

OCT 16 2015

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

BRISTOL, ss.

DOCKET NO. BRCR 201⁴-0324

COMMONWEALTH)
) SUPPLEMENTAL MEMORANDUM OF LAW
v.) IN SUPPORT OF MOTION TO DISMISS THE
) MURDER INDICTMENT PURSUANT TO
) COMMONWEALTH V. MCCARTHY AND
) COMMONWEALTH V. O'DELL
CARLOS ORTIZ)

The defendant, Carlos Ortiz, respectfully submits this Supplemental Memorandum of Law in Support of his Motion to Dismiss the Murder Indictment Pursuant to *Commonwealth v. McCarthy*, 385 Mass. 160 (1982) and *Commonwealth v. O'Dell*, 392 Mass. 445 (1984).

I. FACTUAL BACKGROUND.

The facts in this case are well known to the Court and all the parties. The Aaron Hernandez case has been fully litigated as have motions to suppress and other matters. Therefore, the defendant, Carlos Ortiz, will not delve into the factual background.

II. ARGUMENT.

A. Pursuant To *Commonwealth v. McCarthy*, The Commonwealth Failed To Prove Criminal Activity By Carlos Ortiz.

"The grand jury occupies a unique place in our jurisprudence. Comprised of citizens who sit independently and in secrecy, the grand jury determines whether sufficient cause exists to justify requiring a person to undergo the 'public accusation of crime, and ... the trouble, expense and anxiety of a public trial' before a jury of his peers. The right of indictment on probable cause is 'one of the securities to the innocent against hasty, malicious and oppressive public prosecutions.' " *Commonwealth v. Riley*, 73 Mass. App. Ct. 721, 726 (2009), citing *Jones v. Robins*, 8 Gray 329, 344 (1857), and *Commonwealth v. McCravy*, 430 Mass. 758, 761-762

(2000). “Indeed, the right to presentment and indictment by a grand jury is a right enshrined, as to serious crime, in art. 12 of the Massachusetts Declaration of Rights.” *Commonwealth v. Riley*, 73 Mass. App. Ct. at 726, citing *Commonwealth v. Mayfield*, 398 Mass. 615, 622 n. 3 (1986).

“A grand jury finding of probable cause is necessary if indictments are to fulfill their function as an effective protection ‘against unfounded criminal prosecutions.’” *Commonwealth v. McCarthy*, 385 Mass. at 162-163, citing *Lataille v. District Court of E. Hampden*, 366 Mass. 525, 531 (1974). In *McCarthy*, the Court held “the grand jury’s failure to hear any evidence of criminal activity by the defendant justifies dismissal of [the] indictment.” *Id.* at 163 (indictment dismissed where defendant may have been present at commission of wrongful act and did not prevent it but no evidence defendant had aided, commanded, counseled or encouraged the crime). See also *Commonwealth v. Hanright*, 466 Mass. 303 (2013), citing *Commonwealth v. Stevens*, 362 Mass. 24, 26 (1972), quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (probable cause has been defined as “reasonably trustworthy information ... sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.”). The *McCarthy* Court held “at the very least the grand jury must hear sufficient evidence to establish the identity of the accused” and “probable cause to arrest him.” *McCarthy* at 163 (citations omitted). “Although this standard is ‘considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding,’ it serves ‘to strike down indictments in cases where a grand jury has heard no evidence . . . that would support an inference of the defendant's involvement.” *Commonwealth v. Reveron*, 75 Mass. App. Ct. 354, 357 (2009), quoting *Commonwealth v. O’Dell*, 392 Mass. at 451 and *Commonwealth v. Club Caravan, Inc.*, 30 Mass. App. Ct. 561, 567 (1991).

To establish first-degree murder, the Commonwealth was required to present sufficient evidence to the Grand Jury to establish probable cause that:

1. The defendant caused the death of Odin Lloyd.
2. The defendant intended to kill [Lloyd], that is, the defendant consciously and purposely intended to cause [Lloyd's] death.
3. The defendant committed the killing with deliberate premeditation, that is, he decided to kill after a period of reflection, or with extreme atrocity or cruelty.

SJC Model Jury Instructions on Homicide at 38 et. seq. "Where, as here, the liability of a joint venturer is at issue, the Commonwealth must present the grand jury with evidence that the defendant both participated in, and shared the requisite mental state for, each crime charged."

Commonwealth v. Hanright, 466 Mass. at 313-314 (2013), citing *Commonwealth v. Zanetti*, 454 Mass. 449, 467-468 (2009). Thus, to support a murder indictment on a joint venture theory, the Commonwealth must present evidence that Carlos Ortiz:

1. aided, encouraged, planned, participated in, or stood ready to assist [a co-venturer] in killing [the victim], and
2. intended the victim's death, grievous bodily harm to him, or any act which a reasonable person would know created a plain and strong likelihood of death.

Commonwealth v. Hanright, at 313-314. "The critical question with respect to whether the evidence was sufficient to warrant a finding that a defendant is guilty of murder in the first degree as a joint venturer on the theories of deliberate premeditation and extreme atrocity or cruelty is whether the defendant was present at the scene of the murder, with the knowledge that another intends to commit a crime or with intent to commit the crime and by agreement was willing and available to assist if necessary." *Commonwealth v. Deane*, 458 Mass. 43, 50 (2010), citing *Commonwealth v. Philipps*, 452 Mass. 617, 633 (2008). ¹ Carlos Ortiz admits that he was

1 The model instructions provide as follows: "Mere presence at the scene of the crime is not enough to find a defendant guilty. Presence alone does not establish a defendant's knowing participation in the crime, even if a person knew about the intended crime in advance and took no steps to prevent it. To find a defendant guilty, there must be proof that the defendant intentionally participated in some fashion in committing that particular crime and that he had or

present at the scene. However, mere presence is not enough to support the indictment. *Id.* Nor is “mere presence at the commission of the wrongful act and even failure to take affirmative steps to prevent it . . . render a person liable as a participant.” *Commonwealth v. Benders*, 361 Mass. 704, 708 (1982). Also, the fact that he did not report the crime is also not a crime and does not equate with the crime of murder. *Commonwealth v. Nickerson*, 386 Mass. 54, 60 (1982).

The Commonwealth provided no evidence that Ortiz participated in any way or had any intent to commit or participate in the murder of Odin Lloyd. There is no evidence that the defendant shot Odin Lloyd. There is no evidence that he encouraged anyone to shoot Lloyd or that he helped to plan the crime or agreed to stand by to aid the shooter or provide assistance in any way to the shooter. *Commonwealth v. Zanetti*, 454 Mass. at 470; *Commonwealth v. Hanright*, 466 Mass. at 314; *Commonwealth v. Deane*, 458 Mass. at 51. Although the Commonwealth is not required to prove how a joint venture participated or who the actual shooter is, it must “prove that the defendant shared the requisite malice, that is, a specific intent to kill, and that the murders were committed in a manner that showed extreme atrocity or cruelty and deliberate premeditation.” *Commonwealth v. Dean*, at 51. The Commonwealth failed to prove the requisite mental state. See *Commonwealth v. Reveron*, 75 Mass. App. Ct. 354, 358-359 (2009) (judge correctly allowed motion to dismiss murder indictment where evidence before grand jury did not establish probable cause to believe defendant knew his friends planned a robbery rather than a drug deal). See also *Commonwealth v. Montalvo*, 76 Mass. App. Ct. 319, 330 (2010) (though defendant found in “hustle house” next to man who threw bag of cocaine out window and cocaine and packaging materials were in plain view, court held that mere presence was not enough to sustain conviction of possession of cocaine with intent to distribute). There was no shared the intent required to commit the crime. It is not enough to show that the defendant simply was present when the crime was committed or that he knew about it in advance.”

evidence supporting any inferences that Ortiz, Wallace, and Hernandez worked collectively to procure Lloyd's death and shared the requisite mental state. Nothing suggests that Ortiz knew that Hernandez planned to shoot Lloyd or participated in any way in the shooting. Ortiz consistently told the officers that he never got out of the car at the industrial park.² Trooper Benson's testimony to the grand jury about the distance and location of the towel was incorrect. His testimony put the towel closer to the body of Lloyd than it was and gave it improper significance. The evidence shows nothing more than Ortiz's mere presence.

Furthermore, any knowledge by Ortiz that Hernandez had a gun the night of the shooting does not provide any evidence that he knew that Hernandez and/or Wallace had planned to shoot and kill Lloyd. Ortiz told the police that Hernandez carried a gun for protection and it is not unusual for a celebrity such as Hernandez to be armed.

Moreover, any claim by the Commonwealth that false or inconsistent statements by Ortiz to the police were suggestive of consciousness of guilt to meet the Commonwealth's burden of proof are without merit. See *Commonwealth v. Basch*, 386 Mass. 620, 624-625 (1982) ("Evidence of consciousness of guilt together with other evidence may support a determination of guilt."). Throughout his interviews with the police, Ortiz maintained that he had not participated in Lloyd's shooting and did not know it was going to happen. He believed he was going to Hernandez's house to socialize. He was not urgently summoned by Hernandez as the Commonwealth may claim. Likewise, any claim that the video surveillance shows Ortiz, Hernandez, and Wallace at Hernandez's home after Lloyd was shot behaving normally in support of active participation in the murder lacks merit. Ortiz had maintained throughout his interview that he was that he was shocked that Lloyd had been shot and was scared when they returned to

² Any initial denial of being at the scene was not evidence of guilt. However, the prosecution attempted to use such denials as evidence of guilt.

Hernandez's house because Hernandez had threatened him and his family. [interview transcript Tr.2/123-124].

Accordingly, there is no reasonably trustworthy information to support the Commonwealth's contention and not enough to provide a juror with reason to indict. *Commonwealth v. Hanright*, 466 Mass. at 312; *Commonwealth v. McCarthy*, 385 Mass. at 163. Fundamental fairness requires that a court dismiss an indictment where the grand jury receives no evidence of criminality on the part of the accused. *Commonwealth v. Moran*, 453 Mass. at 884. There must be at least enough evidence to rise to the level of "probable cause to arrest" and that evidence was not presented to the grand jury. Thus, the indictment must be dismissed.

B. Pursuant To *Commonwealth v. O'Dell*, The Commonwealth Impaired The Integrity Of The Grand Jury Proceedings And Violated The Defendant's' Due Process Rights.

During the grand jury proceedings, the Commonwealth elicited testimony that Ortiz was on probation and smoked Angel Dust with Wallace. Also, Trooper Benson only articulated certain aspects of his and Sergeant Moran's interview with Ortiz in his grand jury testimony. Such evidence impaired the integrity of the grand jury proceedings and violated the defendant's' due process rights under the Fifth and Fourteenth Amendments and art. 12. The improper introduction of this evidence warrants dismissal of the murder indictment.

An indictment may be dismissed upon a showing that the integrity of the grand jury proceedings was impaired. *Commonwealth v. O'Dell*, 392 Mass. at 449. Dismissal of an indictment based on impairment of the grand jury proceedings requires proof of three elements: To dismiss an indictment, the grand jury evidence must have been "given with knowledge that it was false or deceptive [and that] evidence must probably have been significant in the view of the

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Offering Legal Services for District and Superior Court Criminal Cases, SDP and SORB

October 14, 2015

Bristol County Superior Court
Clerk Magistrate
186 South Main Street
Fall River, Ma 02721

Re: Carlos Ortiz Motion to Dismiss
2013-0324 Supplemental Memo

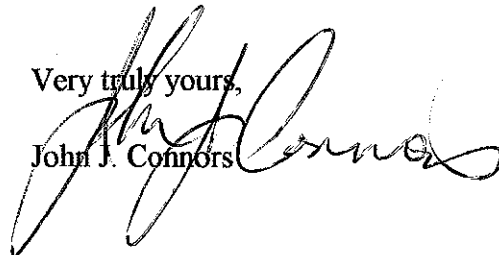
Dear Clerk Magistrate:

Please file the enclosed supplemental Motion to Dismiss in the above captioned action.

Thank you.

Very truly yours,

John J. Connors

A handwritten signature in black ink, appearing to read "John J. Connors", is written over the typed name.