

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

COMMONWEALTH

v.

AARON HERNANDEZ

DEFENDANT'S MOTION FOR DISCOVERY RELATED TO BREACH OF  
DEFENDANT'S TELEPHONE SECURITY AND RECORDING OF  
ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS

Now comes the Defendant in the above-entitled matter and respectfully moves this Honorable Court, pursuant to Massachusetts Rules of Criminal Procedure 14, to compel discovery of: 1) any and all information related to the breach of Defendant's telephone security while he was held in detention by the Commonwealth; and 2) any and all information related to the recording of Defendant's Attorney-Client telephone calls, while detained by the Commonwealth and is within its possession, custody or control, including, the Suffolk County and Bristol County District Attorney's Offices, the Suffolk County and Bristol County Sheriff's Offices, all persons under the prosecutor's direction and control, persons who

2016 DEC -6 PM 3:39

have participated in investigating or evaluating the case, or who either regularly reports to the prosecutor's office or have done so in the case.

#### THE BREACH

As has been widely reported by the news media, the Defendant had his jailhouse phone calls tapped by an unknown person while awaiting trial in a previous criminal case in Bristol County.<sup>1</sup> According to news reports, detainee and inmate phone calls are recorded and stored on a database maintained by Securus Technologies, Inc., a for-profit prison technology company. In or around the summer of 2014, the security of this database was breached, and an unknown person obtained unauthorized access to recordings of Mr. Hernandez's calls. Undersigned counsel was never told of the improper access to Mr. Hernandez's telephone calls, even though the Suffolk County Sheriff's Department had knowledge of the breach. According to a Sheriff's Department spokesperson, the

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<sup>1</sup> See, e.g., Bob McGovern, Aaron Hernandez's jailhouse phone calls tapped during first murder trial, authorities say, Boston Herald (Oct. 28, 2016), [http://www.bostonherald.com/news/local\\_coverage/2016/10/aaron\\_hernandezs\\_jailhouse\\_phone\\_calls\\_tapped\\_during\\_first\\_murder\\_trial](http://www.bostonherald.com/news/local_coverage/2016/10/aaron_hernandezs_jailhouse_phone_calls_tapped_during_first_murder_trial); Bob McGovern, After phone monitoring revelation, Hernandez lawyer eyes possible retrial motion, Boston Herald (Oct. 28, 2016), [http://www.bostonherald.com/news/local\\_coverage/2016/10/after\\_phone\\_monitoring\\_revelation\\_hernandez\\_lawyer\\_eyes\\_possible\\_retrial](http://www.bostonherald.com/news/local_coverage/2016/10/after_phone_monitoring_revelation_hernandez_lawyer_eyes_possible_retrial). See attached Exhibit "1".

Sheriff's Department first "discovered that Securus' telephone database had been accessed for calls relating to detainee Hernandez" "[d]uring a routine security check" performed by its Investigative Division.<sup>2</sup> However, defense counsel only learned of the problem through recent media reports.<sup>3</sup>

The breach of Defendant's phone security was reported in connection with reports of a massive breach of security at Securus Technologies between 2011 and 2014, which exposed over 70 million records of phone calls placed by prisoners in at least 37 states, including downloadable recordings of calls.<sup>4</sup>

#### **RECORDING OF ATTORNEY-CLIENT PRIVILEGED CALLS**

While Attorney-Client calls are allegedly not recorded or preserved,<sup>5</sup> at least 14,000 recorded conversations between prisoners and attorneys were

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<sup>2</sup> See McGovern, Aaron Hernandez's jailhouse phone calls tapped, supra attached as **Exhibit "1"**.

<sup>3</sup> Therefore, the discovery sought in this motion "could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing[.]" Mass. R. Crim. P. 13(d) (1) (A).

<sup>4</sup> See Jordan Smith & Micah Lee, Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege, The Intercept (Nov. 11, 2015), <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/>, attached as **Exhibit "2"**.

<sup>5</sup> See McGovern, Aaron Hernandez's jailhouse phone calls tapped, supra, attached as **Exhibit "1"**.

among the files in the Securus breach,<sup>6</sup> indicating habitual violations of the Attorney-Client privilege unprecedented in size and scope.

Such recordings have been occurring even though Attorneys have registered their telephone numbers in accordance with the Securus protocol managed by the respective correctional facility allegedly exempting such calls from recording.<sup>7</sup> In Romero v. Securus Technologies, Inc., Complaint, Case No. 16-cv-1283-JM-MDD (S.D. Cal. November 7, 2016), cited in footnote 7 **Exhibit "4"**, at paragraph 69 pg. 17, and generally pgs. 9-16, a California Public Records request led to the release of 2,330 emails between the San Diego Sheriff's office and Securus establishing that Attorney-Client privileged communications were being recorded even though the Attorney numbers were placed

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<sup>6</sup> See Smith & Lee, *supra*. **Exhibit "2"**.

<sup>7</sup> See, e.g., Jonathan Shoreman, Federal judge chides prosecutors in Leavenworth CCA recording controversy: "You all need to get your act together", The Topeka Capital-Journal (Sept. 7, 2016), <http://cjonline.com/news-state/2016-09-07/federal-judge-chides-prosecutors-leavenworth-cca-recording-controversy-you-all> attached as **Exhibit "3"**.

See also Romero v. Securus Technologies, Inc., Complaint, Case No. 16-cv-1283-JM-MDD (S.D. Cal. November 7, 2016) attached as **Exhibit "4"**

See also USA v. Lorenzo Black, et al., Case No.16-20032 (D. Kan. 2016).



on the do not record list. Similarly, in an ongoing criminal matter in the U.S. District Court, District Of Kansas, USA v. Lorenzo Black, et al., Case No.16-20032 (D. Kan. 2016) an Exhibit No. 449 filed by the Defense indicates 74 Attorney-Client privileged calls were recorded. **Exhibit "5"**. A Special Master was appointed by the Court in USA v. Lorenzo Black to examine recordings of Attorney-Client privileged material in the possession of the correctional facility and US Attorney. The Master is expected to report his findings this month to the Court in that matter.

#### ACCESS TO THE RECORDINGS

Defendant and his counsel are not aware, at this juncture, who had access to Defendant's phone calls including potential Attorney-Client privileged calls without further inquiry. The following exchange between a Seattle, WA correction's official and Securus illustrates the broad access to Securus's recordings.

Contained within the release of emails posted to the same site as the above 2,330 emails were emails dated June 25, 2015 between a Captain Eric Urie, Internal Investigations Unit, Department of Adult and

Juvenile Detention (Jail) Seattle, WA and Jeffrey Ollar, On-site Administrator for Securus, Dallas, Texas. Urie wrote, "...I am trying to get a clearer understanding of what levels of access our system has, what specifically each level of access can do in the system, and who has each level." In response Ollar provided a description of the levels of access to prisoners telephone calls and page after page of individuals including 82 detectives. With respect to the access by detectives Ollar writes, "These users have a wide access to calls,...". **Exhibit "6"**.

The Defendant is entitled to know who had access to his telephone calls and who in fact accessed his calls.

#### **DISCOVERY REQUESTED**

Pursuant to Massachusetts Rules of Criminal Procedure 14, the Defendant now asks this Honorable Court to authorize discovery of any and all information related to the breach of his telephone security and recording of Attorney-Client privileged communications. These materials are highly relevant to the instant case. By the summer of 2014, the Defendant had been indicted in this case and likely

discussed the matter with his then-counsel by phone. If Mr. Hernandez's communications with his attorneys regarding this case were improperly recorded and then improperly accessed, there has been a serious violation of the Attorney-Client privilege that must be addressed. To the extent that the substance of such recordings is within the possession or knowledge of the Commonwealth, the Defendant's constitutional rights have been violated with the potential for deeply prejudicial effect. See Com. v. Fontaine, 402 Mass. 491, 497, 524 N.E.2d 75, 79 (1988). The defense must be permitted to investigate the issue further.

Accordingly, the Defendant moves this Court, pursuant to Massachusetts Rules of Criminal Procedure 14, to compel discovery of any and all information related to the Defendant's telephone calls including but not limited to the following material while he was held in detention by the Commonwealth and is within its possession, custody or control, including the Suffolk County and Bristol County District Attorney's Offices, the Suffolk County and Bristol County Sheriff's Offices, all persons under the prosecutor's direction and control, persons who have participated in investigating or evaluating the case, or who either

regularly reports to the prosecutor's office or have done so in the case. All such material to be produced within 30 days from the Court's order:

1. All call recordings and call records related to Aaron Hernandez.

2. All documents regarding any Authorized or Unauthorized Access of Aaron Hernandez's calls, records and data, including without limitation:

a. How any Authorized or Unauthorized Access occurred; and

b. Calls, records and data accessed during any Authorized or Unauthorized Access; and

c. The identities of the parties accessing calls, records and data; and

d. The identities of any additional persons or entities to whom calls, records or data was provided; and

e. The identities of any and all persons or entities notified of any Unauthorized Access; and

f. Any and all calls to or from any person or entity including but not limited to Securus regarding any Authorized or Unauthorized Access; and

g. Any and all subpoenas requesting call recordings or call records related to Aaron Hernandez.

h. Any and all records from or to any of Defendant's counsel regarding requests to be placed on the do not record list.

i. Internal and external communications regarding any Authorized or



Unauthorized Access of Aaron Hernandez calls, records, and data.

j. All documents and communications between any party including, without limitation, the Commonwealth, the Sheriffs of Bristol County, MA and Suffolk County, MA, or political subdivisions thereof, or any employee or agent thereof, or any political subdivision thereof, regarding any of Aaron Hernandez's calls, records or data whether Authorized or Unauthorized.

k. Any reports, records, investigations, or findings prepared by any party regarding any Authorized or Unauthorized Access of Aaron Hernandez's calls, records or data.

l. Any and all contracts with Securus to provide telephone services.

m. Any and all records or documents indicating who had access to the Securus system including but not limited to any law enforcement agency or employee, law enforcement official or employee, correctional official or employee and any other individual or entity with access to the Securus system, data or recordings.

Defendant requests that the Court order covers electronic and hard copy calls, records, data, documents and Material and Electronically Stored Information ("ESI"). ESI includes e-mails, spreadsheets, databases, calendars, Internet usage records, word processing documents, and voicemails. This Order includes any and all information from databases, tapes, servers, computer systems, discs, cartridges, archives, disaster recovery systems, "deleted" and "sent" computer and email files, and

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Dated: December 6, 2016

CERTIFICATE OF SERVICE

I hereby certify this 6<sup>th</sup> day of December 2016 that a true copy of the within *Defendant's Motion for Discovery Related to Breach of Defendant's Telephone Security and Recording of Attorney-Client Privileged Communications* was sent via First Class Mail, postage prepaid, and by email to all counsel of record as follows:

Daniel F. Conley, Esq.  
Patricia M. Haggan, Esq.  
Teresa K. Anderson, Esq.  
Janis Diloreto Smith, Esq.  
One Bulfinch Place  
Boston, MA 02114



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Jose Baez, Esq.

CERTIFICATE OF SERVICE

I, Ronald S. Sullivan Jr., hereby certify that a true copy of the attached documents was served upon the following parties by First Class US Mail on December 6, 2016:

Patrick Haggan  
Suffolk County District Attorney's Office  
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Boston, MA 02114

Janis DiLorento Smith  
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December 6, 2016

Clerk Magistrate  
Suffolk Superior Court-Criminal Business  
3 Pemberton Square  
Room 1403  
Boston, MA 02108

RE: Commonwealth v. Aaron Hernandez  
SUCR2014-10417; SUCR2015-10384

Dear Clerk Magistrate:

I am the attorney for the defendant in the above-entitled indictments. Enclosed herewith for filing are two motions. They are intended to be substitute motions for two similar motions filed on November 21, 2016.

1) DEFENDANT'S MOTION FOR THIRD PARTY RECORDS RE:  
SECURUS TECHNOLOGIES, INC.

2) DEFENDANT'S MOTION FOR DISCOVERY RELATED TO BREACH OF  
DEFENDANT'S TELEPHONE SECURITY AND RECORDING OF  
ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS

If you have any questions, please call me at the number listed above.

Sincerely



Ronald S. Sullivan, Jr.