

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
SUCR2014-10417;  
SUCR2015-10384

COMMONWEALTH

v.

AARON HERNANDEZ

MOTION TO DISMISS THE WITNESS INTIMIDATION INDICTMENT

**THE PALM BEACH INDICTMENT AGAINST THE DEFENDANT SHOULD BE  
DISMISSED BECAUSE PHYSICAL EVIDENCE MATERIAL TO THE DEFENDANT'S  
DEFENSE WAS DESTROYED/LOST APPROXIMATELY SIX DAYS AFTER THE  
SHOOTING BY LAW ENFORCEMENT OFFICIALS WHICH HAS RESULTED IN  
IRREMEDIAL HARM TO THE DEFENDANT THAT PREVENTS THE  
POSSIBILITY OF A FAIR TRIAL**

It has been held that the Commonwealth has the duty not to destroy or lose exculpatory evidence and, rather, must preserve such evidence for the defendant to inspect and examine, if he so chooses. *Commonwealth v. Neal*, 464 N.E.2d 1356 (Mass. 1984). Furthermore, courts have acknowledged that prosecutors can be liable for destruction of evidence, even if it is done wholly by police. *Commonwealth v. White*, 713 N.E.2d 987, 991 (Mass. App. Ct. 1999) (“The prosecution was chargeable with the actions of the police for destroying the cocaine.”) (citing *Commonwealth v. Donahue*, 487 N.E.2d 1351 (Mass. 1986); *Commonwealth v. Martin*, 696 N.E.2d 904 (Mass. 1998)). When a defendant makes a claim that the prosecution, as a result of personal or police negligence, has lost or destroyed potentially exculpatory evidence, he bears the initial burden and is entitled to relief if he establishes a “reasonable possibility, based on concrete evidence rather than a fertile imagination,” that access to the evidence would have been favorable to his cause. *Id.* at 1364. This is a threshold burden which must be met in order to advance a claim for relief. *Commonwealth v. Williams*, 919 N.E.2d 685, 694 (Mass. 2010).

If the defendant meets this burden, then the judge must employ a balancing test to determine the appropriateness and extent of remedial action. *Id.* at 693. The court must weigh the culpability of the Commonwealth, the materiality of the evidence, and the potential prejudice to the defendant. *Commonwealth v. DiBenedetto*, 693 N.E.2d 1007 (citing *Commonwealth v. Willie*, 400 Mass. 427, 432, 510 N.E.2d 258 (1987)).

The remedial action is up to the judge's discretion, however, granting a motion to dismiss the indictment would be an appropriate remedy if the destruction of evidence results in irreparable harm to a defendant that prevents the possibility of a fair trial. *See Commonwealth v. Henderson*, 582 N.E.2d 496 (Mass. 1991); *Commonwealth v. Gliniewicz*, 500 N.E.2d 1324, 1326 (Mass. 1986) (citing *Commonwealth v. Lam Hue To*, 461 N.E.2d 776 (Mass. 1984)).

1. The Defendant can meet the initial burden that the evidence would have been favorable to him because it is reasonably possible that access to the destroyed evidence might have affected the outcome to his trial.

Because he need only make a showing of "reasonable possibility," the Defendant is "entitled to relief pursuant to the more favorable standard whether access to the destroyed or lost evidence 'might have' affected the verdict." *Commonwealth v. White*, 713 N.E.2d 987, 991 (Mass. App. Ct. 1999). In *White*, the defendant requested access to seized narcotics to perform his own laboratory tests before trial. *Id.* The evidence, however, was destroyed by police. *Id.* The defendant hoped to defend against the charged crime by showing, through independent tests, that the narcotics had been tampered with after the search and seizure. *Id.* The court held that, given the circumstances and the inability to locate the evidence, the defendant had met the initial burden of showing that the evidence "might have" affected the verdict. *Id.*

Here, the Defendant meets the initial burden and can make a showing that the lost or destroyed evidence might affect the verdict of his case. The Defendant argues that the physical evidence is exculpatory and would have assisted the defense in presenting an argument different

than the Commonwealth's version of the February 13, 2013 shooting of Alexander Bradley. Like the case in *White*, the Defendant was relying on access to and the ability to inspect the physical evidence maintained by the Palm Beach County Sheriff's Office. Because his request for production of the evidence was met with the Sheriff's inability to produce, the Defendant meets the initial burden and the court must weigh the factors in order to determine the appropriate remedy.

2. On balance, the Defendant's motion to dismiss the indictment should be granted as law enforcement was negligent in maintaining the evidence, the evidence is material to the defendant's defense, and the lack of access is prejudicial to the Defendant.

- a. *Law Enforcement in Florida was at least negligent in maintaining the evidence, resulting in its destruction; and therefore, the Defendant is entitled to a remedy.*

When the Commonwealth has acted recklessly or in bad faith, resulting in the destruction of evidence, the Defendant may be independently entitled to a remedy even without meeting the *Neal* threshold burden. *See, e.g., Commonwealth v. Gliniewicz*, 500 N.E.2d 1324 (Mass. 1986) (new trial ordered where evidence, the defendants' boots, were effectively destroyed by the Commonwealth's testing); *see also Commonwealth v. Olszewski*, 519 N.E.2d 587 (Mass. 1988) ("It would seem that culpability, in the sense of bad faith destruction or falsification of evidence, could present an independent ground for remedial action"). Additionally, even where the Commonwealth's level of culpability is no greater than negligence, the Defendant may still be entitled to make an argument at trial that focuses on such negligence. *See Commonwealth v. Bowden*, 399 N.E.2d 482 (Mass. 1980). Furthermore, courts have acknowledged that prosecutors can be held responsible for the actions of law enforcement in destroying evidence. *Commonwealth v. White*, 713 N.E.2d 987, 991 (Mass. App. Ct. 1999) (citing *Commonwealth v. Donahue*, 487 N.E.2d 1351 (Mass. 1986); *Commonwealth v. Martin*, 696 N.E.2d 904 (Mass. 1998)).

The absence of bad faith does not necessarily absolve the Commonwealth because an unfair trial may still result even if the evidence was lost despite the police or prosecutors' good faith in maintaining it. *Commonwealth v. White*, 713 N.E.2d 987, 991 (Mass. App. Ct. 1999); see *Commonwealth v. Henderson*, 582 N.E.2d 496 (Mass. 1991). In *Henderson*, a police officer who interviewed a robbery victim wrote a description of the assailant in her notes. 582 N.E.2d at 496. Two years later, when the defendant was charged with the crime, the notes containing the description were lost or destroyed. *Id.* The judge concluded that dismissal of the indictment was warranted because, though the degree of police fault was not great, considering the passage of time, law enforcement officers were still negligent and there should have been a mechanism in place for preserving such evidence. *Id.* at 497.

Here, the Commonwealth chose to indict the Defendant in 2015 for a case arising out of Florida in 2013 and, although the law enforcement officers did not work for or are even in the same jurisdiction as the Suffolk County District Attorney, the Commonwealth should still be chargeable with the negligence of the Palm Beach County officers as they would be for officers acting within the Commonwealth. If “[a]cts done outside a jurisdiction, [] intended to produce and producing detrimental effects within it,” can be tried within the Commonwealth via the “effects” doctrine, so too should the prosecution be held to the same standard and can be charged with the negligence of police regardless of whether the law enforcement officers were within the jurisdiction.

Due to their prosecutorial duty to preserve evidence, the Commonwealth including Law Enforcement Officials, by bringing the case in Massachusetts, had a duty to preserve evidence to the best of their ability despite its location in Palm Beach County. As in *Henderson*, there should have been a mechanism in place for preserving the physical evidence, which the

Defendant argues is exculpatory. To allow a defendant to be charged in another jurisdiction under the “effects” doctrine and not holding prosecutors and law enforcement to the same standards of responsibility by virtue of working in separate jurisdictions, would mean such defendant would lose all rights to a fair trial.

*b. The destroyed evidence is material because it would create reasonable doubt as to the Defendant’s guilt regarding the charged crime.*

Evidence is material if, in light of the entire record, it creates a reasonable doubt as to the Defendant's guilt. *Commonwealth v. Simpson*, 750 N.E.2d 977, 988 (Mass. 2001) (citing *Commonwealth v. Otsuki*, 581 N.E.2d 999 (1991)). In *Otsuki*, the evidence in question was lost or destroyed bullet fragments. *Id.* at 1007. Despite the absence of this evidence, the Commonwealth introduced substantial evidence at trial as to the defendant’s guilt. *Id.* The court held the missing evidence was not material as it likely would not have raised any doubt as to the defendant’s guilt nor would it have affected the verdict of the case. *Id.*

In this case the primary evidence of the Defendant’s guilt regarding the Palm Beach shooting rests with the testimony by the alleged victim Alexander Bradley. Evidence that calls into question Bradley’s testimony as to the shooting speaks directly to the veracity of Bradley’s version of such events.

In *Commonwealth v. Williams* *infra* at 694 when a defendant makes a claim that the prosecution, as a result of personal or police negligence, has lost or destroyed potentially exculpatory evidence, he bears the initial burden and is entitled to relief if he establishes a “reasonable possibility, based on concrete evidence rather than a fertile imagination,” that access to the evidence would have been favorable to his cause. *Id.* at 1364. This is a threshold burden which must be met in order to advance a claim for relief. *Commonwealth v. Williams*, 919 N.E.2d 685, 694 (Mass. 2010).

The Defendants forensic scientist and bloodstain pattern analyst Stuart H. James examined the remaining physical evidence located at the the evidence facility of the Palm Beach County Sheriff's Office on January 31, 2017. **EXHIBIT A** (Affidavit of Stuart H. James). Mr. James was retained by Defendant's counsel to review materials, and examine evidence in this case to perform a blood stain pattern analysis to determine if possible, the location and position of Alexander S. Bradley when he received a gun shot. *Id.*

He examined the following materials in the case:

1. Reports of the Palm Beach County Sheriff's Office
2. Crime scene log
3. Scene photographs
4. Evidence photographs
5. Medical records and photographs of Alexander S. Bradley in the hospital

*Id.*

He also examined the following items of physical evidence at the evidence facility of the Palm Beach County Sheriff's Office and made a visit to the scene on January 31, 2017.

Item 10 consisted of a brass S&W .40 caliber Remington Peters casing that was collected from the scene.

Item 14 consisted of a lead projectile fragment recovered from the right temporalis fossa of Alexander S. Bradley.

Item 15 consisted of a red cap with a blue bill and Bulls logo collected from the scene. The underside of the bill was gray and contained a pattern of spattered possible impact blood stains, small yellowish tissue fragments and dark hair-like fiber. This finding is consistent with the cap being worn by Alexander S. Bradley when the shot was fired.

Item 16 consisted of a brown and a white paper collected from the scene. Both papers exhibited a few small spatters and larger passive drive stains.

Item 17 consisted of a Gatorade Perform 20 plastic bottle that had been previously treated with black fingerprint powder.

*Id.*

The following items were not available for examination as they were reportedly returned to Alexander S. Bradley.

Item 5 consisted of the shoes and socks of Alexander S. Bradley.

Item 7 consisted of a shirt, pants and boxer shorts of Alexander S. Bradley.

*Id.*

A complete scientific blood stain pattern analysis requires examination of all forensic blood stain evidence. A close and detailed examination of the shoes, socks, shirt and pants worn by Alexander S. Bradley for blood stains and patterns is necessary to assist with the determination as to whether he was within or outside the vehicle when shot. The unavailability of the shoes, socks, shirt and pants of Alexander S. Bradley for examination prevented me from forming complete and definite scientific conclusions in this case. *Id.*

This destroyed evidence is material to the Defendant's case in chief as it would allow him to present his version of the events that in turn could create reasonable doubt in the fact finder. Defendant has met his burden of establishing a "reasonable possibility, based on concrete evidence rather than a fertile imagination," that access to the evidence would have been favorable to his cause.

*c. The destruction of the evidence is prejudicial to the Defendant because it is reasonably possible that access to the evidence would have favorably helped his cause.*

Similar to the initial burden articulated in *Neal*, to establish prejudice, the defendant must show "reasonable possibility, based on concrete evidence rather than a fertile imagination," that access to the material would have produced evidence favorable to his cause. *Commonwealth v. DiBenedetto*, 693 N.E.2d 1007 (citing *Commonwealth v. Willie*, 400 Mass. 427, 432, 510 N.E.2d 258 (1987)). Further, where the Defendant is essentially precluded from presenting a defense, the prejudice is great. *Commonwealth v. Sasville*, 616 N.E.2d 476, 483 (Mass. App. Ct. 1993) (citing generally *Commonwealth v. Francis*, 375 N.E.2d 1221 (Mass. 1978)). In *Sasville*, the defendant, charged with rape, was unable to conduct blood tests on an aborted fetus when the

evidence no longer existed because police advised the physician to destroy the fetus. *Id.* at 479. Such evidence would have allowed the defendant to impeach the witness's credibility and exculpate himself. *Id.* Because the defendant was essentially precluded from presenting a defense since the evidence was destroyed, the judge found that the prejudice was too great and ordered the indictment to be dismissed. *Id.* at 483-84.

As was the case in *Sasville*, all of the potentially exculpatory physical evidence the Defendant had to offer was destroyed or lost in Palm Beach County approximately six days after the alleged incident. Because he is effectively precluded from presenting a defense, the prejudice against the Defendant is too high and, as the court ordered in *Sasville*, the indictment should be dismissed.

On balance, all three factors weigh in favor of granting the Defendant's motion to dismiss the indictment. Palm Beach County law enforcement, and by extension the Commonwealth by trying the case in Massachusetts, negligently failed to uphold their duty to preserve evidence that they should have been aware of; the evidence was material to the defendant's case and could have caused reasonable doubt in the fact finder; and, in turn, lack of access and the inability to use the evidence will greatly prejudice the Defendant at trial. Due to the irremediable harm the destroyed evidence will cause at trial, the motion to dismiss the indictment should be granted.

Respectfully Submitted  
on behalf of Aaron Hernandez,  
by his attorneys,



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Dated: February 1, 2017

## **EXHIBIT A**

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**Commonwealth of Massachusetts**

**v.**

**Aaron Hernandez**

**PALM BEACH COUNTY SHERIFF'S OFFICE CASE NO: 13-037333**

**Affidavit of Stuart H. James**

I, Stuart H. James am a forensic scientist and bloodstain pattern analyst with James and Associates Forensic Consultants, Inc. in Fort Lauderdale, Florida. A copy of my current CV is attached.

I was retained by Attorney Jose Baez to review materials, and examine evidence in this case to perform a bloodstain pattern analysis to determine if possible, the location and position of Alexander S. Bradley when he received a gunshot.

I have examined the following materials in the case of the Commonwealth of Massachusetts v. Aaron Hernandez received on January 24<sup>th</sup>, 2016.

1. Reports of the Palm Beach County Sheriff's Office
2. Crime scene log
3. Scene photographs
4. Evidence photographs
5. Medical records and photographs of Alexander S. Bradley in Hospital

I also examined the following items of physical evidence at the Evidence Facility of the Palm Beach County Sheriff's Office and made a visit to the scene on January 31<sup>st</sup>, 2017.

Item 10 consisted of a brass S&W .40 caliber Remington Peters casing that was collected from the scene.

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A complete scientific bloodstain pattern analysis requires examination of all forensic bloodstain evidence. A close and detailed examination of the shoes, socks, shirt and pants worn by Alexander S. Bradley for bloodstains and patterns is necessary to assist with the determination as to whether he was within or outside the vehicle when shot. The unavailability of the shoes, socks, shirt and pants of Alexander S. Bradley for examination prevented me from forming complete and definitive scientific conclusions in this case.

  
Stuart H. James