

#285

2/27/15

BRISTOL, SS SUPERIOR COURT  
FILED  
FEB 27 2015  
SUPERIOR COURT DEPARTMENT  
OF THE TRIAL/COURTE  
CRIMINAL #2013-983

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**DEFENDANT'S MOTION TO PRECLUDE  
ADMISSION OR DISPLAY OF A  
GLOCK .45 CALIBER PISTOL BEFORE THE JURY**

Aaron Hernandez ["Hernandez"], the defendant in the above-captioned criminal case, hereby moves this Court, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article XII of the Massachusetts Declaration of Rights, and the Massachusetts common law of evidence, to preclude the Commonwealth from introducing into evidence or otherwise displaying before the jury a Glock Model 21 .45 caliber semi-automatic pistol or any other Glock pistol. As grounds therefore, Hernandez avers as follows:

1. Part of the Commonwealth's theory in this case is that the decedent was shot and killed with a Glock .45 caliber pistol. There are numerous models and sizes of Glock .45 caliber pistols sold in the United States.
2. Another part of the Commonwealth's theory is that Hernandez can be seen in his home surveillance video holding an object which the Commonwealth believes to be

a Glock .45 caliber pistol. The Commonwealth will presumably urge the jury to infer that the object Hernandez is holding in the video is, in fact, the murder weapon.

3. The alleged murder weapon in this case has never been recovered.
4. Based upon discovery provided to date, the Commonwealth intends to present a witness, Kyle Aspinwall, to offer an opinion about what he believes to be depicted in the surveillance video. Mr. Aspinwall will presumably opine that the object in Hernandez's hand "appears to be a Glock pistol" based "on the curve of the back strap." See e-mail correspondence between Kyle Aspinwall and Robert Racette, appended here to as *Exhibit 1*.<sup>1</sup>
5. The Commonwealth apparently intends to ask the Court for permission to display a fully functional Glock Generation 3 Model 21 .45 caliber semi-automatic pistol to the jury during the course of Mr. Aspinwall's testimony.
6. Based on discovery provided to date, Mr. Aspinwall has never opined that the object in the surveillance video is or even appears to be a Glock Generation 3 Model 21 .45 caliber semi-automatic pistol nor, in good faith, could he possibly do so. Indeed, he is basing his opinion that the object "appears to be a Glock pistol" upon the shape of the back strap. Upon information and belief, that back strap shape is not unique to the Model 21 or even to .45 caliber Glocks in general.
7. The display of a fully functional firearm to the jury under these circumstances as a surrogate for the alleged murder weapon (according to the Commonwealth's theory of the case) would be inflammatory, unduly and improperly suggestive, and far more

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<sup>1</sup> The defendant does not concede that such proffered opinion evidence will be admissible.

unfairly prejudicial than probative. Indeed, the particular firearm the Commonwealth wants to show the jury has nothing to do with this case!

8. Assuming *arguendo* that Mr. Aspinwall's opinion that the object in Hernandez's hand "appears to be a Glock" based "on the curve of the back strap" is admissible, he might arguably be permitted to use a **photograph** of a generic Glock back strap to illustrate and explain his testimony.<sup>2</sup> That is a far cry from displaying an actual firearm in a murder case where no weapon has been recovered (let alone the very model the Commonwealth wants the jury to believe to be the murder weapon) to the jury.
9. To the extent that the Commonwealth's proposed demonstration can be likened to an identification procedure involving an inanimate object (essentially a single object show-up), it is so improperly and unnecessarily suggestive that it would constitute a denial of constitutional due process. *See Commonwealth v. Simmons*, 383 Mass. 46, 51 (1981) (referring to "extreme case").
10. Even if displaying a fully functional Model 21 .45 caliber Glock semi-automatic pistol to the jury would not violate Hernandez's constitutional rights, its probative value would be vastly outweighed by the resulting unfair prejudice. There is no evidence that the murder weapon in this case was a Model 21 Glock. Moreover, there is no evidence that the object depicted in the surveillance video is a Model 21 Glock and no evidence (other than Mr. Aspinwall's putative opinion) that it appears to be a Glock, a .45 caliber semi-automatic pistol, or an actual firearm at all! Under

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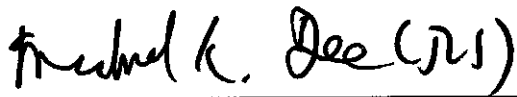
<sup>2</sup> The defendant does not concede that such a photograph would be admissible.

these circumstances, the display of such a firearm to the jury would be unfairly prejudicial, highly inflammatory, and invites unfounded jury speculation. The present case is a far cry from *Commonwealth v. Bresilla*, 470 Mass. 422 (2015), where the Court found no abuse of discretion in permitting the Commonwealth to display a jacket to a witness at trial when the witness had already identified that same jacket as the perpetrator's at the scene of the crime. This case is also distinguishable from *Commonwealth v. Housewright*, SJC-11617 (Feb. 19, 2015), 2014 WL 7891595, where the Court reversed the defendant's conviction for assault by means of a dangerous weapon and related offenses on other grounds and then noted *in dicta* that the admission of photographs of a Derringer was not an abuse of discretion. While the Court has considerable discretion in deciding whether or not to allow courtroom demonstrations, *e.g. Commonwealth v. McGee*, 469 Mass. 1, 9 (2014), the dramatic scene the Commonwealth seeks to perform here should not be countenanced.

Respectfully submitted,

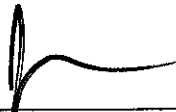
**AARON HERNANDEZ**

By his attorneys,



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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing document upon the Commonwealth, **IN HAND**, to: William McCauley, Assistant District Attorney, Bristol County, 888 Purchase Street, New Bedford, MA 02740 on February 27, 2015.

  
James L. Sultan

**From:** Kyle Aspinwall [mailto:Kyle.Aspinwall@glock.us]  
**Sent:** Tuesday, December 23, 2014 9:02 AM  
**To:** Racette, Robert (BRI)  
**Subject:** RE: Surveillance Video Clips - C v. Hernandez - Bristol County (MA)

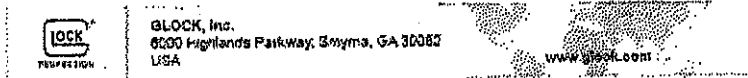
Robert,

In sequence 35 there is a brief glimpse of the base plate of the magazine, which has a distinct "U" shaped design, as well as "lip" on the bottom forward edge of the magazine. That being said, I would not be comfortable saying it is a Glock magazine, as there is not in my opinion, enough detail there to distinguish it from magazines used in other manufacturer's pistol(s).

Kind regards,

**Kyle Aspinwall**  
District Sales Manager

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[www.glock.com](http://www.glock.com)



**From:** Racette, Robert D (DAA) [mailto:robert.d.racette@state.ma.us]  
**Sent:** Thursday, December 18, 2014 6:35 PM  
**To:** Kyle Aspinwall  
**Cc:** Racette, Robert D (DAA); McCauley, William (DAA)  
**Subject:** Re: Surveillance Video Clips - C v. Hernandez - Bristol County (MA)

Thanks Kyle. One of our troopers indicated there were distinct features regarding the magazine seen in sequence 35. Can you see anything in particular about the magazine?

*Sent from my Verizon Wireless 4G LTE DROID*

Kyle Aspinwall <[Kyle.Aspinwall@glock.us](mailto:Kyle.Aspinwall@glock.us)> wrote:

Gentlemen,

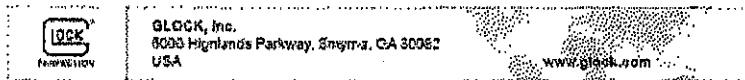
I have looked at the video and corresponding stills. I think the best shots are found in sequence 34 and 32. As the subject is holding the pistol by the muzzle (somewhat unorthodox), you can see the grip frame. Based on the curve of the back strap, it appears to be a Glock pistol. As the dustcover of the pistol cannot be seen (the part of the frame below the barrel), I can't see if there is an accessory rail or not, so I am not able to tell (from those two videos) if the pistol is a Gen4, 3 or 2. Gen2 pistols have no accessory rail.

**EXHIBIT 1**

Kind regards,

**Kyle Aspinwall**  
District Sales Manager

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[www.glock.com](http://www.glock.com)



**From:** Racette, Robert D (DAA) [<mailto:robert.d.racette@state.ma.us>]  
**Sent:** Thursday, December 18, 2014 4:01 PM  
**To:** Kyle Aspinwall  
**Cc:** McCauley, William (DAA)  
**Subject:** Surveillance Video Clips - C v. Hernandez - Bristol County (MA)

Video clips per request of ADA McCauley. All videos playback have been slowed down.

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