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BRISTOL, SS SUPERIOR COURT
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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

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

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR REQUIRED FINDING OF
NOT GUILTY ON INDICTMENTS 2013-983-1 AND 2013-983-2
AT THE END OF THE COMMONWEALTH'S CASE**

I. SUMMARY OF APPLICABLE LAW.

Permitting a jury to convict a defendant of a criminal offense based on insufficient evidence violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article XII of the Massachusetts Declaration of Rights. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *Commonwealth v. Latimore*, 378 Mass. 671, 676-678 (1979). The operative test under both federal and state law is whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could find that the Commonwealth proved beyond a reasonable doubt every essential element of the crime charged. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Commonwealth v. Forte*, 469 Mass. 469, 481 (2014).

While sufficiency of the evidence is necessarily a case-specific inquiry, a number of general principles have emerged. In order to pass this constitutional test, “[a] conviction may not rest upon

the piling of inference upon inference or on conjecture or speculation.” *Commonwealth v. Kelly*, 470 Mass. 682, 693 (2015). “If a rational jury necessarily would have had to employ conjecture in choosing among the possible inferences from the evidence presented, the evidence is insufficient to sustain the Commonwealth’s burden of proving guilt beyond a reasonable doubt.” *Kelly*, 470 Mass. at 693-694, quoting *Commonwealth v. Rodriguez*, 456 Mass. 578, 582 (2010) (*internal quotations omitted*).

It is well-settled that proof of a defendant’s presence at the scene of a crime and association with the principals is insufficient to support a conviction. Indeed, such evidence is insufficient to establish probable cause, much less proof of guilt beyond a reasonable doubt. *Commonwealth v. Ilya, A Juvenile*, 470 Mass. 625, 631 (2015) (probable cause not established); *see also Commonwealth v. Morris*, 422 Mass. 254, 257-258 (1996) (presence of plastic mask with defendant’s thumb print left at shooting scene insufficient to establish guilt); *Commonwealth v. Mazza*, 399 Mass. 395, 399 (1987) (proof of presence insufficient to convict since jury would have to engage in “impermissible conjecture or surmise.”).

In *Commonwealth v. Salemme*, 395 Mass. 594 (1985), there was evidence that the defendant was present at the scene of the murder and had an opportunity to commit the crime. There was also evidence of consciousness of guilt on the part of the defendant. 395 Mass. at 598. Nevertheless, the Supreme Judicial Court deemed that evidence insufficient to support a conviction. *Id.* at 602. *Salemme* illustrates the principle that “where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury *must necessarily entertain* a reasonable doubt.” *O’Laughlin v. O’Brien*, 568 F.3d 287, 301 (1st Cir. 2009) (*emphasis in original*).

None of this constitutional precedent was altered by the SJC's decision in *Commonwealth v. Zanetti*, 454 Mass. 449, 469 (2009), which effectively merged the concepts of principal and joint venture liability into a single definition of criminal culpability. Under *Zanetti*, as the SJC recently explained: "The Commonwealth [has] to prove that the defendant knowingly participated in the commission of the crime charged and that the defendant had or shared the required criminal intent."

Commonwealth v. Simpkins, 470 Mass. 458, 461 (2015). Post-*Zanetti*, as pre-*Zanetti*:

Mere knowledge that a crime is to be committed is not sufficient to convict the defendant.... Mere presence at the scene of the crime is not enough to find 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.... 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.

Zanetti, 454 Mass. at 470 [Appendix].

After *Zanetti*, sufficient proof of criminal culpability for a substantive crime remains separate and distinct from sufficient proof of culpability for the crime of being an accessory-after-the-fact to that substantive crime. The distinction is clearly delineated in *Simpkins*. In that case, the victim was shot to death on the front porch of his residence by two assailants. *Simpkins* and others were charged with first degree murder, and *Simpkins* was also charged (and convicted) as an accessory after the fact. There was evidence about an incident a week before the shooting which involved, among others, the victim and *Simpkins*. The same car involved in that incident was observed on the victim's street shortly before the shooting. *Simpkins*' fingerprints were found on that car, which was registered to the brother of a co-defendant identified as one of the two shooters. There was evidence that, shortly before the shooting, a group of individuals, including *Simpkins*, got out of that car and

went into Simpkins' home, which was near the victim's residence. There was evidence that immediately after the shooting, the assailants fled to Simpkins' residence, and that he assisted in concealing the firearms used in the shooting. *Simpkins*, 470 Mass. at 460.

The Court held that this evidence was insufficient to survive Simpkins' motion for a required finding of not guilty on the murder charge. With respect to the prior incident, the Court found: "There is insufficient evidence about the nature of the encounter one week before the shooting to imply an intent to kill or even a motive to kill on the part of anyone involved." *Simpkins*, 470 Mass. at 461. The Court further found a lack of evidence that "suggests knowing participation by the defendant in the shooting itself or the planning thereof." *Id.* at 461-462.

With respect to Simpkins' post-shooting conduct in providing refuge to the shooters and helping to conceal their weapons, the Court stated:

The defendant's role in hiding the murder weapons occurred after the commission of the crimes and explains his indictment charging him with being an accessory-after-the-fact. The Commonwealth presented no fact which could prove beyond a reasonable doubt that such involvement was contemplated prior to the shooting.... that the defendant gave aid and assistance to the shooters in their escape is true, but this conduct was correctly charged as accessory-after-the-fact, not as "aiding and abetting."

The Court then explained that the Commonwealth's effort to blur the distinction rested on a misreading of *Zanetti*:

The Commonwealth's argument parses our holding incorrectly for purposes of imposing liability under *Zanetti* for the crime of murder. In the jury instruction provided in that case, we said liability can be imposed on participation in a crime when the conduct "take[s] the form of *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." (*emphasis added* [by SJC]). *Id.* at 470 (Appendix).

The Court in *Simpkins* then emphasized the very holding of *Zanetti* that is quoted earlier in this memorandum rejecting the view that presence and knowledge are sufficient to prove knowing participation:

We went on to state: “mere knowledge that a crime is to be committed is not sufficient to convict the defendant.... Mere presence at the scene of the crime is not enough to find 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.... 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.”

Id. at 462. The Court concluded:

The close proximity of the shooters to the defendant’s home prior to the murder and their flight simply do not support a finding beyond a reasonable doubt of any express or implied agreement by the defendant before or during the commission of the crime to act in concert during or after the shooting. Accordingly, as a matter of law, the Commonwealth did not satisfy its burden of proof.

Id. at 462-463. *Simpkins* thus makes crystal clear that *Zanetti* preserved, indeed, reinforced, the important distinction between proof of joint participation in the crime itself and proof of providing assistance to the principal in the immediate aftermath of the crime.

II. WHAT THE COMMONWEALTH HAS AND HASN’T PROVED.

A. What the Commonwealth Has Proved.

Considering the evidence in the light most favorable to the Commonwealth, the jury **could** find the following alleged facts to be proved beyond a reasonable doubt:¹

- Aaron Hernandez and Odin Lloyd socialized together.

¹ This does not purport to be a comprehensive recitation of the evidence presented during this lengthy trial, but rather the most salient points. Of course, the jury could also find that some or all of these alleged facts have not been proven.

- Lloyd supplied Hernandez with marihuana.
- Hernandez and Lloyd socialized together on the night of June 14-15, 2013 at Rumor and at an apartment in Franklin. Hernandez was armed with a handgun outside of Rumor.
- Ernest Wallace was a close friend of Hernandez.
- On June 15-16, 2013, Hernandez urged Wallace to return to Massachusetts.
- On the evening of June 16, 2013, Hernandez contacted Lloyd about meeting up and going out again that night.
- Shortly after midnight on the morning of June 17, Wallace and Carlos Ortiz arrived at Hernandez's residence.
- Hernandez and Shayanna Jenkins arrived at their residence at approximately 12:30 a.m. after a social engagement. Hernandez was carrying a handgun when he came into the house.
- Hernandez, Wallace, and Ortiz left Hernandez's residence together in a rented Nissan Altima. Wallace was driving when they left.
- The three men stopped at gas station/convenience store. Hernandez was driving at that time. The Altima proceeded to Boston, where Lloyd was picked up outside his home at approximately 2:30 a.m. Hernandez was driving at that time.
- The Altima proceeded to Corliss Landing in the North Attleboro Industrial Park, arriving at approximately 3:20 a.m.
- Lloyd was shot five or six times with a Glock .45 caliber semi-automatic pistol at that location and died from his wounds.
- Hernandez, Wallace, and Ortiz proceeded in the Altima to Hernandez's home located less than a mile away from Corliss Landing, arriving at approximately 3:30 a.m.
- Within five minutes of arriving home, Hernandez is observed on home surveillance video holding a Glock pistol of unknown caliber.

- In the late afternoon of June 17th, Hernandez returned the Altima to Enterprise Rental Car and rented a Chrysler 300. Shortly thereafter, Wallace and Ortiz left Hernandez's residence in that Chrysler 300.
- Hernandez had frequent cell phone contact with Wallace in the days following Lloyd's death.
- Wallace traveled with Tanya Singleton and Euna Ritchon by car from Bristol, Connecticut to Georgia several days after Lloyd was killed. Wallace then traveled by bus from Georgia to Miami, Florida, where he turned himself in to local law enforcement authorities on an arrest warrant.
- Shortly after midnight on June 18, 2013, while Hernandez was at the North Attleboro Police Station, he asked his fiancé, Shayanna Jenkins, to meet with Wallace and give him money. Jenkins contacted Wallace, met him in East Greenwich, RI, and gave him \$500.00.
- Later on June 18th, Hernandez asked Jenkins to locate a large box in a storage area of their basement and dispose of it. Jenkins found the box, put it into a trash bag, and drove it to a nearby dumpster, where she left it.
- Hernandez provided canteen money for his cousin, Tanya Singleton, while she was incarcerated for contempt after refusing to testify before a grand jury investigating Lloyd's death.
- Hernandez possessed one or more handguns in his home at various times.
- Hernandez possessed a box of .22 caliber ammunition in his home on June 22, 2013.
- A marijuana cigarette containing a mixture of Lloyd's DNA and Hernandez's DNA was found near Lloyd's body at Corliss Landing.
- A shoe print which could have been made by the shoes Hernandez was wearing on the morning of June 17, 2013 was found near Lloyd's body.
- A tire track found near Lloyd's body at Corliss Landing was made by the right rear tire of the Altima.
- A shell casing found in the Altima upon its return to Enterprise matched five shell casings recovered from the scene (they were all discharged from the same firearm). The four recovered projectiles also matched, indicating that they had been fired from the same firearm.

- Hernandez could not be excluded as a contributor to DNA found on the shell casing that was in the Altima. That casing was physically attached to a wad of chewed bubblegum when it was recovered by police. The gum was a likely source of the DNA recovered from the casing. No DNA was found on any of the five shell casings recovered from the scene.
- A .22 caliber handgun was found by police on June 19, 2013 in a wooded area located between Corliss Landing and Hernandez's residence. That handgun was purchased by Gion Jackson in Belle Glade, Florida in April 2013.
- In February 2013, Hernandez examined a black pistol that looked like a Glock brought to a hotel room by someone else in West Palm Beach, Florida.
- A Toyota Camry was purchased in Florida by Oscar Hernandez (no relation to Aaron Hernandez) in April 2013. That vehicle was shipped to Aaron Hernandez's home in late April and was in Hernandez's garage through June 22, 2013, inclusive.
- In April 2013, Hernandez transferred \$15,000.00 to Oscar Hernandez.
- The police searched for a sweatshirt Hernandez was wearing on June 17th, the shoes Hernandez, Wallace and Ortiz were wearing that night, and for a murder weapon, all to no avail.

B. What the Commonwealth Has Failed to Prove.

Even considering the evidence in the light most favorable to the prosecution, the Commonwealth has failed to present sufficient evidence to prove any of the following beyond a reasonable doubt:

- Any motive whatsoever for Hernandez to kill Lloyd or want him to be killed.
- Any intent by Hernandez to kill Lloyd.
- Any plan by Hernandez to kill Lloyd.
- Any agreement by Hernandez to provide aid or assistance to others in murdering Lloyd or in escaping if such help became necessary.
- Any knowing participation by Hernandez in the killing of Lloyd.

- Any possession by Hernandez of a .45 caliber handgun outside his home on June 17, 2013 (as alleged in Indictment No. 002 and the accompanying bill of particulars).

III. APPLICATION OF LAW TO FACTS.

Determining whether the Commonwealth has presented sufficient evidence to permit any trier of fact to find every essential element of the crimes charged beyond a reasonable doubt is necessarily a fact-bound inquiry. No trial is exactly like any other trial, so legal precedent in this area tends to be persuasive, rather than dispositive. Nevertheless, a close analysis of the mountain of evidence introduced by the Commonwealth at this trial places this case squarely within the *Salemme*, *Mazza*, *Morris*, and *Simpkins* line of precedent. As in *Salemme*, *Mazza*, and *Morris*, there was evidence placing the defendant at the scene of the crime so he **could** have been the perpetrator. As in *Salemme*, there was evidence of consciousness of guilt. As in *Simpkins*, there was evidence that the defendant assisted others after the shooting and took steps to conceal or destroy evidence. As in all of those cases, there was plenty of evidence pointing to the defendant as a possible, indeed, likely, participant in the crime.

Yet in all of those cases, the Supreme Judicial Court found the evidence insufficient as a matter of state and federal constitutional law to support a conviction. That is because in all of those cases, there were gaps in the Commonwealth's proof, gaps that the Constitution prohibits being filled in by speculation or guesswork. Proof of the defendant's presence at the scene or of his association with other alleged perpetrators cannot fill in those gaps, nor can the defendant's efforts to assist his alleged co-venturers after the fact fill in those gaps. While it was possible in all of those cases to view the evidence as consistent with the defendant's guilt, such a conclusion necessarily required

the piling of inference upon inference, speculation, or guesswork. That, the Court held in each instance, does not equate to proof beyond a reasonable doubt. More is required.

Similarly, in the instant case, the Commonwealth's evidence falls short of the mark. It is true that the Commonwealth need not prove motive, but its utter failure to present any evidence that Hernandez had any reason whatsoever to kill Lloyd or to want him dead directly undermines the inference it wants the jury to make that Hernandez intended to kill Lloyd, an essential element of first degree murder. Surely, the Commonwealth's lame evidence that Hernandez was staring at Lloyd at Rumor two nights before the killing or that he became "more aggressive" while dancing there or that he walked quickly out of the club when it closed that night is far less suggestive of the requisite intent than the "prior incident" evidence deemed insufficient in *Simpkins*. The Commonwealth's fanciful suggestion (based on no evidence) that Hernandez manifested some hostility towards Lloyd on Friday night is further undermined by Jennifer Fortier's uncontradicted testimony that Hernandez and Lloyd were getting along well during the ride from Boston to Franklin and later at the Franklin apartment, singing, talking and sharing marihuana while socializing with two young women. Any imagined conflict between Hernandez and Lloyd is further undermined by uncontradicted evidence that Hernandez loaned Lloyd a rental Suburban for the weekend.

A second critical gap in the Commonwealth's proof is the absence of any evidence, let alone proof beyond a reasonable doubt, that Hernandez formulated or participated in a plan or agreement to murder Lloyd. True, he texted Wallace on Saturday and Sunday, asking him to return to Massachusetts, but there is no evidence that request had anything at all to do with murdering Odin Lloyd. There is also evidence that Hernandez contacted Lloyd on Sunday and arranged to meet with him later that night, but there is no evidence supporting the Commonwealth's contention that the

intended purpose of that meeting was to murder Lloyd. This is all part of the Commonwealth's elaborate theory, but it is utterly unsupported by the evidence, let alone by proof beyond a reasonable doubt. Indeed, there is absolutely no evidence that the killing of Lloyd, whoever was responsible for it, was planned at all, rather than a spontaneous occurrence. And there is certainly no evidence that Hernandez ever intended, planned, or agreed to kill Odin Lloyd.

Third, there is no evidence at all, let alone proof beyond a reasonable doubt, that Hernandez personally participated in Lloyd's killing, either by pulling the trigger himself or by agreeing to stand by to provide aid and assistance to the perpetrator(s) or in any other way. Keeping in mind that proof of presence, association with the perpetrator(s), and knowledge that the crime was going to occur and failing to take steps to stop it is insufficient, the obvious gap in the Commonwealth's proof cannot be filled in except by speculation and guesswork "choosing among possible inferences from the evidence presented." *Kelly, supra*. That is impermissible. There is substantial evidence placing Hernandez at the scene where Lloyd was killed. However, as in *Mazza* and *Salemme*, there is no evidence, let alone proof beyond a reasonable doubt, about what, if anything, Hernandez did at that scene.

Finally, it is critical to analyze evidence of Hernandez's post-shooting conduct under the proper rubric – accessory-after-the-fact. Hernandez didn't tell the police what he may have known about the incident. He provided Wallace and Ortiz a vehicle to leave the state. He provided Wallace with money (via Shayanna Jenkins). He directed Jenkins to dispose of a large box the day after the shooting. Given this and other evidence, there may well have been sufficient evidence to charge and even convict Hernandez as an accessory-after-the-fact to murder. But he is not on trial for that offense. As in *Simpkins*, the Commonwealth may not parlay evidence that the defendant was an

accessory-after-the-fact into a murder conviction. Absent proof beyond a reasonable doubt that Hernandez participated in the murder of Odin Lloyd, sharing the required intent for that crime, the evidence is insufficient as a matter of federal and state constitutional law. Accordingly, Hernandez is entitled to a required finding of not guilty on the indictment charging him with murder in the first degree.

Hernandez is also entitled to a required finding of not guilty on Count Two, charging him with possession of a .45 caliber pistol outside his home on June 17, 2013. There is simply no evidence, let alone proof beyond a reasonable doubt, that Hernandez possessed such a weapon outside his home on that date. Even if the jury could infer that the object Hernandez was holding inside his home as depicted in the home surveillance video is a .45 caliber pistol, he is not charged with possessing such a firearm inside his home. It would require speculation and guesswork to conclude beyond a reasonable doubt that whatever he was holding inside the house he possessed earlier at Corliss Landing. There is no evidence he was holding such an object (whatever it is) when he exited the Altima upon returning home at approximately 3:30 a.m. or when he entered the residence. If he was holding a firearm several minutes later after going upstairs, then downstairs, then down to the basement, then upstairs again, it is just as likely that he procured that weapon inside his home to protect himself or that he took it away from someone else as it is that he previously had it in his possession outside the home that night. Speculation and guesswork are no substitute for proof. Accordingly, a directed verdict of not guilty must enter on Count Two as well.

CONCLUSION

For the reasons set forth above, the Defendant's Motion for Required Finding of Not Guilty on Indictments One and Two at the Close of the Commonwealth's Case should be allowed.

Respectfully submitted,

AARON HERNANDEZ

By his attorneys,



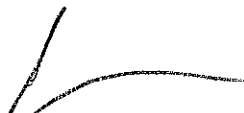
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CERTIFICATE OF SERVICE

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



James L. Sultan