

#380

JUN 22 2015

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CRIMINAL #2013-983

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**DEFENDANT'S REPLY TO COMMONWEALTH'S OPPOSITION TO
DEFENDANT'S RENEWED MOTION FOR A REQUIRED FINDING OF NOT GUILTY**

**I. THE COMMONWEALTH RELIES ON A SPECULATIVE VERSION OF THE
FACTS.**

In an effort to blunt the defendant's arguments, the Commonwealth continues to describe the fatal shooting of Odin Lloyd in a manner which was not established by the evidence. First, the Commonwealth asserts: "Ballistic evidence indicated that the first shot was fired from inside the car." *Com. Mem.* at 3. In fact, there was no evidence at all about the sequence of shots fired (or who fired them). This is sheer speculation.

Second, the Commonwealth alleges: "The next three shots were then fired outside the car and in quick succession while the victim was crouching near the vehicle." *Com. Mem.* at 3. Yet there was no testimony from Dr. Zane regarding either the sequence of shots or the decedent's physical position or posture. *See* Transcript appended to the Defendant's Memorandum as Exhibit 1. There was no other evidence to that effect, either. This is sheer speculation.

Third, the Commonwealth alleges: “The final two shots were fired while the victim lay wounded and helpless on the ground.” *Com. Mem.* at 3-4. Once again, there was no testimony or other evidence respecting the sequence of shots, whether the decedent was shot while on the ground, or whether some of his injuries were inflicted after he had died.

Finally, the Commonwealth asserts (at p. 4, n.2):

There was videotape evidence depicting the defendant’s demeanor immediately before and after the killing. At all times he and the others appear relaxed and happy.

Assuming that the shooting occurred shortly before 3:30 a.m. on June 17, 2013, as the Commonwealth alleges, there was no videotaped evidence depicting Hernandez’s demeanor “immediately before” that incident. As for the home surveillance video recorded shortly thereafter, neither Hernandez nor his alleged co-venturers appear “relaxed and happy.” This is simply made up out of whole cloth.

It should also be noted that in stark contrast to the Commonwealth’s closing argument, which depicted Hernandez as the shooter, the Commonwealth’s memorandum carefully avoids any suggestion to that effect. Indeed, the Commonwealth asserts that it “was not required to prove that the defendant pulled the trigger of the gun that killed the victim.” *Com. Mem.* at 16. While that is a correct statement of the law, there is something fundamentally unfair about obtaining a verdict based on one theory and defending the fairness of that verdict on another.

II. THE COMMONWEALTH’S ARGUMENT ABOUT SUFFICIENCY OF THE EVIDENCE IGNORES KEY SIMILAR CASES.

In his previously-filed memorandum of law, Hernandez relied upon a body of legal precedent in which the SJC found insufficient evidence to convict the defendant of first degree murder. *E.g.*

Commonwealth v. Simpkins, 470 Mass. 458 (2015); *Commonwealth v. Morris*, 422 Mass. 254 (1996); *Commonwealth v. Mazza*, 399 Mass. 395 (1987); *Commonwealth v. Salemme*, 395 Mass. 594 (1985). Recognizing that the evidence in every case is different, Hernandez argued that similarities between those cases and this one supported a similar result. *Def. Mem.* at 12. In its response, the Commonwealth utterly ignores that entire body of precedent, an omission which illustrates the weakness of its argument.

With respect to extreme atrocity or cruelty, the Commonwealth claims (at pp. 21-22, n.7) that Hernandez is “asking this Court to change the law of the Commonwealth” based upon “*dicta*” in *Commonwealth v. Berry*, 466 Mass. 763, 773-778 (2014) and *Commonwealth v. Reilly*, 467 Mass. 799, 828-829 (2014), by imposing an additional intent element to support a conviction of first degree murder by extreme atrocity or cruelty. The Commonwealth is wrong. Nowhere in the defendant’s memorandum of law does such an argument appear. But in the absence of any special intent requirement (beyond malice), it is particularly incumbent upon trial judges in applying Rule 25(b)(2) to ensure that evidence of **extreme** atrocity or cruelty (as compared to most cases) is clearly present before permitting a first degree murder conviction based solely on that theory to stand.

III. THE COMMONWEALTH’S ARGUMENT AGAINST A REDUCTION OF THE VERDICT IS FLAWED.

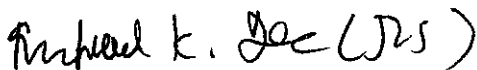
The Commonwealth acknowledges (at p. 25) that a trial judge’s discretion to reduce a verdict under Rule 25(b)(2) “is appropriately exercised when the weight of the evidence in a case, although technically sufficient to support a jury’s verdict, points to a lesser crime.” *See, e.g., Commonwealth v. Pagan*, 471 Mass. 537, 542 (2015); *Commonwealth v. Chhim*, 447 Mass. 370, 381-382 (2006). It goes on to argue that the evidence presented on the element of extreme atrocity or cruelty in this

case was “overwhelmingly powerful” and that the verdict was “indisputably commensurate with verdicts in other similar cases.” *Com. Mem.* at 26-27. Yet, as Hernandez noted in his memorandum of law, there was nothing particularly “extreme” about this case when compared to numerous other killings involving the use of a handgun. Moreover, the Commonwealth fails to cite a single “similar case” where such a verdict was upheld. Finally, the Commonwealth simply does not address cases like *Commonwealth v. Colleran*, 452 Mass. 417 (2008), where, as in the instant case, the killing may well have been spontaneous, the defendant and victim enjoyed a good relationship prior to the killing, no motive for the killing was shown, and drugs and alcohol were likely involved.

Respectfully submitted,

AARON HERNANDEZ

By his attorneys,



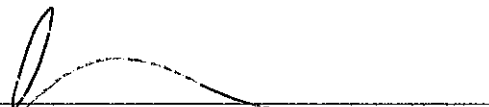
Michael K. Fee, BBO #544541
Latham & Watkins, LLP
John Hancock Tower
200 Clarendon Street, 20th Floor
Boston, MA 02116
(617) 948-6000



James L. Sultan, BBO #488400
Charles W. Rankin, BBO #411780
Rankin & Sultan
151 Merrimac Street, Second Floor
Boston, MA 02114
(617) 720-0011

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by e-mail and by mailing a copy thereof, US mail, postage prepaid, to: William McCauley, First Assistant District Attorney, Bristol County, 888 Purchase Street, New Bedford, MA 02740 on June 18, 2015.



James L. Sultan