

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

TRIAL COURT OF MASSACHUSETTS  
SUFFOLK SUPERIOR COURT  
SUCR2014-10417; SUCR2015-  
10384

COMMONWEALTH

v.

AARON HERNANDEZ

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
CONTINUANCE OF TRIAL DATE**

**A. BACKGROUND FACTS<sup>1</sup>**

On May 15, 2014, a Suffolk County grand jury returned two indictments against the defendant, Aaron Hernandez, for murder, in violation of G. L. c. 265, § 1. The grand jury also returned indictments on three counts of armed assault with intent to murder, in violation of G.L. c. 265, § 18(b), assault and battery by means of a dangerous weapon in violation of G. L. c. 265, § 15A (b) , and carrying a firearm without a license of G.L. c. 269, § 10(a).<sup>2</sup> Approximately one

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<sup>1</sup>Not intended as an exhaustive list, but a summary

<sup>2</sup> Indictment No. SUCR2014-10417

year later, on May 8, 2015, the Suffolk County grand jury returned an additional indictment against the defendant for intimidation, in violation of G. L. c. 268, § 13B<sup>3</sup> for an incident that allegedly occurred on February 13, 2013, in the State of Florida.

The current defense attorneys filed appearances on behalf of Mr. Hernandez on June 9, 2016, barely (7) seven months ago. At that time, the Supreme Judicial Court had not decided defendant's petition for relief pursuant to G. L. c. 211, §3 filed on December 1, 2015 or the Commonwealth's appeal filed on April 8, 2016, significant discovery remained outstanding, and substantive motions still needed to be filed and rulings made. In addition, since newly hired defense attorneys assumed representation, the Commonwealth has provided, and is providing, late disclosure of a number of witnesses, some of whom reside out of state, voluminous forensic reports, and police reports. For these reasons, which are detailed below, the defendant moves for a continuance of the currently scheduled trial date.

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<sup>3</sup> Indictment No. SUCR2015-10384

**(1) Historical development of the two indictments<sup>4</sup>**

Mr. Hernandez was arraigned on indictment number SUCR2014-10417 on May 28, 2014. On that date, Mr. Hernandez was represented by prior counsels Charles Rankin, James Sultan and Michael Fee.

On June 9, 2014, the Commonwealth filed a Notice of Discovery I.

On June 24, 2014 the case was scheduled as a Track C Case and a presumptive trial date set for May 28, 2015.

On July 2, 2014, the Commonwealth filed a Notice of Discovery II.

On August 14, 2014, the Commonwealth filed a Notice of Discovery III. On that date, the case was continued by agreement to October 21, 2014 for further status conference.

On October 21, 2014, the Commonwealth filed Notice of Discovery IV and the case was continued to November 25, 2014 for pretrial hearing.

On November 25, 2014 the defendant moved for a continuance of the trial date which was allowed. On the same date, the Commonwealth filed a *Certificate of*

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<sup>4</sup> Not an exhaustive list, but a summary of relevant court proceedings

Compliance regarding pretrial discovery and a Notice of Discovery V.<sup>5</sup>

On December 18, 2014, the Commonwealth filed an additional Notice of Discovery VI.

On May 21, 2015, the Commonwealth filed Notice of Discovery VII, a motion for a court order permitting exhaustive testing of a swab indicating that forensic discovery was not yet complete by May 21, 2015.

On June 4, 2015 the Court ordered further discovery motions filed by July 24, 2015 and the case was continued to September 15, 2015 indicating that discovery was not complete by that time, which was over a year after Mr. Hernandez's arraignment.

On June 9, 2015 and July 17, 2015, the Commonwealth filed an additional Notices of Discovery VIII and IX respectively.

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<sup>5</sup>Mass. R. Crim. P. 14(a)(3) states in no uncertain terms: "When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available ***all items*** subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided." (*italics added*)

On July 23, 2015, the defendant while represented by prior counsel filed a Motion to Suppress the search of a 2006 Toyota.

On August 4, 2014, the case was continued by agreement to September 22, 2015.

On September 22, 2015, the Commonwealth filed yet another Notice of Discovery X and the matter was continued to October 6, 2015 to address "further motions before Judge Locke."

On October 6, 2015, hearings were held on Defendant's Motion to Suppress and Motion to Dismiss. The case was continued to October 13, 2015 for further hearing on motions. On this date, the Commonwealth also filed a memorandum pertaining to the application of search warrant for a cell phone in the possession of Ropes and Gray LLP and a Rule 17 Motion for Third Party Records.

On October 13, 2015 the trial date of December 1, 2015<sup>6</sup> was cancelled and the trial was continued to January 19, 2016 by agreement.

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<sup>6</sup> It's unclear from reading the on-line docket when the December 1, 2015 trial date was initially scheduled.

Between October 2015 and January 19, 2016, multiple motions were filed by the Commonwealth and by the defense team at that time.

On November 17, 2015, the Court conducted hearings on motions and continued the matter to December 1, 2015 for status.

On December 1, 2015, the defendant filed for relief pursuant to G. L. c. 211, §3<sup>7</sup>

On December 4, 2015, an agreed upon motion to continue the trial date was filed by the parties.

On December 23, 2015, the Court cancelled the trial date of January 19, 2016 and converted that date to status hearing presumably due to the pending Supreme Judicial Court's rulings.

On February 26, 2016 a motion hearing was held and the matter was taken under advisement.

On March 7, 2016, Judge Jeffery Locke issued rulings on Commonwealth's Motion for Rule 17 Production of cell phone from Rope and Gray LLP and the Commonwealth filed an application for a search warrant.

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<sup>7</sup> Judgment on Rescript was issued on September 20, 2016 only three months *after* the current defense team assumed representation of Mr. Hernandez and filed appearances.

It appears from the reading of the docket that the case remained essentially in limbo from March 7, 2016 until the new defense lawyers filed their appearances on June 9, 2016. On March 23, 2016, the Court took motions under advisement and rendered a decision on March 25, 2016.

On March 23, 2016 a motion hearing occurred regarding the Commonwealth's Motion to Compel Evidence and Motion for Anticipatory Search Warrant and the matters were taken under advisement.

On March 25, 2016 the Court allowed the Commonwealth's Motion to Compel Evidence and denied the Commonwealth's Motion for an Anticipatory Search Warrant.

On April 8, 2016, the Commonwealth filed an appeal under G. L. c. 211, §3 with the Supreme Judicial Court regarding the denial of its application for an anticipatory search warrant.

On April 11, 2016, the Supreme Judicial Court issued Notice of Assembly of the record indicating that the matters on appeal were not yet resolved.

On April 26, 2016, the defendant filed an ex parte motion for leave which was ordered sealed by the Court.

On May 10, 2016, the Defendant's motion for leave was allowed without objection from the Commonwealth.

On June 9, 2016 the new defense attorneys filed appearances on behalf of Mr. Hernandez and moved for pro hac vice appointment of four (4) attorneys licensed in other states.

On June 21, 2016, the Court allowed defendant motions to allow the new attorneys to practice pro hac vice on this case.

On July 21, 2016, the new defense attorneys made their first in court appearance in this case. At that time, the Court allowed predecessor counsels' motion to withdraw. At this time the previously filed petitions under G. L. c., 211, § 3 were still pending. The case was continued to August 16, 2016 for "litigation control conference and trial date selection."

On August 12, 2016, the Commonwealth filed a motion in limine for in-court identification of the defendant.

On August 16, 2016 the court scheduled a trial date for February 13, 2017. At that time, defense counsel expressed to the court that six (6) months was insufficient time to prepare for trial given the



voluminous nature of the case, the need to review discovery to date to determine what remained outstanding, and to determine what additional motions to file, the necessity of more time to conduct investigations of multiple witnesses in different states to prepare an adequate defense. Defense counsel also stated that upon initial review significant discovery remained outstanding and that the defense planned to file additional discovery and substantive motions. The case was continued to October 5, 2016 for status conference and to address the inspection of evidence and any discovery motions and pretrial motions.

On August 29, 2016, the Commonwealth filed a Motion for a Search Warrant which was allowed on August 31, 2016.

On September 16, 2016 the defendant filed a motion in limine to preclude all Impermissible Identification testimony.

On October 4, 2016, the defendant filed additional motions in limine regarding admissibility of certain forensic evidence, disclosure of prior and subsequent bad acts, and motion for list of witnesses,

all of which fall under mandatory discovery under Mass. R. Crim. P. 14.

On October 5, 2016, the Commonwealth filed a Notice of Discovery XIII and a compliance date was scheduled for all outstanding discovery by November 1, 2016. Presumably based on the assumption that the Commonwealth would comply with the court ordered discovery compliance date of November 1, 2016, the court further ordered the defendant to file a substantive motion to suppress by November 15, 2016. The case was scheduled for status conference on December 7, 2016

The Commonwealth was not in compliance with discovery by November 1, 2016 as ordered by the Court.

On November 15, 2016, the defendant filed a motion seeking mandatory discovery of Prospective Expert Testimony and Forensic Testing and a Motion to Suppress.

On November 22, 2016, the defendant filed an additional discovery motions and a Rule 17 Motion for Third Party Records after it was discovered that a private corporation providing phone system services to correctional institutions within the Commonwealth were

recording conversations of the defendant that may have violated the Attorney-Client Privilege.

On December 2, 2016, the Commonwealth filed a Motion in Opposition to the Defendant's Motion to Exclude Firearms Analysis Testimony.

On December 7, 2016, the ordered further out of court filing of motion by December 16, 2016. The Commonwealth filed another *Certificate of Compliance*,<sup>8</sup> Notice of Discovery XII and XIII, and various oppositions to defendant's motions. The Defendant filed another discovery motion seeking criminal background checks of all civilian witness, another matter deemed mandatory discovery. In fact, after hearing on the motions, the Court ordered the Commonwealth to comply with all outstanding discovery **within ten (10) days**. On December 16, 2017, due to continued outstanding discovery, the defendant filed additional discovery motions regarding the forensic analysis and criminal background checks of the Commonwealth's civilian witnesses. The Court on this date issued its decision denying the defendant's motion to suppress the contents of the cell phone which previously argued.

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<sup>8</sup> See footnote #5

On December 20, 2016, the defendant moved for a continuance of the trial date, which was denied. The defendant also filed a Motion to Suppress Identification and multiple motions in limine showing sincere efforts to address the outstanding and unresolved matters as efficiently as possible.

On January 9, 2016 the Court issued multiple decisions on motions filed, in particular, regarding the defendant's motion to suppress identification evidence and testimony, defendant's motion in limine to preclude reference to a gun related tattoo, which was denied.

On January 13, 2016 both parties file motions pertaining to jury selection and voir dire.

On January 18, 2016, the Court issued its ruling denying the defendant's motion to suppress the contents of a cell phone. The defendant filed additional discovery motions: motion to subpoena to view and examine evidence in possession of Palm Beach County (Florida) Sheriff's Office, rule 17 motion for production of third party document related to the sentencing agreement of the Commonwealth's witness who received total immunity in exchange for his cooperation, motion in limine to disclose promises,

inducements and rewards, which is mandatory under rule 14, motion to compel buccal swab of a Commonwealth witness as DNA evidence will be prominent in this case.

On January 19, 2016, the Commonwealth filed Notice of Discovery XIV, and various oppositions to defense motions.

On January 20, 2016, the defendant a petition for relief under G. L. c. 211, § 3 regarding the denial of his motion in limine on December 20, 2016 at Suffolk County Superior Court to 1) Exclude Any Testimony on Firearms Analysis; 2) Exclude Any Testimony On Firearms Analyses; and 3) Report The Questions Of Law Raised In Paragraphs I And 2 and requesting a stay of the trial proceedings. As of the date of this motion, the Supreme Judicial Court has not ruled on defendant's petition and motion to stay.

On January 24, 2017 the Commonwealth filed a Notice of Expert Disclosure Statement and the court allowed defendant's motion for expert testing.

On January 27, the Commonwealth filed a supplemental motion in opposition to the defendant's motion in limine for relief based on the alleged destruction of tangible evidence.

## **(2) Delay caused by appeal**

According to the court docket, the trial date was continued on November 25, 2014 at the request of the defense, on October 13, 2015 at the request of the Commonwealth, on December 4, 2015 as joint motion purportedly after the defendant exercised his right to petition the Supreme Judicial Court under G. L. c., 211, § 3 in December 1, 2015. The Commonwealth's subsequently filed its own appeal under the same statute on April 8, 2016. The Supreme Judicial Court did not issue decisions on both appeals until September 19, 2016, barely four (4) months ago, and almost two (2) months after newly hired defense counsel's first filing of appearance on June 9, 2016. As a result of the Supreme Judicial Court's decisions, the defense team needed to assess the landscape of voluminous discovery to that point and in a hastily fashion file the necessary discovery motions that appeared the most obvious.

## **(3) Delayed Mandatory Discovery**

Despite filing a Certificate of Compliance attesting that its discovery obligations were complete

on November 11, 2014 and on December 7, 2016, upon review of the dockets this does not appear to be accurate as there were a number of motions filed by both sides since the Commonwealth's first certificate of discovery until now. Again, on June 9, 2016, when the defendant's newly hired attorneys took over the case two (2) appeals were still pending before the Supreme Judicial Court. After the Supreme Judicial Court's decision on September 19, 2016, the defense filed essential discovery motions and substantive motions as ordered by the Court. Over the last few months the Court has made rulings on these motions which affect the discovery landscape. In fact, as of the date of this motion, one decision is currently on appeal with the Supreme Judicial Court pursuant to G. L. c., 211, § 3. The parties are still waiting for the court's ruling on that petition. With that said, the Commonwealth has provided significant discovery just in the last few weeks.

On January 9, 2017, the Commonwealth disclosed to the defendant notice of eight (8) additional witnesses they intend to call, namely: 1) Josh McDaniels, the offensive coordinator of the Patriots, who presumably is unavailable to the defense investigators because he

is now preparing his team to compete in the Super Bowl. The Commonwealth alleges the defendant sent a text message to Mr. McDaniels showing him another tattoo that he received at the same time from tattoo artist David Nelson with the letters "CBS/WBS/ IWB TG". According to Commonwealth, it expects Mr. McDaniels to testify (if called) as to the meaning of those letters. Obviously, the defense would need time to interview Mr. McDaniels; 2) Steve Burton, a TV sports reporter for WBZ-CBS Boston, who conducted an interview of the defendant in December 2011 where the meaning of his tattoos was discussed. The defense is still waiting to view this video prior to trial and it has not been disclosed by the Commonwealth; 3) Kelly Whiteside, the Commonwealth expects will testify about the meaning of every tattoo that the defendant has placed on his body. Miss Whiteside interviewed the defendant in October of 2009, and he specifically discussed his tattoos and their significance. This is the *first instance* the Commonwealth has mentioned this witness and her anticipated testimony; 4) Marissa Pagan, who currently lives in Arizona, will testify to



certain purported prison calls<sup>9</sup> with the defendant, primarily from August 2016; 5) Renee Whitney, who the Commonwealth only identifies as a friend of the defendant through recorded prison calls, but provides no additional information provided about her anticipated testimony; 6) Eliseu Abreu, one of the decedent's brother. The Commonwealth in its disclosure admits their failure to provide this witness beforehand "was an oversight not including him on [its] prior potential witness list;" 7) Robert Settana, an investigator in the Suffolk County District Attorney's Office and apparently is assigned to this case; 8) Gregory Guillette, an expert from Gladiator Forensics who may be called relative to software used for the cellular tower plotting. If there is a possibility that he will be called, we will certainly provide the same materials and information as we have agreed to provide with the other experts.

On January 17, 2017, the Commonwealth provided defense counsel with a dropbox link containing forensic fingerprint files, but the link does not appear to work.

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<sup>9</sup> On December 13, 2016 the Commonwealth provided volumes of phone calls purportedly made by Mr. Hernandez.

On January 23, 2017, the Commonwealth provided defense counsel with 78 pages of expert witness disclosure and Curriculum Vitae's. In the expert witness disclosure, the Commonwealth notified the defense for the first time that the medical examiner is going to testify. Specifically, "Dr. Lindstrom will testify regarding the mechanism of death and the length of time that each victim would have been expected to survive his wounds: Abreu - minutes; and Furtado - seconds." The Commonwealth is divulging this anticipated testimony for the first time even though these autopsies took place years ago. The defense needs to review this anticipated testimony, possibly draft and file an in limine motion prohibiting this as it is not an element of a crime and can only seek to inflame the passion and prejudices of a jury and its probative value is outweighed by its prejudicial effect. If the court is going to allow this inappropriate testimony the defendant should be given more time to have this intended testimony properly analyzed and prepare a responsive expert report. In the same expert witness disclosures for the first time, the Commonwealth provided notice of expected testimony of two (2)

fingerprint experts, Kristen Tolan and Deborah Kosiorek, who will testify that it is very unusual not to find usable fingerprints in a car. Specifically, the Commonwealth's notice provides these witnesses will testify that it is unusual to have a motor vehicle that lacks any friction ridge detail and their observations that the vehicle appeared to have been thoroughly cleaned and wiped down. Again, this is the first time after years that the prosecution has disclosed this as testimony. This should be barred from being presented as there is simply no scientific database that underlies this prejudicial and improper scientific opinion testimony. If the prosecution had disclosed this years ago or even months ago, the defendant would have included a request to have all the databases that this opinion testimony relies upon, including all the cases where these two (2) fingerprint experts have examined automobiles, the name of the case, the background, the results, etc. With such late disclosure, the defendant is simply unable to do.

On January 27, 2017, the Commonwealth notified the defendant of several new civilian witness

involving specifics that absolutely require additional time for the defense to conduct its own independent investigation into these individuals and their anticipated testimony. The defense was also informed on this date that they are unable to obtain the prosecutor's file in Connecticut pertaining to one of the witnesses who was given total immunity in exchange for his participation in the case. Without being able to review Connecticut prosecutors file, the defense is essentially handicapped from investigating whether there was any additional incentive in the Connecticut case for his participation as a prosecution witness in this case. Thus, the ability to properly and thoroughly impeach this witness is significantly hampered. The defendant has filed a Rule 17 motion for the documents, but this Court has not acted on that motion as of the date of this motion.

On January 31, 2017, the Commonwealth provided an additional list of experts and reports, including Firearm Validation Studies for Det. Tyrone Camper, Curriculum Vitae's for Christopher Rirtchell (AT&T) and Todd Ritch (EMT), two (2) reports created by United States Marshall Tony Visalli utilizing "Gladiator Forensic" mapping software and additional

phone records, a receipt for the "black case" that Boston Police Homicide Detectives received from the Massachusetts State Police, which needs to be inspected, three additional (3) police reports (two for Je'nelle Pierre in Florida and the other for Jailene Diaz-Ramos) and one recent homicide investigative report, all of which require additional time to investigate.

**B. LEGAL ANALYSIS**

Pursuant to Mass. R. Crim. P. 10, the factors the judge shall consider in determining whether to grant a continuance are: 1) whether the failure to grant a continuance would likely make continuation of the proceeding impossible or result in a miscarriage of justice; 2) whether the case taken as a whole is so unusual or so complex, because of the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation of the case at the time it is scheduled for trial; 3) whether the overall caseload of defense counsel prohibits his making scheduled appearances, whether there has been a failure of diligent preparation by a party, and whether there has been a

failure by a party to use due diligence to obtain available witnesses.

At this time if the trial proceeds as scheduled, there is simply not be enough time for the defense to review the discovery in its entirety, including the voluminous recently provided discovery, interview newly disclosed multiple witnesses in different states, and to formulate an adequate defense. If the trial proceeds as scheduled, denial of this motion certainly will result in a miscarriage of justice. This is a highly complex case with the most serious charge of First Degree Murder, which carries a penalty of life in prison without the possibility of parole. The stakes are simply too high to force a newly hired defense team to trail for a case of this nature, with the stakes this high, and with evolving complexity of discovery within eight (8) months from their initial appearance on the case, while the case has gone up on appeal at least three (3) times with one appeal still pending and maybe more appeals to follow. The decision whether to grant a motion to continue lies within the sound discretion of the trial judge. Commonwealth v. Haley, 413 Mass. 770, 775 (1992). Commonwealth v. Habarek, 402 Mass. 105, 108

(1988). A denial of a continuance will not constitute error absent an abuse of that discretion.

Commonwealth v. Mamay, 407 Mass. 412, 419

(1990). Commonwealth v. Bryer, 398 Mass. 9, 15 (1986).

Commonwealth v. Miles, 420 Mass. 67 (1995).

However, a trial judge may not exercise his discretion in such a way as to impair a defendant's

"constitutional right to have counsel who has had reasonable opportunity to prepare a

defense." Commonwealth v. Souza, 397 Mass. 236, 240

(1986), quoting Commonwealth v. Cavanaugh, 371 Mass.

46, 51 (1976). In determining whether a trial judge's

denial of a continuance has violated a defendant's

right to effective assistance of counsel and to due

process of law, we must examine the "circumstances

present in [the] case, 'particularly [those] reasons

presented to the trial

judge.'" Commonwealth v. Cavanaugh,

supra, quoting Ungar v. Sarafite, 376 U.S. 579, 589

(1967). Commonwealth v. Pena, 462 Mass. 183, 190

(2012).

The Supreme Judicial Court has stated that there is no "mechanical test" for determining whether the denial of a continuance constitutes an abuse of

discretion because we must examine the unique circumstances of each case, particularly the reasons underlying the request. See Commonwealth v. Cruz, supra at 747; Commonwealth v. Cavanaugh, supra at 51. See also Ungar v. Sarafite, 376 U.S. 575, 589 (1964). A judge "should give 'due weight' to concerns about judicial economy and the avoidance of delays that do not 'measurably contribute to the resolution of a particular controversy.'" Commonwealth v. Cruz, supra at 748, quoting Commonwealth v. Gilchrest, 364 Mass. 272, 276-277 (1973).

See Commonwealth v. Dunne, 394 Mass. 10, 14 (1985).

At the same time, a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Commonwealth v. Cavanaugh, supra, quoting Ungar v. Sarafite, supra.

"In considering a request for a continuance, a trial judge should balance the movant's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party if the motion is granted." Commonwealth v. Gilchrest, 364 Mass. 272, 276 (1973).



If this Court applies the balancing test of Gilchrist, any inconvenience or increased costs to the Commonwealth is minuscule compared to the potential life sentence the defendant faces if convicted especially because defense was afforded sufficient time to prepare due to the delays in providing mandatory discovery.

**C. CONCLUSION**

For all the above reasons, the defendant respectfully asked this Honorable Court to allow the motion for a three (3) month continuance.

Respectfully submitted  
on behalf of Aaron  
Hernandez by his  
attorney,



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