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BRISTOL, SS SUPERIOR COURT
FILED

APR -6 2015

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT SO.
OF THE TRIAL COURT CLERK/MAGISTRATE
CRIMINAL #2013-983

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**DEFENDANT'S THIRD SUPPLEMENTAL REQUEST FOR
JURY INSTRUCTIONS**

The defendant Aaron Hernandez requests that the Court instruct the jury regarding the permissible inferences it may draw about the Commonwealth's failure to call the case officer, Trooper Eric Benson. The defendant has attached the Model Instruction for use in the District Courts. In support of this request, the defendant states:

1. A theme of the defense has been that law enforcement and the prosecutors prematurely focused their investigation on Aaron Hernandez. In line with *Commonwealth v. Bowden*, 379 Mass. 472 (1980), the defense has highlighted many shortcomings of the investigation. The case law permits the Commonwealth to respond to such attacks by having an investigator, such as the case agent, testify as to the reasons for the investigative decisions – in short, to defend the investigation. Trooper Benson has been listed as a witness to be called during the final week of the Commonwealth's case, but he never testified.

2. There are a number of areas of inquiry that the defense would have explored with Trooper Benson, had he been called, the answers to which would not have been favorable to the Commonwealth. These areas include the following:
- a. In November 2014, persuading Lt. Bennett to change his opinion about whether the footwear impression at the scene had enough detail to make a further comparison;
 - b. Not seeking a swab for DNA testing purposes from Ernest Wallace;
 - c. Conducting a two-week long search of a pond in Bristol, Connecticut for the murder weapon, even though investigators contended that Shayanna Jenkins had removed a large box from the basement of the house at Aaron Hernandez's request on June 18;
 - d. Conducting a search of a pond in south Florida for the murder weapon near of the home of relatives of Ernest Wallace, even though investigators contended that Shayanna Jenkins had removed a large box from the basement of the house at Aaron Hernandez's request on June 18;
 - e. Interviewing over 100 people who were present at Rumor nightclub on June 14-15, including five members of the Boston Police Department in an unsuccessful effort to find evidence of any conflict between Hernandez and Lloyd.
 - f. Improperly pressuring Amanda Devito to change her testimony about the time she spent with Hernandez and Lloyd in the early morning hours of June 15 by telling her that her best friend, Jennifer Fortier, had told police that something sexual had occurred between her and Aaron Hernandez, when in fact, Fortier had not said anything of the kind;

- g. Improperly telling a number of people being interviewed by police that they would not be permitted to leave the interview until they agreed to permit their cell phones to be copied and searched by police;
 - h. Trying to persuade Robert Olivares to submit to a police interview by asking if he had paid his taxes, by threatening to park a police car in front of his barber shop, by confining him and others to the District Attorney's Office for many hours on January 9, 2015, rather than bring them to the courtroom to be recognized; and by telling him that he would go to jail if he did not come to Court when the police told him to appear.
3. Where there is sufficient foundation for an adverse inference against a party for its failure to call a witness, the trial judge has discretion to provide a so-called "missing witness" instruction. Generally, an instruction is appropriate when a party

"has knowledge of a person who can be located or brought forward, who is friendly to, or at least not hostilely disposed toward, the party, and who can be expected to give testimony of distinct importance to the case," and the party, without explanation, fails to call the person as a witness.

Commonwealth v. Saletino, 449 Mass. 657, 667-668 (2007), quoting *Commonwealth v. Anderson*, 411 Mass. 279, 280 n. 1 (1991). See *Commonwealth v. Schatvet*, 23 Mass. App. Ct. 130, 134 (1986). The instruction permits the jury, "if they think reasonable in the circumstances, [to] infer that [the witness], had he been called, would have given testimony unfavorable to the party." *Id.* at 668, quoting *Commonwealth v. Anderson*, 411 Mass. at 280 n. 1.

4. The missing witness argument must be distinguished from the classic, always-permissible **reasonable doubt** argument, however. The SJC in *Saletino* explained further:

Nothing we say today prohibits a defense attorney from arguing to the jury, in a case where there is no missing witness instruction, that the Commonwealth has not produced sufficient evidence to warrant a conviction beyond a reasonable doubt. This is standard argument that can be made in any case. A defendant has wide latitude in every case to argue that the Commonwealth has failed to present sufficient evidence and, in this sense, that there is an “absence” of proof or that evidence is “missing.” That is distinctly different from a missing witness argument, however. In the former, the defendant argues that the evidence that has been produced is inadequate; the defendant may even legitimately point out that a specific witness or specific evidence has not been produced; but the defendant does not argue or ask the jury to draw any conclusions as to the substance of the evidence that has not been produced. In the latter, the defendant points an accusatory finger at the Commonwealth for not producing the missing witness and urges the jury to conclude affirmatively that the missing evidence would have been unfavorable to the Commonwealth. That is the essence of the adverse inference. It is a powerful accusation—that a party is withholding evidence that would be unfavorable—and that is why we regulate it closely and require judges to assess very carefully whether to give the instruction and to permit the argument in a given case.

Saletino, at 672-673 (internal citation and footnote omitted).

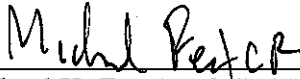
5. That Trooper Benson is equally available to the defense is of no moment since he is the Commonwealth’s lead investigator, is closely allied with the Commonwealth’s interest, and it would be natural to expect the Commonwealth to present the testimony of its lead investigator, especially after the quality of the investigation was challenged by the defense. *See Commonwealth v. Saletino*, 449 Mass. at 668 n. 17.

WHEREFORE, the Court should give an absent witness instruction and permit the defense to argue the adverse inference to the jury in its closing argument.

Respectfully submitted,

AARON HERNANDEZ

By his attorneys,



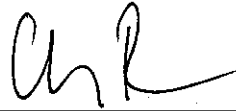
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by hand to:
William McCauley on April 6, 2015.



Charles W. Rankin

ABSENT WITNESS

If the Commonwealth did not call a potential witness to testify, and four conditions are met, you may infer that the witness's testimony would not be favorable to the Commonwealth.

The four conditions are:

First: that the Commonwealth's case against the defendant is sufficiently weak that it would normally be expected to call that witness to testify;

Second: that the absent witness would be expected to offer important testimony that would support the Commonwealth's case;

Third: that the absent witness is available to testify for the Commonwealth; and

Fourth: that the witness's absence is not explained by any of the other circumstances in the case.

If any of these four conditions has not been met, then you may not draw any inference from the witness's absence. If all four conditions have been met, you may infer that the witness's testimony would not be favorable to the Commonwealth if that is a reasonable conclusion in the circumstances of this case.

This rule is based on common sense. First, you may not draw such an inference unless the Commonwealth's case was sufficiently weak that it would be expected to bring in the absent witness.

Second, you may not draw such an inference unless the absent witness's testimony would be relevant to the defendant's guilt or innocence in some significant way. Normally the Commonwealth would have no reason to bring in a witness who would only testify about minor details, or who would only repeat what has already been said by other witnesses.

Third, you may not draw such an inference unless there is evidence that the Commonwealth was able to bring the absent witness into court.

And fourth, you may not draw such an inference if the evidence suggests another reasonable explanation for the witness's absence.

Taken from District Court Model Jury Instructions, § 3500 (revised Jan. 2009)