COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **SUPERIOR COURT DEPARTMENT**

SUCR2014-10417

SUCR2015-10384

COMMONWEALTH

v.

AARON HERNANDEZ

MOTION TO RECONSIDER THE COURT'S DENIAL OF DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ANY EVIDENCE OF DEFENDANT'S GUN RELATED TATTOO

Mass. R. Crim. P. 13, reporter's notes. A judge's power to reconsider his or her own decisions during the pendency of a case is "firmly rooted in the common law, and the adoption of Rule 13 was not intended to disturb this authority." Commonwealth v. Pagan, 73 Mass. App. Ct.369, 375 (2008). Defendant argues that substantial justice requires a rehearing of his Motion In Limine To Exclude Any Evidence Of Defendant's Gun Related Tattoos to fully examine the admissibility of such evidence beyond the question of hearsay.

UTILIZING A DEFENDANT'S TATTOOS AS AN ADMISSION OF A CRIME OR AS EVIDENCE REFLECTING A CONSCIOUSNESS OF GUILT IS A CASE OF FIRST IMPRESSION IN MASSACHUSETTS

The Trial Court held:

"Assuming the Commonwealth establishes a foundation as outlined in its proffer[1], the defendant's conduct in ordering and obtaining these tattoos could be viewed as constituting an implied admission, admissible under Mass G. Evid. § 801 (d)(2)(a). Commonwealth v. Bonomi, 335 Mass. 327, 347 (1957), or as evidence reflecting consciousness of guilt. As such the probative value of the evidence is not outweighed by any risk of unfair prejudice under Mass. G. Evid. § 403 and therefore is admissible." Ruling and Order Jan. 9, 2017 J. Locke.

Using tattoos as testimonial evidence is an issue of first impression in Massachusetts. Tattoos are generally not testimonial, Loughman v. Obrien, 603 F.Supp.2d 259 (D.Mass 2009) (citing Commonwealth v. Poggi, 761 N.E.2d 983 (Mass.App.Ct. 2002)), and courts in Massachusetts have never held that a tattoo is sufficient to constitute an admission. People v. Ochoa is one of the few cases nationwide in which a court utilized a tattoo as an admission 28 P.3d 78, 98 (Cal.4th 2001)

In Ochoa, a California trial court found that a "187" tattoo on the accused's forehead, which was added after the accused was questioned by the police, was highly probative and could be viewed as an admission of defendant's guilt. The tattoo was admitted in the context of expert testimony concerning defendant's gang-related tattoos. The detective testified as to the significance of the "187" tattoo based on training he received on gangs at the police academy, at gang awareness school, and over the course of 11 years investigating street gangs. Section 187 of the California Penal Code defines the crime of murder, and the Court found it highly unlikely that an innocent person would obtain a tattoo that "advertis[ed] … connection to murder." People v. Ochoa, 28 P.3d 78, 98 (Cal.4th 2001).

This case can be easily distinguished from Ochoa. Whereas in Ochoa the meaning of the tattoo is established through expert testimony, here no facts are being admitted that link the gun tattoo to the crime of murder. Furthermore, Ochoa relied on a precedent from People v. Kraft, 23 Cal.4th 978, 5

[1] "Specifically, the Commonwealth proffers that evidence relating to the July 17, 2012 shooting will

P.3d 68, 100-01 (2000), in which a coded list of victim names was admissible where a sufficient nexus could be established between aspects of the particular case and coded entries. In the instant matter, the prosecution cannot establish that a gun tattoo is equivalent to an admission of murder, that the gun barrel in the tattoo is the barrel of the alleged murder weapon, or that the number of bullets corresponds to the number of shots fired. While evidence need not be unambiguous to be admissible, evidence that leads only to speculative inferences is irrelevant. See People v. De La Plane 88 Cal. App.3d 223, 244 (1978).

Unlike the foundation provided in Ochoa, admission of Defendant's tattoo would require the jury to speculate as to the meaning of the various tattoos and make further interpretations of them. The meaning of Ochoa's "187" tattoo did not require any speculation. The Court in Ochoa rejected the Defendant's claim that the evidence was unduly speculative in that it "required interpretation to be understood by a reader." People v. Ochoa 28 P.3d 78, 98 (Cal.4th 2001). In this case, because the Defendant's tattoos are subject to interpretation, which is highly speculative it is necessary to ascertain the subjective intent of the Defendant in getting the tattoos.

Jurors Cannot Reasonably Infer That the Tattoos Are Proof of the Defendant's Admission of Guilt in the Alleged Crimes[2].

The jury cannot reasonably infer that the tattoos connect the Defendant to the alleged crime or that the tattoos are an admission of his guilt.

In cases that have addressed inferences, courts have held that with regard to circumstantial evidence, although it is not a requirement that every inference be premised on an independently proven fact, Commonwealth v. Dostie, 425 Mass. 372, 375-376, 681 N.E.2d 282 (1997), or that each inference made must be proved beyond a reasonable doubt, Commonwealth v. Azar, 32 Mass.App.Ct. 290, 309, 588 N.E.2d 1352 (1992), each inference must be a reasonable and logical conclusion from the prior

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inference. Id. The inferences must be reasonably based on probabilities not possibilities. Poirier v. Plymouth, 372 N.E.2d 212 (1978).

Courts have also held that reasonable inferences are "conclusions which are regarded as logical by reasonable people in light of their experience in life. Lannon v. Hogan, 719 F.2d 518, 521 (1st Cir. Mass. 1983). Although inferences drawn do not have to be necessary inferences, they do need to be "reasonable and possible." See, Commonwealth v. O'Laughlin, 446 Mass. 188, 198-199 (2006). Additionally, "the evidence and inferences drawn therefrom must be of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilty] beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979) quoting from Commonwealth v. Cooper, 264 Mass. 368, 373 (1928); *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979). The result may not be a product of conjecture or speculation, or the piling of inference upon inference. Commonwealth v. Mandile, 403 Mass. 93, 94, 525 N.E.2d 1322 (1988).

The Commonwealth cannot meet its burden to lay a proper foundation as proffered to the Court during oral argument on the Defendant's initial **MOTION IN LIMINE TO EXCLUDE ANY EVIDENCE OF DDEFENDANT'S GUN RELATED TATTO**.

The basis of the Government's proffer of evidence relating to the July 17, 2012 shooting cannot show the following:

A) The testimony from lay or expert witnesses does not establish that five shots were fired during the Boston Shooting.

1) The two victims did not testify at the Grand Jury or provide a statement that 5 shots were fired.

a) Boston Police interview 7/16/12 of victim Aquilino Freire. "Mr. Freire couldn't tell how many shots were fired…" **EXHIBIT A** p.2.

b) Freire Suffolk County Grand Jury July 18, 2012. Question: "How many shots total did you hear?" Answer: "I can't. I don't know." **EXHIBIT B** p. 24 ln 23-24

c) "It was -- the shot it was like cominq kinda [sic] fast but I can't see. I can't see the gun. I can't count the gunshots. **Id.** at p.25 ln 8-10

d) Boston Police interview 7/16/12 of victim Raychilds Sanches. Question: "Okay. So, then he -- how many gun shots do you think you heard? Answer: "I think six or---" **EXHIBIT C** p.7 ln 13-15

2) The Commonwealth's expert witness opined as follows relative to the number of shots fired.

The Commonwealth's Projectile and Clothing Examination Report Nov 29, 2015

EXCERPTS

"Summary"

"By physical evidence alone, ***the total number of shots fired in this incident cannot be conclusively determined*** (emphases added) because there are several paths for bullets to have traversed the passenger area of the vehicle without striking an occupant or surface. The two front windows were down, and the rear left tempered glass window was broken by at least one shot.

Similarly, there are projectile items or fragments that are missing or unrecovered. These could have been removed from the vehicle with the departure of the rear occupants, and may very well have been on their clothing. This scenario is very common. All of the recovered bullet items with remaining observable manufacturing characteristics are consistent with Sellier and Bellot (Czechoslovakian), 158 grain, steel jacketed (copper washed), lead core, soft point bullets.

The lack of a vehicle to examine reduces this investigator's certainty, and in some cases, ability to make conclusions about the relationships between trajectories in bodies versus impacts and paths through the vehicle; however, some likelihoods can be evaluated." *Id* at Bates # 021557. *see* **Exhibit B attached** to Affidavit of Attorney George J. Leontire dated Dec. 26, 2016 and filed with Defendant's Motion In Limine For Relief Based On The Destruction Of Tangible Evidence (car).

The Commonwealth's Projectile and Clothing Examination Report January 16, 2016

With respect to the report written on January 16, 2016, similar cautionary language was included in the expert report as detailed in the Nov. 29, 2015 report with the addition of the following:

EXCERPT

"Rear Left Window"

"Unfortunately, none of the information available from the images from the scene or when the warrant was executed ***help to resolve a finite number of bullet passages through this region.***" (emphases added) Commonwealth's Projectile and Clothing Examination Report Jan. 16, 2016 Michael G. Haag Bates #021572. **Id**

B) There is no evidence that the Defendant requested a six bullet gun barrel tattoo or a semi-automatic pistol like the one Bradley testified was used in the West Palm Beach shooting.

Mr. David Nelson, the California tattoo artist the Commonwealth referenced in its proffer, provided a statement to the Boston Police investigator that contradicts the Commonwealth's assertions.

Question: "He ask you for a six shot cylinder?"
Answer: "I don't know if that was, that mattered or if he was specific about that."
Question: "But he did definitely asked you for one to be empty?"
Answer: "…yeah."
Boston Police interview 9/23/14 of California tattoo artist Davis Nelson. **EXHIBIT D** p.5 ln 4-8

Mr. Neson further testified he did not do the "God Forgives" tattoo. **Id** ln 9-10

Regarding the semi-automatic tattoo, Mr. Nelson stated **Id** at p.6 ln 1-22,:

Question: "Okay. I'm going to make this number two. When you tat - - tat, when you put this tattoo on him what did he ask for a tattoo?"
Answer: "The muzzle of a gun."
Question: "Did he ask what type of gun? Or did he ask you what type of gun to tattoo him with?"
Answer: "No, we went, we just looked up pictures on the computer and picked it."
Question: "Okay. And did you tattoo him with this shell casing?"
Answer: "Yes."
Question: "What did he ask for specifically when he asked for the shell casing?"
Answer: "Just a empty shell casing."
Question: "Empty shell casing?"
Answer: "Yeah."
Question: "Did he say like he wanted a 9mm or a .40 cal or a semi-automatic?"
Answer: "I think I just drew that on him."
Question: "Okay. Did he look at, he looked at images on a computer?"
Answer: . . .
Question: "No?"
Answer: "No, I . . . drew that on him."
Question: "You drew that on him? Okay. So this is image number two. Could you also sign and date this for me."

Question: "Okay. Any idea, did he give you any explanation why he wanted these firearms tattoos on his arm? There's not conversation about that?"
Answer: "No, he didn't talk much at all. He just had his headphones…" **Id** at p.7 ln 6-10.

It is impermissible to ask the jury to draw speculative inferences and conjecture and to pile inference upon inference. See *infra.*

In Commonwealth v. Matthews, the prosecution, and later the judge, allowed the jury to make an inference that the defendant refrained from calling his aunt as a witness because she would not corroborate his testimony of self-defense. 49 Mass. App. Ct. 365, 367-69 (2000). The court stated that "the inference permitted by the failure to call a witness whose testimony would be particularly helpful to a party is a strong one. In a criminal case, it may act as a substitute in part for direct evidence of guilt." It was further stressed that "'[C]ourts, both trial and appellate, should proceed with extreme care

in determining whether the evidence sufficiently establishes a basis for the inference. Cautious vigilance must be maintained against the employment of a naked legal principle in a factual setting which provides no reasonable basis for the principle's application.'" Id. (citing Hale v. United States, 410 F.2d 147, 150 (5th Cir.)).

Moreover, courts have held that a conviction based upon evidence tending to support alternative propositions, some tending to demonstrate innocence and others tending to show guilt, cannot stand. Commonwealth v. Ferguson, 384 Mass. 13, 19, 422 N.E.2d 1365 (1981); Commonwealth v. Croft, 345 Mass. 143, 145 (1962). The drawing of speculative inferences has been prohibited. Id. In Ferguson, the issue was whether the evidence was sufficient for a jury to reasonably infer beyond a reasonable doubt that the complained of conduct (commission of an unnatural and lascivious act) occurred in a public place. Id. However, the Commonwealth offered no direct evidence, but many possibilities and the court held that "evidence warranting an inference that the public had theoretical access to a place did not necessarily support a finding that the place was public." Id. at 17. In choosing among the many possible inferences from the evidence presented in the case, the jury would necessarily have had to employ conjecture. Id.

Here, even if the tattoos are admissible as an exception to hearsay under Mass. G. Evid § 801(d)(2)(a), the jury would be led to infer an implied admission or evidence of consciousness of guilt based on conjecture and speculation. The proffered evidence relates to two separate tattoos and two separate charges based on two separate incidents. Moreover, the Commonwealth intends to compare these two separate tattoos with other tattoos on the Defendant, which were obtained by him on separate and past occasions. The Commonwealth intends to present evidence that all of the Defendant's tattoos have special meaning and significance to the Defendant and therefore the subject tattoo's can only mean the Defendant was admitting to the crime.

The Admission Of Tattoos In Massachusetts

In Massachusetts when tattoos have been allowed in evidence, they have typically been used for the purpose of identification or as proof of an individual's gang affiliation. This is because a tattoo demonstration is more akin to a display of a person for the purpose of "revealing or examining some physical characteristic, such as height, weight, or other physical feature," which is "permitted routinely and is not viewed as testimonial." Commonwealth v. Poggi, 761 N.E.2d 983 (Mass. App. Ct. 2002) (citing Commonwealth v. Kater, 388 Mass. 519, 533, 447 N.E.2d 1190 (1983)).

1. *Tattoo as Evidence of Identification*

If the question turns on identification, tattoos are admissible as evidence of physical characteristics that can be used to confirm or dismiss descriptions of witnesses. See Commonwealth v. Poggi, 761 N.E.2d 983 (Mass. App. Ct. 2002). In Commonwealth v. Poggi, the defendant was charged with armed robbery and witnesses provided descriptions to police. Id. at 985. None of them described the robber as having tattoos on his forearms. Id. at 986. At trial, the defendant wished to display his forearm tattoos to demonstrate that he did not conform to the witnesses' description. Id. The court held that the evidence should have been presented to the jury, as the outcome of the case turned on the question of identification. Id.

Here, there is no issue of identification by way of tattoos. The tattoos being proffered by the Commonwealth were not part of any witness's description. No witness stated that he or she could see tattoos resembling those in question at the time of the alleged crime. Therefore, this case is distinguished from Poggi.

2. *Tattoo as Evidence of Gang Affiliation*

If the question involves the Defendant's participation or affiliation in a gang, tattoos are admissible in so far as they are evidence of the Defendant's gang membership. See Commonwealth v. Bowers, No. 16-P-330, 2016 WL 7471764 at *1 (Mass.App.Ct. Dec. 28, 2016); Commonwealth v. Bettencourt, No. 11-P-1272, 2012 WL 3964031, at *1 n. 4 (Mass.App.Ct. Sept. 12, 2012). In Commonwealth v. Bettencourt, the defendant was charged with crimes arising from a gang-related drive-by shooting. Commonwealth v. Bettencourt, No. 11-P-1272, 2012 WL 3964031, at *1. Photographs of the defendant's tattoos were entered into evidence because, as the Lieutenant explained, the tattoos signaled the defendant's gang affiliation. Commonwealth v. Bettencourt, No. 11-P-1272, 2012 WL 3964031, at *1 n. 4.

Here, there is no issue of gang affiliation regarding the tattoos and their admissibility. Thus, this case is distinguished from Bettencourt.

Use of the Defendant's Tattoo as Testimony Violates the Defendant's Due Process Rights.

The inference being requested violates Defendant's due process right because it unduly shifts the burden of proof for establishing guilt to the Defendant through a highly speculative and prejudicial inference that the tattoo is an implied admission or exhibits consciousness of guilt. Subsection (a) to Rule 302 in the Massachusetts guide to evidence states the following:

> Constitutional principles restrict the manner in which concepts such as inferences, prima facie evidence, and presumptions are permitted to operate in criminal cases. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship , 397 U.S. 358, 364 (1970). "[I]t is constitutionally impermissible to shift to a defendant the burden of disproving an element of a crime charged." Commonwealth v. Moreira , 385 Mass. 792, 794 (1982). Likewise, "[d]ue process requires that the State disprove beyond a reasonable doubt those 'defenses' that negate essential elements of the crime charged." Commonwealth v. Robinson , 382 Mass. 189,

203 (1981). Therefore, a conclusive or mandatory presumption or inference in any form which has the effect of relieving the jury of the duty of finding a fact essential to proof of the defendant's guilt on a criminal charge beyond a reasonable doubt based on evidence offered at trial, or which imposes on a defendant a burden of persuasion as to such a fact, conflicts with the presumption of innocence and violates due process. See Sandstrom v. Montana, 442 U.S. 510, 523–524 (1979); Patterson v. New York, 432 U.S. 197, 210 (1977); Commonwealth v. Stokes, 374 Mass. 583, 589–590 (1978).

CONCLUSION

The evidence proffered here amounts to the mere possibility as to the Defendant's mental processes in getting the tattoos. The jury cannot make a reasonable inference of an implied admission but merely a conclusion based on pure conjecture and speculation.

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

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