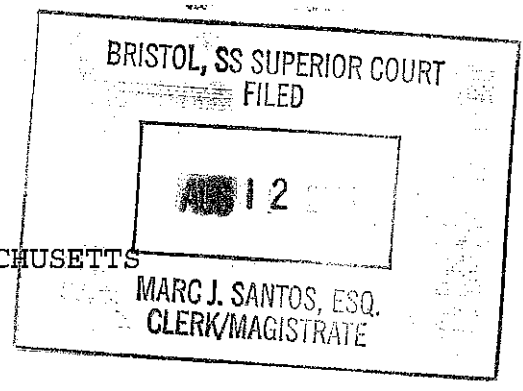


# 403.3



COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

REDACTED

BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S RENEWED MOTION TO QUESTION WITNESS UNDER OATH.

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 asserted that one of the jurors in the case was tainted by knowledge of extraneous facts. Specifically, he claimed 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.

Affidavit #1. The sole basis for the defendant's motion was an affidavit from his lawyer purporting to describe the contents of various telephone conversations

between his lawyer and Katy, an alleged anonymous and disinterested caller who claimed to be acting out of civic duty. The first affidavit filed by defense counsel indicated that he had received five telephone calls from Katy during an eight-day span from April 16, 2015 (the day after the defendant was convicted) to April 24, 2015. Although the duration of these calls in total lasted over one hour and despite the fact that the burden of persuasion for the defendant's motion rested entirely on him, defense counsel described the subject matters of these lengthy calls with few details. For example, in describing one 16-minute call, he indicated merely that the witness stated that she was at [redacted] with the juror in question, and that the "Hernandez trial" and the "Boston murders" were discussed in the presence of the juror. Defense counsel did not disclose what if any other subject matters were discussed during these lengthy calls, including Katy's knowledge or familiarity with the defendant, her memory and true motivation for calling. What is clear from defense counsel's affidavit, is that Katy never attributed any statement and/or actual knowledge of the Boston case to the juror despite Katy's claim

As the defendant's motion was premised entirely on statements attributed to Katy, the Commonwealth requested from defense counsel all information relevant to the calls. On June 8, 2015 the Commonwealth 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." Defense counsel refused to provide the requested information.

The Commonwealth's sought this information in good faith and the request was premised on obvious internal inconsistencies in the few statements attributed to Katy but nonetheless obscured in defense counsel's affidavit in support of his motion. For example, Katy claimed

This was further contradicted by her claim that she was calling because she had just seen the juror on television. In addition, defense counsel further relied on Katy's claim she "had been at \_\_\_\_\_ : at which the Boston case against Aaron Hernandez had been discussed and that [the juror] had been present during and/or participated in that discussion." However, in the same affidavit, Katy never attributed any statement to the juror nor did she describe any other behavior to suggest that the juror ever participated in any such conversation. Given defense counsel's lengthy and apparently exhaustive conversations with Katy and his refusal to provide other information about the substance of these calls that would bear on Katy's credibility, the Court could only conclude that defense counsel framed his affidavit with only the details that best made out his claim. Even in that light the affidavit fails to make out anything more than mere speculation that the juror heard someone else speaking about the defendant.

**Affidavit #2.** The Court authorized the issuance of a subpoena for telephone records to obtain the identity of the anonymous caller in order to allow the defendant to potentially establish his claim. In his second affidavit,

defense counsel, again without revealing the underlying facts, asserted that Katy had been identified. Although continuing to claim that questioning Katy was necessary, defense counsel's filing was silent about how he acquired Katy's name and information, the nature, the timing and the frequency of the prior relationship between Katy and the defendant, and how and when defense counsel came into possession of the information contained in his affidavit. Unbeknownst to the Court and the Commonwealth, defense counsel had acquired a faxed copy of the records. At the time of this assertion, the Court had not received the records even though the authorized summons commanded that they be returned to the court. The affidavit did not inform the Court that defense counsel had obtained them contrary to this order and used them to make contact with the subscriber of the listed telephone number. Nowhere in his affidavit did defense counsel inform the Court that he had allegedly spoken with Katy for an extended period of time, that Katy made statements indicating that she did not know where the juror was during the purported conversation, that she refused to prepare an affidavit or that she made other statements that called into question the veracity of the prior affidavit submitted to the Court.

In this affidavit defense counsel asserted, again without disclosing the facts known to him, that Katy "has had extensive personal contact with the defendant since his arrest on June 26, 2013." Although acknowledging that the nature of the contact "is clearly relevant to [the caller's] credibility", defense counsel omitted numerous material and relevant facts of his interaction with and knowledge of the purportedly now-known anonymous caller.

And so, on July 27, 2015, the Commonwealth once again requested that defense counsel provide basic information required to assess his claims, namely: "(1) the discovery previously requested after [defense counsel] submitted [his] first affidavit [as described *supra*]; (2) a copy of the subpoena sent for the phone records as well as any/all records received; (3) complete details of the "additional investigation" referenced in paragraph 2 of [his second affidavit]; (4) complete details and any documents/records/etc. of the "extensive personal contact" that the defendant has had with [Katy]; and (5) complete details and documents/records/etc. of any additional contact that [defense counsel] or anyone else in the defense team has had with the caller and/or [Katy]." Once again, defense counsel refused to provide any clarifying information, despite the fact that he continued, in effect,

to be the sole witness to the facts and circumstances underlying the assertions of juror misconduct and the only person who could address these matters.

The Commonwealth thereafter learned that Katy was not only not an anonymous, disinterested woman acting out of civic duty but in fact she had maintained a long-term, sexually explicit relationship with the defendant. Moreover, the Commonwealth discovered that there were many apparent false assertions of material fact and omissions in the statements made by Katy to defense counsel as reported in defense counsel's first affidavit. Katy made false assertions about her name, her job

, and her frequent contact with the juror. She presumably omitted (although the details of her calls with defense counsel have still not been provided) to reveal her relationship with the defendant, her bias in favor of the defendant, her belief in his innocence, her hope that he would be released and interest in having a relationship with him after that.

The facts developed by the Commonwealth and defense counsel's subsequently filed, third affidavit, establish that his second affidavit completely lacked in candor with the Court. The only reason for counsel, in this circumstance, to refuse to provide the information

initially requested by the Commonwealth, the information subsequently requested by the Commonwealth and to omit from his affidavit all the details known to him denying, recanting or refuting his first affidavit was to obtain a hearing irrespective of the known facts.

**Affidavit #3.** Two days after the Court denied the defendant's motion, on August 5, 2015, defense counsel filed a third affidavit in which he conceded that Katy could not corroborate, by means of affidavit, any of the statements allegedly made by her during the telephone conversations described by defense counsel in his first affidavit. In this latest affidavit, defense counsel asserts his own opinion that Katy's failure to do so is somehow the result of her "unwillingness to assist the defense." Needless to say, this is a deeply counterintuitive and wholly unsupported inference on the part of defense counsel who continues to play both the role of advocate and sole supporting witness in these proceedings. Indeed, if one were inclined to speculate about the witness's motivations, it would seem far more likely to conclude that her initial statements to defense counsel, made under the cloak of anonymity, reflected a desire to help the defendant, with whom she desired to continue a relationship outside of prison, and that her



subsequent recantation, once she had been identified, reflected her aversion to committing/being punished for making false statements. It is not necessary to indulge in any speculation here. The law imposes a threshold burden on the defendant; until that burden is met, the law forecloses further proceedings in this matter.

Simply stated, after submitting a vague, internally inconsistent and factually inaccurate initial affidavit, not actually based on any personal knowledge of the underlying facts, defense counsel now concedes in his latest affidavit that he has absolutely no affirmative evidence of any misconduct by any juror and so cannot begin to meet the threshold burden imposed by law to obtain post-verdict discovery into matters relating to jury deliberations. As the Court stated in its ruling on the defendant's prior filing, the subpoena was issued to "allow[]... the defendant the opportunity to file a supplemental affidavit executed by the caller." Having failed to accomplish that, the defendant asks the court to revert to the averments in his first affidavit and his own opinion as to Katy's veracity. He presses on despite: (1) his complete failure to carry his evidentiary burden and make a colorable showing, by reference to some reliable evidence, of any juror misconduct; (2) his demonstrated

unwillingness to find a single corroborating witness to the public events described in defense counsel's original affidavit;<sup>1</sup> (3) the numerous misstatements of fact contained in the statements attributed by defense counsel to Katy; (4) the Court's clear ruling that no further proceedings relevant to the matters would be permitted absent an affidavit from Katy; and (5) the settled law of the Commonwealth prohibiting post-verdict fishing expeditions of precisely this type, the defendant still urges the Court to order further discovery; specifically, an in-court examination of Katy.

**Legal Analysis.** As the Commonwealth has previously described, the long-settled law of the Commonwealth necessarily 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,

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<sup>1</sup> Counsel, for instance, had ample opportunity to develop such information in his "additional investigation" and yet his affidavits are completely silent as to what follow-up he engaged in and whether that follow-up corroborated or contradicted. Counsel has yet to establish that Katy does work with the juror. His failure shows a complete lack of investigation by counsel of an easily discernible fact or another instance of lack of candor.

22-23 (2010). Consistent with these principles, post-verdict inquiry of any kind, including the very type of discovery requested here, must, in every case, be supported by a significant threshold showing of necessity. Specifically, "[b]efore post-conviction discovery may be ordered, a defendant must establish 'a prima facie case for relief'" supported by affidavits.<sup>2</sup> Commonwealth v. Tague, 434 Mass. 510, 519 (2001), quoting Mass. R. Crim. P. 30 (c) (4), 378 Mass. 900 (1979) (emphasis added). This, the defendant has manifestly failed to do. The Court, therefore, consistent with the law and with its own prior order, should not permit any hearing.

The law requires more than mere speculation made by a caller under the cloak of anonymity to obtain post-verdict inquiry into extraneous matter concerning a jury's deliberation. Defense counsel, having failed to obtain the necessary information from the now-known caller, is in possession of contradictory information yet he wants the court to revert to the high-water mark of his filings - the

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<sup>2</sup> In his most recent filing counsel points to two cases where affidavits of counsel were sufficient to obtain a hearing. Those cases are easily distinguished. In those cases, counsel's affidavit recited statements of the actual juror and counsel was constrained in interacting with the juror. Here counsel had repeated access to Katy and she contradicted statements attributed to her, refused to adopt statements made anonymously and declined to submit a statement under oath.

implausible, uncorroborated and ultimately recanted testimony of a demonstrably deceitful and strongly biased witness. That is simply not the law. In fact, after a verdict is rendered, a criminal defendant's procedural rights are significantly altered. For obvious reasons, the bar is set quite high to obtain the right to explore the jury's deliberative process. Without such a rule, no verdict would ever be final.<sup>3</sup> In order to justify an inquiry, there "'must be something more than mere speculation,' and, here, the defendant has not provided any more." Commonwealth v. Dixon, 395 Mass. 149, 153 quoting United States v. Barshov, 733 F.2d 842, 851 (11th Cir. 1984). See also Commonwealth v. Philyaw, 55 Mass. App. Ct. 730, 737 (2002).

The defendant's claims are based on the inconsistent, contradictory and refuted claims of a single witness who defense counsel recognizes is completely untrustworthy. Instead of acknowledging these facts, defense counsel asks this Court to rely on his opinion that selected statements of her anonymously made telephone calls are true. The law

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<sup>3</sup> If all a convicted criminal defendant had to do to obtain review of the jury's deliberative process was to produce some partisan willing to make vague and unsubstantiated claims about irregularities in the proceedings, post-verdict inquiry would likely become a staple of every criminal trial.


provides that a jury's verdict should not be explored "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 convincing evidence that any such impermissible influence contributed to the verdict here. In short, the defendant simply has not met his burden of proof.

WHEREFORE, the Commonwealth respectfully requests that the both the defendant's current motion for discovery and his underlying motion for post-verdict examination of a juror be denied.

Respectfully submitted,

THOMAS M. QUINN III  
DISTRICT ATTORNEY

BY:

  
WILLIAM M. McCAULEY  
Deputy District Attorney  
BBO#562635  
888 Purchase St.  
New Bedford, MA 02740

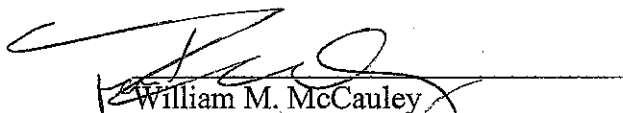
Dated: August 7, 2015

CERTIFICATE OF SERVICE

I, William M. McCauley, certify that I have served a copy of the Commonwealth's Opposition to Defendant's Renewed Motion to Question Witness Under Oath by first class postage prepaid mail to Counsel for the Defendant, as follows: Charles W. Rankin, Rankin & Sultan, 151 Merrimac Street, 2<sup>nd</sup> Floor, Boston, MA 02114; James L. Sultan, Rankin & Sultan, 151 Merrimac Street, 2<sup>nd</sup> Floor, Boston, MA 02114; and Michael K. Fee, Latham & Watkins, LLP, John Hancock Tower, 20<sup>th</sup> floor, 200 Clarendon St., Boston, MA 02116.

Signed under the pains and penalties of perjury this 13th day of August 2015.

COMMONWEALTH OF MASSACHUSETTS,

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