. Speculation is forbidden.

Mere knowledge that a crime is to be committed is not sufficient to convict the defendant. The Commonwealth must also prove more than 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 sufficient to convict the defendant. Presence alone does not establish the defendant's knowing participation in the crime, even if

he knew about the intended crime in advance and took no steps to prevent it. To find the defendant guilty of murder, you must find that the Commonwealth has proved beyond a reasonable doubt that he intentionally participated in some fashion in murdering Odin Lloyd and that he did so while possessing or sharing the intent required to commit the crime. You are reminded that 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.

REQUEST NO. 3 -- ASSISTING IN ESCAPE AND CONCEALMENT OF EVIDENCE INSUFFICIENT.

Consistent with *Simpkins*, 470 Mass. 458, 22 N.E.3d 944, the jury should be instructed that it may not convict Hernandez of murder merely because he helped the perpetrator or perpetrators flee or hide evidence. That conduct is correctly charged as accessory after the fact, not aiding and abetting. 22 N.E.3d at 947. *See Commonwealth v. Deane*, 458 Mass. 43, 56 (2010)(trial judge's instructions made clear defendant could not be convicted of murder if only participation consisted of helping dispose of body). Hernandez is not charged with being an accessory after the fact to Odin Lloyd's murder. He proposes this language:

You may not find the defendant guilty of murder based upon a finding that he assisted the perpetrator or perpetrators in escaping or concealing evidence. As I have said, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime and that he did so with the intent required to commit that crime. Any agreement by the defendant to assist the perpetrator or perpetrators must have existed before or during the commission of the crime. It is not enough that the defendant agreed to assist after the commission of the crime.

REQUEST NO. 4 -- OMISSIONS IN POLICE INVESTIGATION.

Hernandez requests that this Court instruct the jury regarding its consideration of inadequacies in the police investigation pursuant to *Commonwealth v. Bowden*, 379 Mass. 472, 485-486 (1980), and its progeny. Hernandez proposes that the Court instruct the jury in accordance with both Instruction 3.740 of the Criminal Model Jury Instructions for Use in the District Court (2009) and § 4.26 of the Massachusetts Superior Court Criminal Practice Jury Instructions (2003). He proposes the following combination of those pattern instructions:

You have heard some evidence suggesting that the Commonwealth did not conduct certain scientific tests or otherwise follow standard procedure during the police investigation. This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

1) Whether the omitted tests or other actions were standard procedure or steps that would otherwise normally be taken under the circumstances; 2) Whether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and 3) Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions.

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality or reliability of the evidence presented by the Commonwealth. You may also consider whether the omissions tend to show the existence of police bias against the defendant. All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

Grounds for Request.

The SJC held in *Bowden* that the failure by police to conduct an adequate investigation was a permissible ground on which to build a defense. The jury may not be precluded from considering inadequacies in the investigation, which may give rise to a reasonable doubt. 379 Mass. at 485-486. *See generally Commonwealth v. Silva-Santiago*, 453 Mass. 782, 801-802 (2009). A trial judge has the discretion to instruct the jury that it may consider whether the failure to conduct tests or to otherwise follow investigative standard procedures affects the reliability or credibility of the evidence in determining whether the Commonwealth has satisfied its burden of proving the defendant's guilt beyond a reasonable doubt. *See, e.g., Commonwealth v. Seng*, 456 Mass. 490, 501-502 (2010)(trial judge exercised discretion to give *Bowden* instruction; on appeal, SJC cautioned against mention of "CSI effect:" "[J]urors can and should be trusted to separate what they see on television from what evidence is presented at trial"); *Commonwealth v. Tolan*, 453 Mass. 634, 651-652 (2009)(exercising discretion to give *Bowden* instruction).

The evidence provides ample basis for the jury to find that police failed to conduct a fair and adequate investigation in a number of material respects. This Court should exercise its discretion to give a *Bowden* instruction. Hernandez should be deemed to be constitutionally-entitled to the instruction, where his theory of defense is that police failure to conduct a fair and adequate investigation creates reasonable doubt. *See Commonwealth v. Harrington*, 379 Mass. 446, 452-453 (1980)(self-defense), interpreting *Mullaney v. Wilbur*, 421 U.S. 684 (1975).[1/]

[1/] Hernandez recognizes that the SJC has rejected the argument that the defendant is constitutionally-entitled to a *Bowden* instruction. *See, e.g., Commonwealth v. Lao*, 460 Mass. 12, 23 (2011).

REQUEST NO. 5 -- DEFENDANT'S DECISION NOT TO TESTIFY.

Hernandez requests that, should he decide not to testify, that the Court instruct the jury in accordance with Instruction 3.600 of the Criminal Model Jury Instructions for Use in the District Court (2013) and § 4.16 of the Massachusetts Superior Court Criminal Practice Jury Instructions (2003). He proposes the following combination of those pattern instructions:

The defendant did not testify at this trial. The defendant has an absolute right not to testify since the entire burden of proof in this case is on the Commonwealth to prove that he is guilty. It is not up to the defendant to prove that he is innocent.

Under our system of law, a defendant has a perfect right to say to the Commonwealth, "you have the burden of proving your case against me beyond a reasonable doubt. I do not have to say a word."

The fact that the defendant did not testify has nothing whatsoever to do with the question of whether he is guilty or not guilty. You are not to draw any adverse inference against the defendant because he did not testify. You are not to consider it in any way, or even discuss it during your deliberations. You must determine whether the Commonwealth has proved its case against the defendant beyond a reasonable doubt based solely on the testimony of the witnesses and the exhibits introduced into evidence during the trial.

Grounds for Request.

The Fifth and Fourteenth Amendments and Article XII require that, upon request, the Court "minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter v. Kentucky*, 450 U.S. 288, 305 (1981)("Just as adverse comment on a defendant's silence 'cuts down on the privilege by making its assertion costly,'..., the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege"), quoting *Griffin v. California*, 380 U.S. 609, 614 (1965). *See Commonwealth v. Sneed*, 376 Mass. 867, 871-872 (1978); *Commonwealth v. Torres*, 17 Mass. App. Ct. 676, 677 (1984)(reversible error to refuse to give instruction upon request).

As the SJC has explained: "No aspect of the charge to the jury requires more care and precise expression than that used in reference to the right of a defendant in a criminal case to remain silent and not be compelled to incriminate himself...." *Sneed*, 376 Mass. at 871. "Even an unintended suggestion that might induce the jury to draw an unfavorable inference is error." *Id.* (citations omitted). The instruction must "thoroughly protect" the defendant against argument or intimation that he "is invoking constitutional rights to conceal or deceive." *Id. See Commonwealth v. Feroli*, 407 Mass. 405, 411 (1990)("preferable" for judge to use exact words "no adverse inference").

REQUEST NO. 6 -- DEFENDANT'S FAILURE TO VOLUNTEER INFORMATION TO POLICE.

Hernandez requests that the Court instruct the jury that it is also forbidden from drawing an adverse inference from his failure to volunteer information that he may have known about Odin Lloyd's death to the police. He proposes the following instruction:

No person is obligated to report a crime or to volunteer information about a crime to police. There are many explanations for a person's failure report a crime or to volunteer information to police. You may not draw an adverse inference from Hernandez's failure to volunteer any information he may have known about Odin Lloyd's death to police.

Grounds for Request.

A person ordinarily has no legal obligation to report a crime or provide information to police. *Commonwealth v. Hart*, 455 Mass. 230, 238 (2009); *Commonwealth v. Nickerson*, 386 Mass. 54, 57, 58 (1982). *See Commonwealth v. Thompson*, 431 Mass. 108, 117 (2000)("Although most lay people do not know the intricacies of their constitutional rights, it is a generally held notion that one does not have to say anything to the police and that what one does say may be used against [one]"), quoting *Nickerson*.

Under Massachusetts law, evidence of the defendant's silence, even before he is arrested and *Mirandized*, is generally not admissible to prove consciousness of guilt or to impeach his testimony. *See Thompson*, 431 Mass. at 117 (evidence regarding non-testifying defendant's pre-arrest silence inadmissible), extending rule of *Nickerson*, 386 Mass. at 62 (impeachment of testifying-defendant by pre-arrest silence must be approached "with caution"). *See also Irwin v. Commonwealth*, 465

Mass. 834, 852 (2013)("Evidence of a defendant's pre-arrest silence may be introduced against him at trial to establish consciousness of guilt only where it would be reasonable to expect that an ordinary person would speak"); *Commonwealth v. Stuckich*, 450 Mass. 449, 453 (2008)("That the defendant said that he would call [the detective] back or have his attorney do so, and that [the detective] never heard again from anyone, is not a sufficient evidentiary foundation to support [a consciousness of guilt] instruction"). *See generally Commonwealth v. Beneche*, 458 Mass. 61, 73-74 & n. 13 (2010). That evidence has minimal probative value. The defendant may fail to volunteer information because he is aware that he has no obligation to, or because he simply wishes to avoid interacting with authorities. *Nickerson*, 368 Mass. at 61 n. 6. Conversely, it is unfairly prejudicial:

> Jurors, who are not necessarily sensitive to the wide variety of alternative explanations for a defendant's pretrial silence, may be prone to construe such silence as an admission and, as consequence, may draw an unwarranted inference of guilt.

Id. (citation omitted)). It may also infringe the defendant's constitutional privilege against self-incrimination and his decision to testify. *See Jenkins v. Anderson*, 447 U.S. 231, 246 (1980)(Marshall, J., dissenting)(majority's holding that, under Fourteenth Amendment, defendant may be impeached by his pre-arrest silence has three "fatal" defects: (1) pre-arrest silence is unlikely to be probative of falsity of defendant's testimony; (2) drawing an adverse inference from his failure to volunteer incriminating information violates his privilege against self-incrimination; and, (3) such impeachment burdens his decision to testify).[2/] Accordingly, the jury should be instructed that it is forbidden from drawing an adverse inference from Hernandez's failure to volunteer information, if

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[2/] The SJC has declined to reconsider *Nickerson* in the wake of the Supreme Court's decision in *Salinas v. Texas*, --- U.S. ----, 133 S.Ct. 2174, 2180-2183 (2013), upholding a conviction in which the defendant's pre-arrest silence was introduced in the government's case-in-chief as evidence of consciousness of guilt because the defendant had not explicitly invoked his rights under the Fifth Amendment. *Irwin v. Commonwealth*, 465 Mass. 834, 852 n. 31 (2013).

any, that he knew about Odin Lloyd's death to the police. *See Nickerson*, 386 Mass. at 60 (trial judge correctly instructed that defendant had no obligation to report crime or volunteer information to police, but erred by instructing that his veracity could be doubted on basis of pre-arrest silence).

REQUEST NO. 7 -- CREDIBILITY OF WITNESSES: IMMUNITY.

In addition to the standard instruction regarding the assessment of witness credibility generally, *see* Instruction 2.260 of the Criminal Model Jury Instructions for Use in the District Court (2009), Hernandez requests that the Court instruct the jury with regard to its consideration of the testimony of immunized prosecution witnesses specifically, in accordance with *Commonwealth v. Ciampa*, 406 Mass. 257 (1989), and its progeny, as well as G.L. c. 233, § 20I.[3/] He proposes this language:

You have heard from several prosecution witnesses who testified pursuant to immunity orders. By reason of the immunity orders, the Commonwealth cannot prosecute these witnesses for their involvement, if any, in the incident at issue in this trial. Testimony provided under an immunity order should be scrutinized with great care. Furthermore, you may not convict the defendant solely on the basis of immunized testimony.

You should be aware that it is the Commonwealth that applies for an immunity order for witnesses. Upon a finding that the witness could validly invoke his or her privilege against self-incrimination, the Court must grant the Commonwealth's application for immunity. The Court does not have the discretion to deny an application in those circumstances.

You should note further that the Commonwealth has no way of knowing whether a witness who testifies pursuant to an immunity order is testifying truthfully or untruthfully. Nor by granting the Commonwealth application for immunity has the Court expressed an opinion that the witness is testifying truthfully. Neither the Commonwealth nor this Court has

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[3/] "No defendant in any criminal proceeding shall be convicted solely on the testimony of, or the evidence produced by, a person granted immunity under the provisions of section twenty E."

any special knowledge of the truthfulness or untruthfulness of an immunized witness's testimony. Credibility of a witness is solely for you to decide.

Grounds for Request.

The SJC has repeatedly warned that "[t]estimony offered by a witness in exchange for the government's promise of a plea bargain or immunity should be treated with caution, lest the jury believe that the government has special knowledge of the veracity of the witness's testimony." *Commonwealth v. Marrero*, 436 Mass. 488, 500 (2002), citing *Ciampa*, 406 Mass. at 260-261. In *Ciampa*, the SJC established guidelines to minimize the possibility that the jury will believe the witness because the Commonwealth, in effect, has guaranteed the truth of the witness's testimony or vouched for the witness's credibility. *Id.*, citing *Ciampa*, 406 Mass. at 264-266. Among those guidelines are a specific and forceful instruction to the jury that the testimony of a witness under a plea or immunity agreement must be considered with particular care and caution, and that the Commonwealth does not have any special knowledge of the veracity of the witness's testimony. *See Marrero*, 436 Mass. at 501, 504 (setting out trial judge's "complete and comprehensive" instruction "for possible use" in future cases; judge instructed, *inter alia*:"When a witness testifies under a grant of immunity, the jury should be reminded that they must scrutinize her testimony with great care, that such a grant of immunity may influence a witness....The district attorney is not in a position to have any specialized knowledge or opinion about whether her testimony is truthful or not. You may not consider anyone else's opinion, whether it's a government official or anyone else...about whether her testimony is truthful or not").

REQUEST NO. 8 -- CREDIBILITY OF WITNESSES: PRIOR CONVICTIONS.

Hernandez requests that the Court instruct the jury specifically about any witnesses's prior convictions, as set forth at Instruction 3.680(II) of the Criminal Model Jury Instructions for Use in the District Court (2009):

You have heard evidence that Alexander Bradley, a witness called by the Commonwealth, has previously been convicted of a crime. You may consider that evidence, along with other pertinent evidence, in deciding whether or not to believe his testimony and how much weight, if any, to give to it.

Grounds for Request.

Conviction of a crime may be shown to affect the credibility of a witness. *See* G.L. c. 233, § 21. *See also Commonwealth v. Bohannon*, 376 Mass. 90, 93 (1978); *Commonwealth v. Leno*, 374 Mass. 716, 717 (1978). "The idea underlying G.L. c. 233, § 21, is that a conviction of a prior crime is a valid measure of the truthfulness of a witness, *i.e.*, willingness to violate the law translates to willingness to give false testimony...." *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 762-763 (1997).

The trial judge has the discretion to describe particular factors commonly used to assess witness credibility if she "informs the jurors that they are ultimate arbiters of credibility, and that it is for them to decide whether, and to what extent, [something] may affect credibility." *Commonwealth v. Thomas*, 439 Mass. 362, 366 (2003)(citation omitted). The Appeals Court has stated:

...[T]here should be no bar to additional specific instructions about classes of

> witnesses provided these do not create imbalance, or indicate the judge's belief or disbelief in the given witness, thereby ousting the jury from their authentic and traditional role as the sole arbiters of credibility....The trial judge, closer to the facts and the atmosphere than an appellate court, may be trusted with a discretion whether to stick with general instructions or to make a closer approach.

Commonwealth v. A Juvenile, 21 Mass. App. Ct. 121, 125 (1985)(citations omitted). *Cf. Commonwealth v. Burgos*, 462 Mass. 53, 74-75 (2012)(although agreement different from that in *Ciampa*, 406 Mass. 257, "preferable" to give "fuller and more cautionary instruction" regarding evaluation of cooperating witnesses' credibility), citing *Commonwealth v. Davis*, 52 Mass. App. Ct. 75, 78 (2001).

REQUEST NO. 9 -- CREDIBILITY OF WITNESSES: PENDING CHARGES.

Hernandez requests that the Court also instruct the jury specifically about any witnesses's pending criminal charges as indicative of bias. He proposes the following language:

You have heard evidence that Alexander Bradley is currently facing criminal charges. You may consider that evidence, along with other pertinent evidence, in deciding whether or not to believe his testimony and how much weight, if any, to give to it. Specifically, you may consider whether his pending criminal charges gives him motivation to provide testimony consistent with the Commonwealth's theory of the case.

Grounds for Request.

"Cross-examination of a prosecution witness to show the witness's bias or prejudice is a matter of right under the Sixth Amendment to the Constitution of the United States and art. 12 of the Declaration of Rights of the Commonwealth." *Commonwealth v. Meas*, 467 Mass. 434, 449 (2014)(citation omitted). If there is a possibility of bias, even a remote one, the trial judge has no discretion to bar all inquiry into the subject. *Id.* (citation omitted).

The defendant has the constitutional right to question a witness about pending criminal charges in order to those his or her motive in cooperating with the prosecution. *Meas*, 467 Mass. at 450. *See Commonwealth v. Connor*, 392 Mass. 838, 841, 467 N.E.2d 1340 (1984). *See also Davis v. Alaska*, 415 U.S. 308, 317-318 (1974). Even if no promises have been made to a witness concerning the pending charges, it is enough that a prosecution witness is hoping for favorable treatment to justify inquiry. *Meas*, 467 Mass. at 450 (citation omitted). *See Commonwealth v. Henson*, 394 Mass. 584, 587 (1985).

REQUEST NO. 10 -- CREDIBILITY OF WITNESSES: LAW ENFORCEMENT.

Hernandez requests that the Court instruct the jury as follows with regard to its assessment of the credibility of law enforcement-witnesses. The proposed language is adapted from Instruction 3.640 (Expert Witness) of Criminal Model Jury Instructions for Use in the District Court (2009):

You have heard from a number of witnesses who work in law enforcement. Merely because a witness works in law enforcement does not mean that you must accept his or her testimony as credible. As with any other witness, it is up to you to decide whether or not to believe a law enforcement witness and to decide what weight, if any, to give his or her testimony. In making your assessment, you should consider the factors that generally bear upon credibility as I have described them to you.

Grounds for Request.

Under such cases as *Commonwealth v. A Juvenile*, 21 Mass. App. Ct. 121, 125 (1985), the trial judge has the discretion to provide specific, balanced instructions about classes of witnesses. The request for an instruction that a law enforcement official's testimony is not to be accorded any greater weight or credibility is regarded "a garden variety request [which] remains discretionary with the judge." *Commonwealth v. Whitlock*, 39 Mass. App. Ct. 514, 521 (1995). Furthermore, in the context of *voir dire*, the SJC has advised that the trial judge should ordinarily "comply with a defendant's request to ask prospective jurors whether they give greater credence to police officers...." *Commonwealth v. Sheline*, 391 Mass. 279, 291 (1984). Such an inquiry was made during the jury selection process in the instant case.

REQUEST NO. 11 -- OBJECTIONS BY COUNSEL.

Hernandez requests that the Court instruct the jury about the duty of counsel to raise objections and the jury's obligation to refrain from speculating about answers which were excluded. He proposes this language, derived from Instruction 2.140 (Function of Counsel) and Instruction 3.620(I) (Excluded Question) of the Criminal Model Jury Instructions for the Use in the District Court (2009):

It was the duty of the lawyers in this case to object when the other side offered evidence which they believed was not admissible under our rules of evidence. They also had an obligation to ask to speak to me at the judge's bench about questions of law, which the law requires me to rule on out of your hearing.

The purpose of such objections and rulings is not to keep relevant information from you. Just the opposite: it is to make sure that what you hear is relevant and admissible, and that the evidence is presented in a way that gives you a fair opportunity to evaluate its worth.

You should not draw any inference, favorable or unfavorable, to the attorneys or their clients for objecting to proposed evidence or asking me to make such rulings. That is the function and responsibility of the attorneys here.

During this trial, I have "sustained" many objections -- that is, I have not allowed the witnesses to answer questions put to them. You are to disregard those questions and you must not speculate or guess about what the answers might have been. An unanswered question is not evidence. Similarly, if the answer to a question was ordered stricken by me after it was given, you must disregard that answer entirely. Just put it out of your mind.

Please note also that a lawyer's question itself, no matter how artfully phrased, is not

any evidence. A question can only be used to give meaning to a witness's answer. If a question included any suggestions or insinuations, you are to ignore them unless I permitted the witness to answer and the witness confirmed those suggestions.

All of this comes down to a simple rule: testimony comes from the witnesses, not from the lawyers.

Grounds for Request.

The trial judge has the discretion to determine what action is necessary and appropriate to protect the defendant's rights when the jury is exposed to potentially-prejudicial information. *Commonwealth v. Paradiso*, 368 Mass. 205, 208, 210 (1975)(where statutory violation did not require mistrial, judge had discretion to declare mistrial or take other action, including cautionary instruction, to protect defendant's rights thereunder).[4/] *See Commonwealth v. Repoza*, 382 Mass. 119, 131 (1980)(judge properly instructed that content of leading questions not evidence and must be disregarded unless and until proved). The mitigating effect of forceful cautionary instructions cannot be overstated. *See Commonwealth v. Cobb*, 374 Mass. 514, 521 (1978)(in reversing defendant's conviction, observing that inadmissible testimony and improper argument reached "jury with full force and without the potentially countervailing influence of prompt and forceful cautionary

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[4/] In *Paradiso*, the SJC approved an instruction which cautioned in part: "...[I]t is the lawyer's obligation to defend his client or to prosecute a case to the best of his ability; and there have been a lot of objections and exceptions and matters have been stricken. All of that is the law's way of providing an orderly trial. But I remind you that the only thing which you are to consider at the questions asked and answered, the testimony that you hear in this courtroom, the exhibits, and your observation of the witnesses as they testify. You are to take no other matters into consideration. The fact that the lawyers object or that matters are objected to and excluded is no part of your fact-finding function." 368 Mass. at 208 n. 2.

instructions by the judge...To the contrary, the judge's rulings against the defendant allowed the judicial imprimatur to attach to the inferences of guilt").

Hernandez submits that the jury should be told that it must not draw any adverse inference from counsel's objections, and that it is not to speculate as to the answers to question which were excluded. In light of the number of objections which have been made and sustained during this trial, there is a real risk that the jury will be inclined to so speculate. A cautionary instruction is necessary and appropriate to protect Hernandez's rights.

REQUEST NO. 12 -- FURTHER REMEDIAL INSTRUCTION REGARDING KYLE ASPINWALL'S STRICKEN TESTIMONY.

Pursuant to the discretion afforded by cases like *Paradiso*, 368 Mass. 205 (1975), Hernandez requests that the Court provide further remedial instructions in its final charge on the jury's duty to disregard that portion of the testimony of Kyle Aspinwall which has been struck. Hernandez proposes the following language, derived from Instruction 3.620(II) of the Criminal Model Jury Instructions for Use in the District Court (2009):

You will recall that I ordered some of Commonwealth witness Kyle Aspinwall's testimony stricken from the record the day after he presented that testimony on direct examination. Specifically, I ordered stricken his opinion identifying the object the defendant appears to be holding in portions of the home surveillance video insofar as that opinion was based upon the rear of the slide, the front strap, the trigger guard, or anything other than the back strap. That testimony is no longer in evidence. You must disregard it.

I recognize that it is a difficult thing for you to put out of your mind something that you have heard or seen. But please keep in mind why we have rules of evidence. They are not to keep evidence from you, but to make sure that all the evidence before you is presented is reliable and that you are in a fair position to be able to assess its truth. If I strike something from the record, it is because it would be unreliable or misleading for you to rely on it in that form.

It is your sworn duty not to consider information that has been stricken from the record in deciding this case.

REQUEST NO. 13 -- FIRST DEGREE MURDER WITH DELIBERATE PREMEDITATION.

Hernandez requests that the Court instruct the jury as to first degree murder with deliberate premeditation. Specifically, he proposes the following language, derived from the Model Jury Instructions on Homicide (2013) at 36-42:

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 this theory: murder with deliberate premeditation. To find the defendant guilty of murder in the first degree by deliberate premeditation, you must be unanimous; that is, all the deliberating jurors must agree that the Commonwealth as met its burden of proving every required of the theory beyond a reasonable doubt.

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 Lloyd's death.**
3. **The defendant committed the killing with deliberate premeditation; that is, he decided to kill after a period of reflection.**

The first element is that the defendant caused the death of Odin Lloyd. A defendant's act is the cause of a victim'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 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.

REQUEST NO. 14 -- SECOND DEGREE MURDER.

An unlawful killing that is not murder in the first degree is murder in the second degree. G.L. c. 265, § 1. The jury must determine the degree of murder. *Id.* Where there is evidence of malice that would support a conviction for second degree murder, an instruction on second degree murder is appropriate. *Commonwealth v. Paulding*, 438 Mass. 1, 10 (2002).

Hernandez is entitled to an instruction on second degree murder. The jury should therefore be instructed that the Commonwealth must prove beyond a reasonable doubt that **he caused the death of Odin Lloyd and that he either intended to kill Lloyd or intended to cause grievous bodily harm to Lloyd.** *See* Model Jury Instructions on Homicide (2013) at 57. Intent to kill should be defined in a manner consistent with that required to convict for first degree murder with deliberate premeditation -- "the defendant consciously and purposefully intended to cause Lloyd's death." *See* Model Jury Instructions on Homicide (2013) at 37. Grievous bodily harm means severe injury to the body. *See* Model Jury Instructions on Homicide (2013) at 45.

Hernandez objects to an instruction on "third-prong malice," which allows the jury to convict on a finding that he "intended to do an act which, in the circumstances known to [him], a reasonable person would have known created a plain and strong likelihood that death would result." *See* Model Jury Instructions on Homicide (2013) at 45 (first degree murder by extreme atrocity or cruelty), 57 (second degree murder). *See also Commonwealth v. Grey*, 399 Mass. 469, 470 n. 1 (1987). Third-prong malice does not require that a defendant possess a morally culpable state of mind when committing the act which results in a death. This violates a fundamental principle of the criminal law that "'criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.'" *Commonwealth v. Matchett*, 386 Mass. 492, 507 (1982),

quoting *People v. Aaron*, 299 N.W.2d 304, 409 Mich. 672, 708 (1980). *See Morissette v. United States*, 342 U.S. 246, 250-251 (1952)("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil")(footnote and citation omitted). In *Matchett*, the SJC modified the felony-murder rule so that a conviction of felony-murder in the second degree based upon the crime of extortion required that the defendant must act with a conscious disregard of the risk to human life. 386 Mass. at 507-508. *See also Commonwealth v. Catalina*, 407 Mass. 779, 785-786 (1990)(relying on fundamental principle to abolish "unlawful act" manslaughter). Hernandez submits that adherence to this fundamental principle should result in the abolition of third-prong malice.

Furthermore, third-prong malice and involuntary manslaughter are nearly indistinguishable. The definitions of these concepts provide the jury no clear guidance in choosing between the two, and allows it to make essentially legislative judgments about what is and is not murder. As such, third-prong malice is unconstitutionally vague, and instruction on the concept would violate Hernandez's federal and state constitutional due process rights. *See Commonwealth v. Vizcarrando*, 427 Mass. 392, 396-397 (1998)(where trial judge erroneously instructed on third-prong malice, observing that conviction of murder upon mental state sufficient only to support manslaughter conviction violates due process, as well as principle that criminal liability should be proportionate to moral culpability), citing, *inter alia*, *Matchett*.[5/]

[5/] Hernandez recognizes that the SJC declined to abolish third-prong malice in *Commonwealth v. Riley*, 433 Mass. 266, 273 (2001).

REQUEST NO. 15 -- NO INFERENCE OF MALICE FROM USE OF FIREARM.

Hernandez hereby objects to an instruction that the jury may 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. *See* Model Instructions on Homicide (2013) at 92. The instruction, though permissive, diminishes the Commonwealth's burden of proving malice beyond a reasonable doubt and is thus unconstitutional under the Fifth and Sixth Amendments and Article XII. *See Sandstrom v. Montana*, 442 U.S. 510, 518-519 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). *See also Commonwealth v. Callahan*, 380 Mass. 821, 822-825 (1980).[6/]

[6/] Hernandez recognizes that the SJC has held that such an instruction, as long as the words "you are permitted to infer" are used, is not improper. *See Commonwealth v. Tu Trinh*, 458 Mass. 776, 784-785 (2011)(collecting cases).

REQUEST NO. 16 -- DEFENDANT MUST HAVE ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARM.

Hernandez objects to any instruction to the jury that he may be found guilty on the firearms charge in the absence of evidence that he actually or constructively possessed the firearm. That is to say, the jury should not be permitted to convict him as a "joint venturer" on that charge. *See* Instruction 3.220 to the Criminal Model Jury Instructions for Use in the District Courts (2009)(defining actual and constructive possession). *See also* Supplemental Instruction 3 to Instruction 7.600 to the Criminal Model Jury Instructions for Use in the District Courts ("Merely being present in a motor vehicle in which a [firearm] is found is not sufficient by itself to permit an inference that the person knew about the presence of the [firearm] without other indications of knowledge").

REQUEST NO. 17 -- INTOXICATION.

Hernandez requests that the Court instruct the jury as to its consideration of intoxication on the Commonwealth's ability to prove beyond a reasonable doubt that he possessed the requisite intent or malice and acted with deliberate premeditation. In accord with Instruction 9.180(I) of the Criminal Model Jury Instructions for Use in the District Court (2009) and the Model Jury Instructions on Homicide (2013) at 21-22, he proposes the following language:

In deciding whether the Commonwealth has proved beyond a reasonable doubt that Hernandez intended to kill Lloyd and whether he formed that intent with deliberate premeditation -- that is, whether the defendant thought before he acted and whether he reached a decision to kill after reflection, you may consider any credible evidence that the defendant was affected by his consumption of alcohol or drugs. A defendant may form the required intent and act with deliberate premeditation even if he consumed alcohol or drugs, but you may consider such evidence in determining whether the Commonwealth has proved these elements of first degree murder with deliberate premeditation beyond a reasonable doubt.

Similarly, in deciding whether the Commonwealth has proved beyond a reasonable doubt that Hernandez intended to kill or to cause grievous bodily injury to Lloyd, you may consider any credible evidence that the defendant was affected by his consumption of alcohol or drugs. A defendant may form the required intent and act with deliberate premeditation even if he consumed alcohol or drugs, but you may consider such evidence in determining whether the Commonwealth has proved these elements of second degree murder beyond a reasonable doubt.

Grounds for Request.

Where the Commonwealth must prove intent, knowledge, deliberate premeditation, or extreme atrocity or cruelty, and there is evidence tending to show that the defendant was under the influence of alcohol or drugs at the time of the crime, the trial judge should instruct the jury, upon request, that it may consider evidence of the defendant's intoxication in deciding whether the Commonwealth has proved the requisite mental states beyond a reasonable doubt. *See Commonwealth v. Henson*, 394 Mass. 584, 592-594 (1985)(intent and deliberate premeditation). *See also Commonwealth v. Sama*, 411 Mass. 293, 299 (1991)(knowledge); *Commonwealth v. Perry*, 385 Mass. 639, 649 (1982)(extreme atrocity or cruelty). *See generally Commonwealth v. Sires*, 413 Mass. 292, 300-301 (1992)(outlining recommended instruction).[7/] The failure to give an instruction on intoxication where one is warranted constitutes reversible error. *See, e.g., Commonwealth v. Gonzalez*, 469 Mass. 410, (2014). Hernandez submits that evidence of his intoxication raises a reasonable doubt as to whether he was capable of forming the requisite mental states for convictions of the crimes charged.

7/ Hernandez's position is that no instruction on first degree murder with extreme atrocity or cruelty is warranted. *See infra*. However, if the Court disagrees, the jury must be instructed that intoxication is bears not only on the defendant's intent and knowledge, but also on the question of whether he acted with extreme atrocity or cruelty. *Perry*, 385 Mass. at 649.

Hernandez has also objected to an instruction on third-prong malice. *See supra*. If the Court disagrees, the jury must be informed that intoxication likewise bears on the question of whether he had sufficient knowledge of the circumstances to realize that, by his actions, he created a plain and strong likelihood that death or grievous bodily injury would result therefrom. *Sama*, 411 Mass. at 296-297.

REQUEST NO. 18 -- NO INSTRUCTION ON FIRST DEGREE MURDER BY EXTREME ATROCITY OR CRUELTY.

Hernandez hereby objects to an instruction on the theory of first degree murder by extreme atrocity or cruelty.

A. Summary of Applicable Law.

To submit this theory to the jury, the evidence "must be of such a character as to show that the crime was committed under circumstances indicating something more than ordinary atrocity or cruelty, manifesting a degree of atrocity or cruelty which must be considered as aggravated and extreme." *Commonwealth v. Eisen*, 358 Mass. 740, 746 (1971). This is because every killing invariably includes some degree of atrocity or cruelty. *Commonwealth v. Linton*, 456 Mass. 534, 537 (2010). Rather, the Commonwealth must prove beyond a reasonable doubt the presence of one or more of the *Cunneen*, 389 Mass. 216, 227 (1983), factors: (1) the defendant was indifferent to or took pleasure in the victim's suffering; (2) the consciousness and degree of suffering of the victim; (3) the extent of the victim's physical injuries; (4) the number of blows inflicted on the victim; (5) the manner and force with which the blows were delivered; (6) the nature of the weapon, instrument, or method used in the killing; and (7) the disproportion between the means needed to cause death and those employed. *Linton*, 456 Mass. at 536 & n. 10. *See Commonwealth v. Hunter*, 416 Mass. 831, 836-837 (1994).

The SJC has recently deemed evidence of extreme atrocity or cruelty insufficient in a case where the victims were killed by two or three shots to the head, respectively, fired at close range, absent evidence of extensive wounding or significant disproportion between the means necessary to cause death and those used. *Commonwealth v. Santana*, 465 Mass. 270, 296 (2013), citing

Commonwealth v. Brown, 386 Mass. 17, 28 n. 11 (1982)(trial judge properly declined to instruct on theory where victim killed by gunshot to the head but no other signs of injury). *Contrast, e.g.*, *Commonwealth v. Alicea*, 464 Mass. 837, 853 (2013)(evidence sufficient where victim fired upon as many as five times while he fled, ultimately suffering multiple wounds, including to head; furthermore, defendant smiled and then frowned when victim fell to ground).

B. Application of Law to Facts.

Hernandez submits that the evidence was insufficient to prove any of the *Cunneen* factors beyond a reasonable doubt. Consistent with the SJC's rationale in *Santana*, 465 Mass. at 296, multiple gunshots, without more, does not elevate the ordinary degree of atrocity or cruelty "to aggravated and extreme," *see Eisen*, 358 Mass. at 746. Thus, the Court should decline a request for an instruction on the theory of first degree murder by extreme atrocity or cruelty.[8/]

[8/] In denying Hernandez's motion to dismiss, the Court cited *Commonwealth v. Anderson*, 445 Mass. 195, 201 (2005), observing that "[e]ven a single gunshot may be sufficient to establish extreme atrocity or cruelty where the victim is shot at close range and has some awareness of what is about to happen to him." Memorandum of Decision and Order, 2014 WL 3738592, *4 (July 24, 2014)("Here, given the position of the body when at least some of the shots were fired and the number of shots fired, there was probable cause to return a first degree murder indictment on extreme atrocity or cruelty"). Of course, the grand jury was guided by a lesser standard than proof beyond a reasonable doubt. Moreover, there was no evidence comparable to that introduced in *Anderson*. 445 Mass. at 201-202 (between five minutes of defendant's approach and shooting, victim was terrified and pleaded for mercy; victim was shot in the face at point-blank range beneath right eye causing such extensive injuries that first witnesses were unsure what caused them; distance of blood spatter and evidence that victim was reaching for doorknob suggested he was kneeling and trying to escape; following shooting, defendant bragged that he "murked" the victim and "got my body for the summer"). *Anderson* is thus inapposite.

C. Additional Legal Bases for Objection to Extreme Atrocity or Cruelty Instruction.

Recently, several Justices of the SJC have recommended revisiting the jurisprudence on extreme atrocity or cruelty, questioning whether it is permissible for a defendant to be convicted under this theory if he did not intend to commit an extremely atrocious or cruel death and was not indifferent to the victim's extraordinary or prolonged suffered. *See Commonwealth v. Berry*, 466 Mass. 763, 774-778 (2014)(Gants, J., concurring, with whom Ireland, C.J. and Duffly, J., joined). In *Berry*, the Court reduced the defendant's conviction of first degree murder with extreme atrocity or cruelty to second degree murder in light of the defendant's mental illness and tumor, which, it was persuaded, affected her conduct in a manner that impacted the determination of whether she committed the murder with extreme atrocity or cruelty. 466 Mass. at 772-773. *See Commonwealth v. Gould*, 380 Mass. 672, 684-685 (1980)(mental illness should be considered in determining whether defendant committed murder with extreme atrocity or cruelty).

The concurring Justices wrote separately because the case "reveal[ed] an apparent inconsistency in [Massachusetts] common law of homicide that [the Court] should confront when the issue next arises, *i.e.*, whether a defendant's state of mind must be considered in determining whether a murder is committed with extreme atrocity or cruelty." *Id.* at 778. Under the common law as it now stands, a defendant may be found guilty of murder in the first degree with extreme atrocity or cruelty regardless of whether he or she intended that the murder be extremely atrocious or cruel. *Id.* at 777. Indeed, only the first *Cunneen* factor (that the defendant was indifferent to or took pleasure in the suffering of the victim) addresses the defendant's state of mind. The remaining six factors look only to the manner of killing. *Id.* The concurring Justices explained, at length:

> If, as we conclude today, a verdict of murder in the first degree based on extreme atrocity or cruelty is not consonant with justice because of the defendant's mental disorder, perhaps we should require that a defendant's state of mind always be considered in determining whether a killing is committed with extreme atrocity or cruelty, and not limit such consideration to cases where a defendant had a mental impairment or was under the influence of alcohol or drugs. If the reason such a defendant may be less criminally culpable is based on the defendant's inability to intend to commit an extremely atrocious or cruel murder, then perhaps a defendant who does not intend to commit such an act should not be convicted of murder in the first degree on that theory. Perhaps we should join those States that, by statute or common law, will not permit a finding that a killing was aggravated by extreme atrocity or cruelty (or comparable terms of art) unless the defendant intended that the victim suffer a torturous death or was indifferent to the victim's extreme suffering.... And perhaps the *Cunneen* factors are not a fair measure to distinguish between murder in the first degree and murder in the second degree where they permit a finding of extreme atrocity or cruelty even where the defendant did not intend to commit an extremely atrocious or cruel death and was not indifferent to the victim's extraordinary or prolonged suffering.

Id. at 777-778 (collection of authorities from other jurisdictions omitted). *See Commonwealth v. Riley*, 467 Mass. 799, 828-829 (2014)(Duffly, J., concurring)(suggesting that Court impose requirement that defendant either intended to cause an extremely atrocious or cruel death or was indifferent to such result before conviction of murder may be elevated to murder in the first degree based on this theory). Consistent with the concurrences in *Berry* and *Riley*, if this Court decides that an instruction on this theory is warranted, **it should instruct the jury that the Commonwealth must prove beyond a reasonable doubt that the defendant intended to cause an extremely atrocious or cruel death or was indifferent to such a result.** The Court should eliminate from the Model Instruction all but the first of the *Cunneen* factors.

If the Court decides that an instruction on this theory is warranted and listing the *Cunneen* factors is appropriate, Hernandez requests that the jury also be instructed that it must be unanimous as to the specific factor found beyond a reasonable doubt. A requirement of specific unanimity

comports with the rights to trial by jury and conviction upon proof beyond a reasonable doubt, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article XII to the Massachusetts Declaration of Rights.[9/]

Lastly, Hernandez objects to an instruction on this theory because it is unconstitutionally vague and therefore violates his federal and state constitutional due process rights. Again, he recognizes that the SJC has rejected this claim. *Moses*, 436 Mass. at 605-607. He raises the claim to preserve it for further review.

[9/] Hernandez recognizes that the SJC has previously rejected this argument. *Commonwealth v. Moses*, 436 Mass. 598, 605-607 (2002). However, it does not appear that the SJC has revisited the issue since the Supreme Court's decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013). In *Commonwealth v. Denehy*, 466 Mass. 723 (2014), while declining to hold that *Alleyne* required the jury to find beyond a reasonable doubt facts bearing on restitution, the SJC interpreted that decision as follows:

> Under *Apprendi*, 530 U.S. [466, 490 (2000)], and its progeny, certain factual determinations relevant to sentencing must be found by a jury beyond a reasonable doubt. The Supreme Court has interpreted this to include any fact that aggravates the punishment, either by raising the floor or the ceiling, such that "the fact necessarily forms a constituent part of a new offense" or "alters the prescribed range of sentences to which a criminal defendant is exposed." *Alleyne*, 133 S.Ct. at 2160, 2162–2163....Once the jury has found the facts needed to establish the statutory sentencing limits, the judge may exercise discretion within this range. *See* [*Southern Union Co. v. United States*, 132 S.Ct. 2344, 2353, 2355 (2012)]("court [may] select a fine from within the maximum authorized by jury-found facts"). **In this context, we read the *Apprendi* line of cases to mean that where relevant facts would either identify or shift the legislatively prescribed sentencing parameters that the judge will employ, those facts must be found by a jury beyond a reasonable doubt in order to satisfy a criminal defendant's Sixth Amendment right to a jury trial.**

466 Mass. at 736-737 (*emphasis supplied*).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by delivering a copy, in hand, to: William McCauley, Assistant District Attorney, Bristol County, 888 Purchase Street, New Bedford, MA 02740 on April 2, 2015.

James L. Sultan