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AUG 18 2015

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE
BRISTOL, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-0983

COMMONWEALTH

vs.

AARON HERNANDEZ

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
RENEWED MOTION TO QUESTION WITNESS UNDER OATH**

Defense counsel seeks to question under oath the individual (the "Caller") who called him on several occasions and gave him information which, if true, suggests that a deliberating juror may have been exposed to extraneous information. After review of the parties' submissions, Defendant's Renewed Motion To Question Witness Under Oath is **ALLOWED**.

BACKGROUND

On July 27, 2015, Hernandez filed a Motion To Question Witness Under Oath, accompanied by an affidavit from Attorney Sultan identifying the name, date of birth, address and phone number of the Caller. Sultan's affidavit suggested that the Caller has had extensive personal contact with Hernandez since his arrest on June 26, 2013, a matter which unquestionably impacts her credibility. This Court denied the defendant's motion on August 3, without prejudice to renew it supported by an affidavit from the Caller.

In connection with the defendant's renewed motion, Attorney Sultan has filed an affidavit detailing his unsuccessful efforts to speak to the Caller in person at her home, and subsequent phone conversations in which the Caller adamantly expressed a reluctance to cooperate. Despite counsel's

good faith efforts to obtain an affidavit from the Caller, she has refused to provide one.

DISCUSSION

Where there is a post-verdict claim that a juror was subject to an extraneous influence, the judge has broad discretion to decide what process of investigation should be pursued. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990). The judge is not obliged to hold a public, or even a private, hearing on every such claim. Id. See also Commonwealth v. Dixon, 395 Mass. 149, 151 (1985) (when confronted with allegations of extraneous influence, judge has discretion to determine what manner of hearing, if any, is required). The adequacy of a defendant's showing with respect to a claim of extraneous influence is left to the sound discretion of the trial judge. Commonwealth v. Lynch, 439 Mass. 532, 545, cert. den., 540 U.S. 1059 (2003); Dixon, 395 Mass. at 152.

The Commonwealth objects to the examination of the Caller under oath, citing numerous cases that stand for the proposition that in order to obtain a post-verdict interview 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. See Commonwealth v. Semedo, 456 Mass. 1, 22-23 (2010); Dixon, 395 Mass. at 151; Commonwealth v. Philyaw, 55 Mass. App. Ct. 730, 736 (2002).¹ 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

¹The Commonwealth's citation to Commonwealth v. Tague, 434 Mass. 510 (2001), cert. den., 534 U.S. 1146 (2002), for the proposition that a defendant must, by affidavit, make a prima facie case for relief before the court will order post-conviction discovery is inapposite because Hernandez is not seeking discovery in connection with a new trial motion. See Montefusco v. Commonwealth, 452 Mass. 1015, 1016 (2008) (Rule 30(c) discovery procedures apply only when defendant has motion for new trial pending).

Court is simply ruling on whether to permit an examination under oath of the Caller so that the parties can assess her credibility and decide whether to request that further action be taken by the Court.

The Commonwealth contends that the motion to question the Caller under oath should be denied because there is no reliable evidence of any impermissible influence on the jury and the Caller's credibility is much weaker than the defendant's filings suggest. The Commonwealth characterizes the defendant's claims as based on the inconsistent and contradictory assertions of a witness who is completely untrustworthy. Notably, however, the Commonwealth has chosen not to file an affidavit setting forth the basis for its assertions that the Caller lacks credibility because she had maintained a long-term, sexually explicit relationship with the defendant and that the Caller made false statements about her job and her level of contact with the juror when speaking with defense counsel. The noted inconsistencies in the Caller's reported statements do not render her accusations inherently implausible or compel a conclusion that the Caller's accusations are false. Cf. Commonwealth v. McLeod, 394 Mass. 727, 743, cert. den., 474 U.S. 919 (1985); Commonwealth v. Villatoro, 76 Mass. App. Ct. 645, 649-650, rev. den., 458 Mass. 1101 (2010) (although blatant inconsistencies in testimony may in some circumstances indicate perjury, in general, the fact that witness recants, contradicts or alters prior testimony does not, by itself, establish that new testimony is false).

Finally, contrary to the Commonwealth's assertion in its Opposition, this Court never entered "a clear ruling that no further proceedings relevant to the matters would be permitted absent an affidavit from [the Caller]." Rather, the Court denied the initial motion for questioning under oath without prejudice to renew with an affidavit from the Caller, stating that the motion was premature.

At that point, the defendant had neither presented an affidavit from the Caller nor proffered an explanation for failing to do so. The circumstances have changed. As noted above, counsel made a good faith effort to obtain an affidavit from the Caller, but she has refused to provide one.

This Court concludes that defense counsel's affidavits constitute a sufficient showing to warrant investigation into the matter of possible juror exposure to extraneous information by permitting a preliminary inquiry of the Caller to be conducted under oath. See Dixon, 395 Mass. at 151-153 (affidavit by defendant's counsel, detailing call from juror reporting that a different juror's husband had made known to his wife his conversations with witnesses was sufficient to merit further inquiry). The information provided by the Caller is more detailed than in Dixon; the Caller provided details suggesting that a juror may have concealed knowledge of a prior bad act during impanelment whereas the source in Dixon did not even purport to reveal what the witnesses had discussed with the juror's spouse or whether the discussions had any bearing on the case on trial. Where a case is close, a judge should exercise her discretion in favor of conducting a judicial inquiry. Id. at 153. The Court has determined that the filings to date are insufficient to enable the Court to determine whether the Caller is sufficiently credible to warrant a post-verdict interview of one or more jurors. The defendant is entitled to pursue the information initially provided by the Caller by way of a court ordered examination under oath.

Accordingly, this Court will order an examination under oath of the Caller to be conducted by counsel in a courtroom with the judge present to rule on objections. See Globe Newspaper Co., 407 Mass. at 888 (judge may, in her discretion, conclude that limited interview of juror or other witness is warranted, with questioning conducted by prosecution and defense, or by judge herself). The defendant is entitled to be present. Cf. Commonwealth v. Robichaud, 358 Mass. 300, 302-303

(1970) (defendant has constitutional right to be present during voir dire to determine whether sitting juror has engaged in misconduct); Mass. R. Crim. P. 35(c) (defendant in custody is entitled to be present during deposition to perpetuate testimony). The courtroom shall be closed to the public during the examination, as the public has no constitutional or common law right to attend such a proceeding. Id.

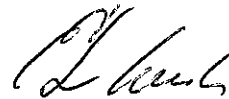
Thereafter, if this Court determines that the substantiality of the claim of extraneous prejudicial influence has reached the level at which it is necessary to hold a formal evidentiary hearing, those proceedings, absent some substantial reason for closure, will be held in open court under the public eye. See Globe Newspaper Co., 407 Mass. at 888-889.

The Commonwealth has sought certain discovery from the defendant regarding the Caller. The Commonwealth's entitlement to such discovery should be resolved prior to the deposition.

ORDER

It is hereby **ORDERED** that the Defendant's Renewed Motion To Question Witness Under Oath be **ALLOWED**. It is further **ORDERED** that counsel for the parties shall confer in person or by telephone on or before August 21, 2015 to attempt to resolve the Commonwealth's discovery requests and that, if not resolved, the Commonwealth shall file its motion for discovery by August 25, 2014 and the defendant shall file his response by August 31, 2015; a hearing shall be held on September 2, 2015, at which time the date for the examination under oath shall be established. If the discovery dispute is resolved by the parties, a joint letter to this effect should be submitted to the

court with suggested dates for the examination. It is further **ORDERED** that the examination under oath shall take place, in the presence of the defendant, at a date and courtroom to be determined and that the public shall not be permitted access.



E. Susan Garsh
Justice of the Superior Court

DATED: August 18, 2015