



**COMMONWEALTH OF MASSACHUSETTS
BRISTOL COUNTY
Docket Report**

06/03/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq.	
06/03/2015	368	CD of Transcript of 09/30/2014 09:00 AM Motion Hearing, 10/01/2014 09:00 AM Motion Hearing, 10/02/2014 09:00 AM Motion Hearing received from Court Reporter Linda L.Kelly.	
06/08/2015	369	Appearance entered On this date Zachary Kleinsasser, Esq. added as Limited Appearance Counsel for Other interested party GateHouse Media, LLC	
06/08/2015	370	Appearance entered On this date Emily C. Hannigan, Esq. added as Limited Appearance Counsel for Other interested party GateHouse Media, LLC	
06/08/2015	371	Other 's Motion to Intervene for the Limited Purpose of Unsealing Certain Post-Trial Motions (GateHouse Media, LLC); Memorandum of Law in Support; Affidavit of E. Hannigan; Affidavit of B. Fraga	
06/11/2015	372	Opposition to paper #363.0 Defendant's Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal filed by Commonwealth	
06/12/2015	373	Opposition to paper #341.0 Defendant's Renewed Motion for a Required Finding of Not Guilty filed by Commonwealth	
06/12/2015		Event Result: The following event: Motion Hearing scheduled for 06/12/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	Garsh
06/15/2015	373	Aaron J Hernandez's Memorandum in support of Motion to Impound Specific Post-Verdict Pleadings and Response to GateHouse Media LLC's "Motion to Intervene for the Limited Purpose of unsealing Certain Post-Trial Motions	
06/15/2015	374	MEMORANDUM & ORDER: on Defendant's Motion to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound): . . . For the foregoing reasons, it is hereby ORDERED that the Defendant's Motion to Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound) be ALLOWED in part and DENIED in part and that GateHouse Media LLC's Request to unseal and grant immediate access to the pleadings respecting post-verdict inquire be DENIED.	Garsh
06/15/2015	375	Defendant 's Motion for Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (REDACTED)	



COMMONWEALTH OF MASSACHUSETTS
BRISTOL COUNTY
Docket Report

06/15/2015	376	Affidavit of James L Sultan in Support of Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (REDACTED)	
06/15/2015	377	Aaron J Hernandez's Memorandum in support of Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (REDACTED)	
06/15/2015	378	Defendant's Motion of Authorize Issuance of Subpoena to Ascertain Source of Information Provided to Counsel (REDACTED)	
06/15/2015	379	CD of Transcript of 08/11/2014 09:00 AM Motion Hearing received from Court Reporter Ann Marie McDonald.	
06/22/2015	380	Aaron J Hernandez's Reply Memorandum to Commonwealth's Opposition to Defendant's Renewed Motion for a Required Finding of Not Guilty	
06/22/2015	381	ORDER: Both the Commonwealth and the defendant (and their respective agents) are prohibited from having any direct or indirect contact with the juror identified in docket #365 until further order of the Court.	Garsh
06/25/2015		Endorsement on Motion for Required Finding of Not Guilty on Counts 1 and 2 or for other Relief, (#341.0): DENIED After review, the defendant's Renewed Required Finding of Not Guilty on Counts 1 and 2 or for Other Relief is DENIED. Considering the evidence in light most favorable to the Commonwealth, the court finds that a rational jury could find that the Commonwealth proved every essential element of the crimes charged in counts 1 and 2 beyond a reasonable doubt. The jury's verdict that the defendant is guilty of murder in the first degree committed with extreme atrocity or cruelty and that he is guilty of unlawful possession of a firearm is supported by the evidence. Further, with respect to the murder charge, the court declines to exercise its discretion, pursuant to Mass. Rules Crim. P. 25(b)(2), to order the entry of a finding of guilty to murder in the second degree. The verdict rendered by the jury is consonant with justice.	Garsh
06/30/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	



COMMONWEALTH OF MASSACHUSETTS
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07/02/2015	382	RESTRICTED INFORMATION - Opposition to paper #378.0 Defendant's Motion to Authorize Issuance of Subpoena filed by (Impounded pursuant to Court order of June 15, 2015 with redacted copy publicly available.	Garsh
07/02/2015	383	Commonwealth's Motion for Post-Verdict Discovery; Affidavit of R.L. Michel, Jr.	
07/03/2015	384	Opposition to paper #378.0 Defendant's Motion to Authorize Issuance of Subpoena filed by (REDACTED)	
07/03/2015	385	MEMORANDUM & ORDER: on Defendant's Motion to Authorize Issuance of Subpoena to Ascertain Source of Information Provided to Counsel	Garsh
07/03/2015		Endorsement on Motion for Motion for Post-Verdict Discovery, (#383.0): DENIED without prejudice. Access to the notes is unnecessary to respond to the request for a subpoena to issue seeking to disclose identity of informant. Should, after the name is disclosed, the defendant seek further action on his motion for post-verdict inquiry, the Court will permit the Commonwealth to renew its motion and seek a response from the defendant.	Garsh
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#384

BRISTOL, SS SUPERIOR COURT
FILED

JUL - 2 2015

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

BRISTOL, SS SUPERIOR COURT
FILED

JUL - 3 2015

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

REDACTED

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION
TO AUTHORIZE ISSUANCE OF SUBPOENA

Introduction. On April 15, 2015, a superior court jury found the defendant, Aaron Hernandez, guilty of the crimes of first-degree murder and unlawful possession of both a firearm and ammunition. By way of post-verdict motion, the defendant alleges that one of the jurors in the case may have been tainted by knowledge of extraneous facts. Specifically, he asserts that the juror was aware (and did not disclose) that the defendant, at the time of trial, had also been charged in a different county with two additional, unrelated murders. On that basis the defendant has asked this Court to authorize the issuance of a subpoena and further to conduct an evidentiary hearing at which an anonymous caller would be called to testify. The

7/3/15
Impounded pursuant to
Court order of June 15, 2015 with redacted
copy policy available.
P. O. Clerk

Commonwealth opposes the issuance of any subpoena, at this stage at least, as the defendant has not made the requisite factual showing, and in fact has resisted requests by the Commonwealth to obtain all of the information provided by the anonymous caller. His motion, therefore, should be denied at this time.

Facts. According to an affidavit filed in support of his motion, the defendant's trial counsel, James L. Sultan, Esq., received four telephone calls from an anonymous informant during an eight-day span from April 16, 2015 (the day after the defendant was convicted) to April 24, 2015. The calls had an average length of 16 minutes and one lasted 25 minutes. The calls were placed from a "blocked" number and so the identity of the caller is currently unknown.

In his affidavit, defense counsel purported to describe the contents of the calls. However, he described the subject matters of these lengthy calls in conclusory fashion, often providing no context or detail whatsoever. There is no indication of what other statements were made or other subjects discussed during this lengthy call, what kinds of questions defense counsel posed, whether or not the anonymous informant's recollection was clear or hazy, whether she vacillated in her statements, whether other

persons witnessed the events described, whether there were any indicia that the juror actually overheard the conversations at issue, whether the anonymous informant spoke directly to the juror, etc. This latter issue is particularly speculative as defense counsel's affidavit appears to make inconsistent assertions on this important point.¹

In view of the crucial importance of the anonymous informant's veracity, bias and basis of knowledge to the resolution of the defendant's motion, and in view of the fact that defense counsel is currently the only source of information regarding the contents of the conversations on which the defendant's motion is based, the Commonwealth is also requesting further discovery be provided before the court decides the appropriateness of issuing any subpoena. Specifically, the Commonwealth, on June 8, 2015, emailed the following request to defense counsel: "To permit us to prepare our responses to your motions for post-verdict juror examination and for discovery of telephone records, please send us copies of any notes describing the entire range of subject matters discussed during your telephone

¹ Defense counsel did provide somewhat greater detail with respect to the final call. However, the description is still quite cursory. Nonetheless, it does suggest that a much higher level of detail could be provided with respect to the other calls.

conversations with the unnamed witness/informant. Also, please send us copies of any sound recordings of the calls. Finally, to the extent that subject matters were discussed that are not memorialized in notes, could you please provide a written description of any and all subject matters discussed together with a description of any witness/informant statements regarding these subject matters."

Defense counsel replied that he believed that his affidavit provided a sufficient basis for the Commonwealth to respond to the defendant's motion, that there were no sound recordings, and that the Commonwealth should file a discovery motion to obtain any further information. The Commonwealth has filed such a discovery motion. The defendant has offered no other affidavits in support of his motion. Other facts are included in the foregoing analysis as required.

Analysis. Without question, and as the defendant asserts, both the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee criminal defendants the right to a trial by an impartial jury. See *Commonwealth v. Bresnahan*, 462 Mass. 761, 770 (2012). "[E]ven one partial juror violates this right." *Ibid.* On the other hand, the

settled law of the Commonwealth places a very high value on "the finality of jury verdicts and [the] protection of jurors from unwelcome solicitation or harassment by litigants following their jury service." *Id.* at 769. Accordingly, "[c]ases in which post-verdict inquiry [has been deemed] proper have been narrowly limited." *Commonwealth v. Semedo*, 456 Mass. 1, 22-23 (2010). Generally, a post-verdict inquiry of a juror may be conducted only if the court finds some preliminary basis for concluding that extraneous matters became part of the jury's deliberations. See *Commonwealth v. Fidler*, 377 Mass. 192, 193 (1979).

Consistent with the foregoing, where there is a claim of extraneous influence on a jury, the defendant "bears the burden of demonstrating [by a preponderance of the evidence] that the jury were in fact exposed to the extraneous matter." *Commonwealth v. Fidler*, 377 Mass. at 201. See also *Commonwealth v. Kincaid*, 444 Mass. 381, 386 (2005). Stated differently, no post-verdict examination of any juror is required unless and until "the defendant makes a colorable showing that extraneous matters may have affected a juror's impartiality." *Commonwealth v. Guisti*, 434 Mass. 245, 251 (2001). To meet this standard, "there must be something more than mere speculation."

Commonwealth v. Dixon, 395 Mass. 149, 151 (1985). See also Commonwealth v. Philyaw, 55 Mass. App. Ct. 730, 737 (2002).

Here, as the record now stands, there is absolutely nothing beyond mere speculation that the juror at issue was, in fact, exposed to any impermissible extraneous information. The defendant has proffered only the affidavit of his own lawyer (who has refused to provide additional discovery) reciting the skeletal and, at times, contradictory allegations of an unnamed informant. *Most important, perhaps, there is no definitive statement anywhere in the affidavit attesting to the fact that the juror, in fact, had any actual knowledge of the facts at issue.* Such an unusual request should at a minimum require full disclosure by Defense counsel of all the circumstances of the calls and not be hampered by his refusing to provide copies of his contemporaneous notes, the names of other parties to the calls, or any additional specific information about the contents of these lengthy calls. The information void on these aforementioned crucial matters is, therefore, attributable, at least in part, to the defendant himself. The defendant should not be permitted to shape the content/context of the calls to suit his purpose without disclosing all of the information provided by the anonymous caller. In these circumstances, there is

simply no adequate basis for granting the defendant the relief he has requested.

In a number of important respects, the present case resembles the situation in *Commonwealth v. Lynch*, 439 Mass. 532 (2003). There, the Court began with the general rule that "[p]ost-verdict interviews should be initiated only if the court finds some suggestion that there were extraneous matters in the jury's deliberation." *Id.* at 545. The Court then went on to state that "[b]efore post-conviction discovery may be ordered, a defendant must establish 'a prima facie case for relief'" supported by affidavits. *Commonwealth v. Tague*, 434 Mass. 510, 519 (2001), quoting *Mass. R. Crim. P. 30 (c) (4)*, 378 Mass. 900 (1979). In meeting this requirement, the Court concluded that an "affidavit from appellate counsel failed to establish a prima facie case for relief and, therefore, for post-conviction discovery." Here, in view of the presence of totem-pole hearsay, the lack of any corroboration of the key facts by disinterested parties, the complete dependence on an anonymous informant of unknown reliability and, perhaps most important, the vague, inconsistent and

inconclusive nature of the key allegations themselves², a similar rule should be applied here.

In sum, post-verdict questioning of jurors regarding their deliberations is generally impermissible. See *Commonwealth v. Fidler*, 377 Mass. At 195-196; Mass. G. Evid. § 606(b) (2014). Admittedly, an exception exists for circumstances in which there is evidence that a jury's deliberations were influenced by "extraneous 'disturbing' influences." *Fidler*, 377 Mass. at 197, quoting from *Woodward v. Leavitt*, 107 Mass. 453, 466 (1871). However, a judge is not under any "duty to investigate . . . unless . . . [there is] some suggestion or showing that extraneous matters were[, in fact,] brought into the jury's deliberations." *Commonwealth v. Dixon*, supra at 151. Here, there is simply no reliable evidence - and, as noted, defense counsel has indicated an unwillingness to share additional information that could assist in determining the reliability of the evidence that is currently before the Court - that any such impermissible influence contributed

² Simply being present where subject matters are discussed by no means mandates an inference of knowledge. Defense counsel's affidavit recites nothing about the relative position of the juror to the persons overheard discussing the defendant's trial and/or other charges, the ambient noise levels, etc.

to the verdict here. Absent that, the relief requested by the defendant, should be denied.

However, even if the Court were to conclude that the allegations contained in the defendant's affidavit are somehow facially sufficient to warrant the issuance of process, the Commonwealth respectfully requests that before any process issues, it be given opportunity to probe the accuracy, bias and basis of knowledge of defense counsel's affidavit. Such a threshold inquiry is an important prerequisite before any further action is taken on the defendant's motions. Cf. *Commonwealth v. Bresnahan*, 462 Mass. 761, 770 (2012) (requiring threshold inquiry into alleged Fidler violations as prerequisite to relief where jury taint is alleged). Certainly in the unusual circumstances presented here - i.e. where a defendant's entire claims rests on his lawyer's uncorroborated report of the statements of an anonymous informant who herself is, by the defendant's own admission, relying in whole or in part or hearsay - there is good reason to test the foundation of the defendant's claim before taking the extraordinary and generally disfavored³ step of conducting any post-verdict juror examination.

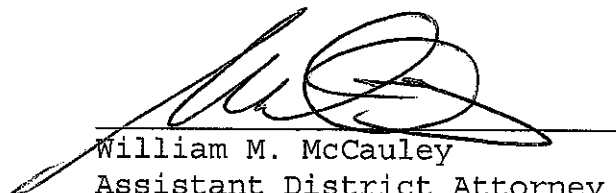
³ As the SJC stated in *Commonwealth v. Fidler*, 377 Mass. At 203, quoting *United States v. Riley*, 544 F.2d 237, 242 (5th

Such a two-step process - i.e. conducting an initial hearing to determine the reliability of the affidavit on which a defendant's request for post-verdict juror examination is based was endorsed by the SJC in *Commonwealth v. McCowen*, 458 Mass. 461, 494 (2010). In *McCowen*, the Court concluded that where "the credibility of the affidavit is in issue, the trial judge should conduct a hearing to determine the truth or falsity of the affidavit's allegations" before conducting any direct examination of a juror. *Ibid.* "In evaluating claims of juror bias, a judge . . . must first determine whether the defendant has satisfied his burden of proving by a preponderance of the evidence that [a true source of potential prejudice exists] . . . If the judge finds that the statements were not made, the judge need make no further findings." *Id.* at 494-495. Similarly, here unless and until the reliability of the facts recited in the uncorroborated affidavit describing the statements of an anonymous informant can be established, no further proceedings are warranted.

Cir. 1976): "Counsel, litigants and the courts should remember that, "[h]istorically, interrogations of jurors have not been favored by federal courts except where there is some showing of illegal or prejudicial intrusion into the jury process."


WHEREFORE, the Commonwealth respectfully requests that the defendant's motion be denied at this time. In the event that the Court is inclined to allow the defendant's motion, the Commonwealth respectfully requests that no direct examination of any juror be permitted unless and until the government is afforded an opportunity, by means of an evidentiary hearing, to test the accuracy, bias and basis of knowledge of defense counsel's affidavit.

Respectfully submitted,



William M. McCauley
Assistant District Attorney
Bristol District
BBO#562635
888 Purchase St.
New Bedford, MA 02740

Dated: July 1, 2015

CLERK'S NOTICE	DOCKET NUMBER 1373CR00983	Trial Court of Massachusetts The Superior Court 
CASE NAME: Commonwealth vs. Aaron J Hernandez		Marc J. Santos, Clerk of Court Bristol County
TO: File Copy		COURT NAME & ADDRESS Bristol County Superior Court - Fall River 186 South Main Street, Suite 202 Bristol County Fall River, MA 02721
<p style="text-align: center;">You are hereby notified that on 07/03/2015 the following entry was made on the above referenced docket:</p> <p>Endorsement on Motion for Motion for Post-Verdict Discovery, (#383.0): DENIED without prejudice. Access to the notes is unnecessary to respond to the request for a subpoena to issue seeking to disclose identity of informant. Should, after the name is disclosed, the defendant seek further action on his motion for post-verdict inquiry, the Court will permit the Commonwealth to renew its motion and seek a response from the defendant.</p>		
DATE ISSUED 07/03/2015	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Susan E Garsh	SESSION PHONE#

#383

BRISTOL, SS SUPERIOR COURT
FILED

JUL - 2 2015

COMMONWEALTH OF MASSACHUSETTS

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

BRISTOL, ss.

BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S MOTION FOR POST-VERDICT DISCOVERY

Introduction. On April 15, 2015, a superior court jury found the defendant, Aaron Hernandez, guilty of the crimes of first-degree murder, unlawful possession of a firearm and unlawful possession of ammunition. By way of post-verdict motion, the defendant has asserted that one of the jurors in the case was tainted by knowledge of extraneous facts. The Commonwealth now requests discovery in order to provide a meaningful response to the defendant's motion.

Discussion. Four telephone conversations between his counsel, James L. Sultan, Esq., and an anonymous witness-informant provide the entire basis for the defendant's motion. The calls had an average length of 16 minutes and one lasted 25 minutes (there was also a 2 minute call).

*Denies without prejudice. Answer 7/13/15 -
As to notes is unnecessary to respond to the request for a subpoena to come
meeting to disclose identity of informant. Should, after the name is disclosed,
The defendant seek further action on his motion for post-verdict
inquiry, the court will
permit it to move
& renew its
motion
seek a response
from the
defendant.
The Commonwealth*

All of the calls took place during an eight-day span from April 16, 2015 (the day after the defendant was convicted) to April 24, 2015. The calls were placed from a "blocked" number and so the identity of the caller is currently unknown.

Defense counsel filed an affidavit in which he purported to describe the contents of the calls. However, he has described the subject matters of these lengthy calls in extreme conclusory fashion, often providing no context or detail whatsoever. For example, in describing a 16-minute call, counsel provides only four sentences of substance related to his claim. The description of the information provided is not consistent with the description of the information provided on other occasions. There is almost no indication of other statements made during this lengthy call, what kinds of questions defense counsel posed, whether or not the caller's recollection was clear or hazy, whether the caller vacillated in her statements, whether other persons witnessed the events described, whether the caller spoke directly to the juror, etc. Defense counsel took this same conclusory approach in his

description of other calls described in his affidavit, as well.¹

In view of the central importance of the caller's veracity and basis of knowledge to the resolution of the defendant's pending motion, and in view of the fact that defense counsel is currently the only source of information (and therefore a necessary witness) regarding the contents of the conversations on which the defendant's motion is based, the Commonwealth requested further information about the subject matters discussed during the calls.

Specifically, the Commonwealth, on June 8, 2015, emailed the following request to defense counsel: "To permit us to prepare our responses to your motions for post-verdict juror examination and for discovery of telephone records, please send us copies of any notes describing the entire range of subject matters discussed during your telephone conversations with the unnamed witness/informant. Also, please send us copies of any sound recordings of the calls. Finally, to the extent that subject matters were discussed that are not memorialized in notes, could you please provide a written description of any and all subject


¹ Defense counsel did provide somewhat greater detail with respect to the final call. However, the description is still quite cursory. Nonetheless, it does suggest that a much higher level of detail could be provided with respect to the other calls.

matters discussed together with a description of any caller statements regarding these subject matters." Defense counsel replied that he believed that his affidavit provided a sufficient basis for the Commonwealth to respond to the defendant's motion, that there were no recordings, and that the Commonwealth should file a discovery motion to obtain any further information.

WHEREFORE, having exhausted all other possible means of learning from defense counsel, currently the only available witness, more about the context and range of topics discussed during the more than one hour of conversations identified by defense counsel, the Commonwealth now respectfully requests that the defendant provide forthwith any/all (1) copies of any notes describing the entire range of subject matters discussed during the telephone conversations with the unnamed caller; (2) the names (and notes if any) of any other person who was present and/or participated in any of these calls; and (3) to the extent that subject matters were discussed that are not memorialized in notes, a written description of any and all subject matters discussed together with a description of any witness/informant statements regarding these subject matters. Further, the Commonwealth requests that these materials be provided prior to further

proceedings on the defendant's pending motion for juror examination. The Commonwealth respectfully suggests that such production is necessary for the Commonwealth to provide a meaningful response to the defendant's claims.

Respectfully submitted,


Roger L. Michel, Jr.
Assistant District Attorney
Bristol District
BBO#555160
888 Purchase St.
New Bedford, MA 02740

Dated: July 1, 2015

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

BRCR2013-0098

COMMONWEALTH

vs.

AARON HERNANDEZ

AFFIDAVIT OF A.D.A. ROGER L. MICHEL, JR.

I, A.D.A. Roger L. Michel, Jr., under the pains and penalties of perjury, state and depose as follows:

1. I am a member of the Massachusetts Bar and an assistant district attorney in the Bristol District.
2. By way of post-verdict motion, the defendant has asserted that one of the jurors in the case was tainted by knowledge of extraneous facts.
3. Specifically, he alleges that his counsel, James L. Sultan, Esq., had four telephone conversations with an anonymous informant. The calls had an average length of 16 minutes and one lasted 25 minutes (there was also a 2 minute call). All of the calls took place during an eight-day span from April 16, 2015 (the day after the defendant was convicted) to April 24, 2015. The calls were placed from a "blocked"

number and so the identity of the caller is currently unknown.


4. Defense counsel filed an affidavit in which he purported to describe the contents of the calls. However, he has described the subject matters of these lengthy calls in extreme conclusory fashion, often providing no context or detail whatsoever. There is no indication of what other subjects were discussed during this lengthy call, what kinds of questions defense counsel posed, whether or not the anonymous informant's recollection was clear or hazy, whether she vacillated in her statements, whether other persons witnessed the events described, whether the anonymous informant spoke directly to the juror, etc. Defense counsel took this same conclusory approach in his description of other calls described in his affidavit, as well.
5. In view of the central importance of the witness-informant's veracity and basis of knowledge to the resolution of the defendant's pending motion, and in view of the fact that defense counsel is currently the only source of information regarding the contents of the conversations on which the defendant's motion is based, on June 8, 2015, the Commonwealth requested

further information about the subject matters discussed during the calls.

6. Specifically, the Commonwealth, on June 8, 2015, emailed the following request to defense counsel:
"To permit us to prepare our responses to your motions for post-verdict juror examination and for discovery of telephone records, please send us copies of any notes describing the entire range of subject matters discussed during your telephone conversations with the unnamed witness/informant. Also, please send us copies of any sound recordings of the calls. Finally, to the extent that subject matters were discussed that are not memorialized in notes, could you please provide a written description of any and all subject matters discussed together with a description of any witness/informant statements regarding these subject matters."
7. Defense counsel replied that he believed that his affidavit provided a sufficient basis for the Commonwealth to respond to the defendant's motion, that there were no sound recordings, and that the Commonwealth should file a discovery motion to obtain any further information.

8. Absent the requested information it is not possible to assess the defendant's claims contained in his pending motion for post-verdict discovery or make a full and proper response to that motion.
9. I submit this affidavit based on my personal knowledge of the facts and circumstances described herein.

Respectfully submitted,


Roger L. Michel, Jr.
Assistant District Attorney
Bristol District
888 Purchase St.
New Bedford, MA 02740
508-961-1873

Attest:

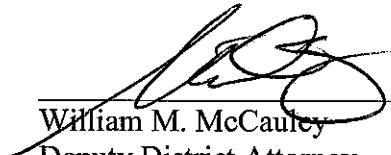
Dated: March 9, 2015

CERTIFICATE OF SERVICE

I, William M. McCauley, certify that I have served a copy of the Commonwealth's Opposition to Defendant's Motion to Authorize Issuance of Subpoena and Commonwealth's Motion for Post-Verdict Discovery along with Affidavit of ADA Roger L. Michel Jr., by first class postage prepaid mail to Counsel for the Defendant, as follows: Charles W. Rankin, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; James L. Sultan, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; and Michael K. Fee, Latham & Watkins, LLP, John Hancock Tower, 20th floor, 200 Clarendon St., Boston, MA 02116.

Signed under the pains and penalties of perjury this 2nd day of July 2015.

COMMONWEALTH OF MASSACHUSETTS,



William M. McCauley
Deputy District Attorney
For the Bristol District
888 Purchase Street
New Bedford, MA 02741-0973

JUL -3 2015

COMMONWEALTH OF MASSACHUSETTS

MARC J. SANTOS, ESQ.
CLERK OF THE COURT
BRISTOL, SS.

SUPERIOR COURT
BRCR2013-0983

COMMONWEALTH

vs.

AARON HERNANDEZ

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION TO AUTHORIZE ISSUANCE OF SUBPOENA TO
ASCERTAIN SOURCE OF INFORMATION PROVIDED TO COUNSEL**

Defense counsel seeks a subpoena to Verizon to discover the identity of an anonymous caller who called him on several occasions and gave him information which, if true, suggests that a deliberating juror may have been exposed before trial to extraneous information that was not disclosed during the voir dire. After review of the parties' submissions, the motion for a subpoena is **allowed**.

The Commonwealth objects to the issuance of a subpoena, citing numerous cases that stand for the proposition that in order to obtain a post-verdict inquiry of one or more jurors, the defendant must make a colorable showing, based on more than speculation, of an extrinsic influence that may have impacted the jury's impartiality. E.g. Commonwealth v. Semedo, 456 Mass. 1, 22-23 (2010); Commonwealth v. Lynch, 439 Mass. 532, 545, cert. den., 540 U.S. 1059 (2003); Commonwealth v. Dixon, 395 Mass. 149, 151 (1985); Commonwealth v. Philyaw, 55 Mass. App. Ct. 730, 736 (2002). However, this Court is not now ruling on whether the defendant has made a sufficient showing to warrant an evidentiary hearing or other interview of one or more jurors. Rather, this Court is simply ruling on whether to issue a subpoena to enable defense counsel to discover the identity of the anonymous caller so that the defendant can ascertain if he can, indeed, make the

required colorable showing.

The adequacy of a defendant's showing is left to the sound discretion of the trial judge. Lynch, 439 Mass. at 545. This Court concludes at this time only that defense counsel's affidavit constitutes an adequate showing to warrant a subpoena to discover the identity of the anonymous caller, not that it is adequate to warrant an inquiry of any juror. Indeed, this Court cannot proceed to assess whether the defendant's motion for post-verdict inquiry should be allowed before the defendant has the opportunity, after obtaining the name of the caller, to decide whether there are grounds to pursue his motion for a post-verdict inquiry and the opportunity to file a supplemental affidavit executed by the caller. Whether the defendant can make a colorable showing sufficient to warrant a post-verdict interview of the juror may well depend on specific details yet to be proffered by the caller and the caller's credibility, all of which cannot be determined as long as the caller remains anonymous. Cf. Commonwealth v. McCowen, 458 Mass. 461, 494 (2010) (before holding hearing, judge should assess credibility of affidavit by juror alleging racial bias). That is precisely why the subpoena should issue.



E. Susan Garsh
Justice of the Superior Court

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