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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

BRISTOL SUPERIOR COURT  
INDICTMENT NO.: BRCR2013-00983

BRISTOL, SS SUPERIOR COURT  
FILED

COMMONWEALTH

SEP 23 2015

vs.

MARC J. SANTOS, ESQ.  
CLERK/MAGISTRATE

AARON HERNANDEZ

COMMONWEALTH'S SECOND MOTION FOR DISCOVERY

**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 based solely on defense counsel's affidavits, the defendant claims that a juror made pre-trial statements evidencing a desire to serve as a juror and knowledge of extraneous facts. To provide the defendant with an opportunity to substantiate his claims, the Court, upon the defendant's motion, has ordered an evidentiary hearing for the purpose of examining the witness.

The Commonwealth has repeatedly requested further information about subject matters expressly raised - but not fully fleshed out or explained - in the multiple affidavits filed by defense counsel in support of the

defendant's post-verdict motions. Specifically, the Commonwealth has requested: 1.) Any/all notes/reports of any conversations with "Katy"; 2.) Any other statements made by "Katy" not included in notes; 3) Names of other persons present during original calls/conversations with "Katy"; 4) Recordings/Phone messages; 5) A copy of the subpoena sent for the phone records as well as any/all records received; 6) Details/documents/etc. related to the "additional investigation" referenced in paragraph 2 of Jamie's second affidavit; 7) Details/documents/etc. of the "extensive personal contact" that the defendant has had with "Katy"; 8) Names of any other person or persons discovered/contacted/interviewed related to this matter; 9) Names of any other person or persons alleged to have attended the 10) Any statement(s) (recorded or unrecorded) of any other person discovered/contacted/interviewed related to this matter (including mother of "Katy"); 11) Any information related to where the "Katy" works and where the juror works; 12) Any other information discovered that calls into question the veracity of "Katy".

The Commonwealth has made these requests because despite repeated contact between defense counsel and "Katy" and claims of other investigation, defense counsel has

never submitted a report or recording of witness statements, an affidavit of a witness or anything other than defense counsel's own selective parsing of contact with "Katy." As the Commonwealth explained to defense counsel, the requested information is essential to the Commonwealth's full understanding of the issue.

In response to the Commonwealth's requests, the defendant provided only defense counsel's notes of counsel's conversations with "Katy." In response to Commonwealth requests 6-12, counsel responded that the information, in their view, "go[es] far beyond the information necessary to question ["Katy"]." While apparently agreeing that at least some of the requested information is not covered by any potential claim of privilege, counsel claimed, without any specificity that "[m]uch of the information sought is protected from disclosure by the attorney-client privilege and/or work product doctrine."

The Commonwealth seeks information that is not privileged and has made that clear to defense counsel. It is also clear that much more information exists. Comparing the notes of conversations with Katy to counsel's multiple affidavits reveals inconsistencies between the two. All of the requested material is, in fact, directly relevant to

the central matters at issue in the hearing requested by the defendant. In fact, defense counsel is, himself, likely to be a necessary witness at any hearing because of his purported knowledge, his claims which are not corroborated by his notes, apparent inconsistencies with the witness's statements and the current state of the information provided to the Commonwealth. Moreover, none of the requested material is subject to protection under either concepts of attorney-client privilege or the work product doctrine.

By placing facts, contained in the evidence sought by the Commonwealth, in controversy in his post-verdict affidavits, and by selectively making use of portions of this evidence in his pleadings, the defendant has placed all of these matters "at issue," and thereby waived any claims derived either from attorney-client privilege or the work product doctrine. They are, therefore, fully discoverable.

**Analysis.** In Clair v. Clair, 464 Mass. 205, 218-219 (2013), the SJC reaffirmed the vitality of the "at issue" exception to the protections otherwise afforded by attorney-client privilege, observing: "In Darius v. Boston, 433 Mass. 274 (2001), we articulated a general framework for considering the 'at issue' waiver doctrine

under Massachusetts law. See McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 191-192 (2012); Global Investors Agent Corp. v. National Fire Ins. Co., 76 Mass. App. Ct. 812, 816-819 (2010). We recognized that there are 'certain exceptions to the attorney-client privilege and some circumstances in which the privilege may be deemed waived other than by express waiver.' Darius, 433 Mass. at 277. *In particular, 'a litigant may implicitly waive the attorney-client privilege, at least partly, by injecting certain claims or defenses into a case.'* Id. See Mass. G. Evid. § 523(b)(2) (2012) (privilege waived where person or entity holding privilege 'introduces privileged communications as an element of a claim or defense') . . . . This is the heart of the 'at issue' waiver doctrine. See Darius, 433 Mass. at 277-278" (emphasis added).

The relevance of these principles - which apply equally to criminal and civil cases - to the present case is plain. See Commonwealth v. Brito, 390 Mass. 112, 119 (1983). All of the foregoing contested evidence that the defendant now claims is, in whole or in part, protected by the attorney-client privilege, relates directly to the very issues he himself has placed in controversy. In effect, he wants to be able to tell part of a story, carefully edited for his own strategic purposes. This is precisely the kind

of abuse the "at issue" exception seeks to prevent. As the First Circuit said in Greater Newburyport Clamshell Alliance v. Public Serv. Co. of N.H., 838 F.2d 13, 20 (1st Cir. 1988), "a party may resist discovery on the basis of privilege, but may not at the same time rely on the privileged communications or information as evidence at trial." See G.S. Enters., Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 270-271 (1991). It is hard to imagine evidence more germane to the subject matters the defendant has placed in dispute than evidence relating to "Katy's" credibility, the existence of other witnesses to the alleged misconduct, the nature and duration of "Katy's" relationship to the defendant and/or the circumstances under which any of this came to the attention of defense counsel.

"At issue" waiver is not "tantamount to a blanket waiver of the entire attorney-client privilege." Rather, it is a limited waiver of the privilege with respect to what has been put 'at issue.'" Id. In addition, "there can be no 'at issue' waiver unless it is shown that the privileged information sought to be discovered is not available from any other source." Darius, 433 Mass. at 284. See Zabin v. Picciotto, 73 Mass. App. Ct. 141, 158 (2008) ("The nature of the defendants' allegations placed

the work [the attorney] performed in the underlying litigation directly at issue, and [the attorney] was the only source available to testify regarding the work she performed"). But see Greater Newburyport Clamshell Alliance, 838 F.2d at 22 (parties seeking to discover privileged communications "do not have to prove that it is absolutely unavailable from other sources"). However, all of the contested evidence meets these criteria. The requested information relates directly and is indispensable to any discussion of the central issues in dispute; i.e. whether "Katy" actually observed and accurately reported regarding the juror. Moreover, to the extent that no other source for any of the materials sought has thus far emerged - all of the evidence supporting the defendant's claims has come to light exclusively through the affidavits of his lawyer - the second requirement - the absence of any non-privileged source for the information sought - is also met here. In short, the "at-issue" exception should apply here.

Similarly, the work product doctrine provides no protection for the defendant. The SJC, in McCarthy v. Slade Assocs., 463 Mass. 181, 193-195 (2012), had an opportunity to consider the scope of the work product doctrine in situations like the present one. "The work

product doctrine is codified in rule 26(b)(3), which protects (1) 'documents and tangible things,' (2) 'by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent),' and (3) 'in anticipation of litigation or for trial.' See generally P.M. Lauriat, S.E. McChesney, W.H. Gordon, & A.A. Rainer, *Discovery* § 4:5 (2d ed. 2008 & Supp. 2011). Work product shielded by the doctrine is not privileged, but instead "is given qualified protection from discovery as a concession to the necessities of the adversary system." D.M. Greenwald, E.F. Malone, & R.R. Stauffer, *Testimonial Privileges* § 2:1, at 2-3 to 2-4 (2005).

Rule 26(b)(3) provides:

[A] party may obtain discovery of documents and tangible things . . . [qualifying as work product materials] only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

As the SJC in McCarthy observed, "[t]he qualifications in the rule speak, albeit more generally, to the [same] concerns addressed by the concept of at issue waiver of the



attorney-client privilege, that is, concerns about fairness where the party asserting the privilege affirmatively raises a claim or defense that makes information protected by the privilege material and relevant to the case, and the particular information is 'vital' to the opposing party . . . . Indeed, a number of courts have adopted and applied the . . . [same standard that pertains to] issue waiver of the attorney-client privilege to analyze discovery requests for work product." Ibid. However, the Court ultimately concluded that "our established work product doctrine, set out in rule 26(b)(3), already provides a satisfactory analytical framework within which to consider the matter, and it is that framework we [elect to] use [in the Commonwealth]."

Under rule 26(b)(3), "the first question is whether the defendants have made the requisite showing that they have 'substantial need' of the materials qualifying as work product that are covered by the motion judge's discovery order." Ibid. The contested evidence, for all the reasons already stated above, "is central to the substantive claims in litigation," relating as they do to core issues like credibility, corroboration, basis of knowledge, and timing. Madanes v. Madanes, 199 F.R.D. 135, 150 (S.D.N.Y. 2001). More generally, the withheld evidence

is essential to understanding the *res gestae* here - to telling the complete story of these potentially significant events. As to the question of an alternative source for the sought-after material, for all the reasons set about above, the defendant has established himself as the exclusive gatekeeper for this essential evidence. If he is not compelled to provide it, the Commonwealth and the Court will remain in the dark about many key issues material to resolving the defendant's claims. Both the law and basic principles of fairness require the defendant to tell the entire story here.

WHEREFORE, the Commonwealth respectfully requests that this Court order the defendant to disclose all of the aforementioned evidence, previously requested by the Commonwealth, in advance of in-court examination of Ms. Mendes.

RESPECTFULLY SUBMITTED,

THOMAS M. QUINN III  
DISTRICT ATTORNEY

BY: 

WILLIAM M. McCAULEY  
Deputy District Attorney  
BBO#562635  
888 Purchase St.  
New Bedford, MA 02740  
(508) 961-1800

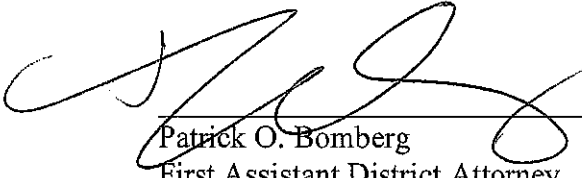
Dated: September 23, 2015

CERTIFICATE OF SERVICE

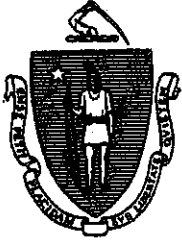
I, Patrick O. Bomberg, certify that I have served a copy of the Commonwealth's Second Motion for Discovery by first class postage prepaid mail to Counsel for the Defendant, as follows: Charles W. Rankin, Rankin & Sultan, 151 Merrimac Street, 2<sup>nd</sup> Floor, Boston, MA 02114

Signed under the pains and penalties of perjury this 23rd day of September 2015.

COMMONWEALTH OF MASSACHUSETTS,



Patrick O. Bomberg  
First Assistant District Attorney  
For the Bristol District  
888 Purchase Street  
New Bedford, MA 02741-0973



*The Commonwealth of Massachusetts*

OFFICE OF THE  
DISTRICT ATTORNEY  
BRISTOL DISTRICT

**THOMAS M. QUINN III**  
DISTRICT ATTORNEY

Fall River Justice Center  
186 S. Main St.  
Fall River, MA 02721  
(774) 627-1600

September 23, 2015

Superior Court Clerk's Office  
Fall River Justice Center  
186 South Main Street  
Fall River, MA 02720

**Re: Commonwealth v. Aaron Hernandez**  
**1373CR00983**

To whom it may concern:

Enclosed for filing, please find the Commonwealth's Second Motion for Discovery.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Patrick O. Bombek".

Patrick O. Bombek  
First Assistant District Attorney

cc: Charles W. Rankin, Esq.