

#326.5

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CRIMINAL #2013-983

BRISTOL, SS SUPERIOR COURT  
FILED

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

APR -3 2015

MARC J. SANTOS, ESQ.  
CLERK/MAGISTRATE

**DEFENDANT'S SUPPLEMENTAL OPPOSITION TO  
COMMONWEALTH'S MOTION TO EXCLUDE  
TESTIMONY OF DR. DAVID J. GREENBLATT**

**I. STATEMENT OF RELEVANT FACTS**

On December 30, 2014, following its receipt of the defendant's notice of expert testimony by David J. Greenblatt, a clinical pharmacologist, on the effects of PCP and marijuana ingestion on the human brain and behavior, the Commonwealth filed a motion to exclude such testimony. In its motion, the Commonwealth acknowledged that "it is true that Wallace and Ortiz were observed smoking PCP on the Saturday night preceding the murder (more than twenty-seven hours before the murder)...." The Commonwealth went on to assert "that there will be no evidence of the use of PCP by any defendant on the date of the murder." The Commonwealth argued that the lack of nexus between PCP use by Wallace and Ortiz and the shooting of Odin Lloyd rendered Dr. Greenblatt's testimony irrelevant.

On January 14, 2015, the defendant filed an opposition to the Commonwealth's motion to exclude, along with an affidavit of Dr. Greenblatt. The Commonwealth filed a second motion to exclude on January 26, 2015 and requested a *voir dire* of Dr. Greenblatt before he would be

permitted to testify before the jury. The defendant filed a response to the Commonwealth's second motion to exclude on February 6, 2015. No action has been taken on either motion by the Court as yet.

Jennifer Mercado was called as a Commonwealth witness on March 24, 2015. She testified about PCP (angel dust) use by Wallace and Ortiz in the spring of 2013 on both direct and cross-examination. A complete transcript of her testimony is appended hereto. In sum, she testified that she observed both Wallace and Ortiz smoking PCP on multiple occasions during the spring of 2013. Tr. 43-20-25, 51, 61. She could tell they were smoking PCP due to its distinctive odor which she likened to "burning plastic." Tr. 43-24-25, 51. She testified that when they were smoking PCP, Wallace and Ortiz "would just sweat a lot. Like they would always have to wipe themselves. They were always nervous and moving around and real jittery. Like acting crazy." *Id.* at 53.

Mercado also testified that she observed Wallace and Ortiz from a distance of 8 to 10 feet outside her home on the night of June 16, 2013 as they were getting into a vehicle. They were both sweating profusely and "real jittery." Tr. 43-57. She testified that Ortiz had a washcloth or towel which he used to wipe his face, while Wallace used his shirt or a towel to wipe his face. *Id.* at 57-58. On redirect examination on March 26, 2015, Mercado testified that she "assumed" they were sweating because they were wiping their faces. Tr. 45-12. On recross examination, she testified that the behavior she observed from Wallace and Ortiz that night was consistent with how they had behaved on other occasions in the spring of 2013 while under the influence of PCP. *Id.* at 16. They were wiping themselves, seemed to be sweating, and seemed jittery, all behaviors she had observed in connection with their use of angel dust. *Id.* at 17.

On redirect examination on March 24<sup>th</sup>, ADA McCauley showed Mercado a video clip of Wallace and Ortiz arriving at Hernandez's home shortly after midnight on June 17, 2013. He asked her if their behavior in the video was consistent with their behavior in the past while they were using PCP. She responded: "Just the jitteriness. The walking back and forth, like, you know, touching themselves or feeling themselves, and then changing in and out of clothes and stuff like that, yes." Tr. 43-72. Both Wallace and Ortiz have been indicted for first degree murder in this case along with Hernandez.

## II. SUMMARY OF APPLICABLE LAW.

Under the Sixth and Fourteenth Amendments to the U.S. Constitution, a criminal defendant has the right to present "competent, reliable...exculpatory evidence" at trial. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The right to present a complete defense is also guaranteed by Article 12 of the Massachusetts Declaration of Rights: "Every subject shall have a right to produce all proofs that may be favorable to him." More specifically, in Massachusetts, the Supreme Judicial Court has afforded "wide latitude to the admission of relevant evidence that a person other than the defendant may have committed the crime charged." *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 800-801 (2009). The opportunity to present third-party culprit evidence is of "constitutional dimension." *Id.* at 804. Accordingly, "[i]f the evidence is 'of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility'." *Id.* at 801, quoting *Commonwealth v. Conkey*, 443 Mass. 60, 66 (2004).

The relevance of particular evidence may depend upon a conditional or foundational fact. In general, it is not up to the trial judge to decide whether or not that conditional fact exists. Rather,

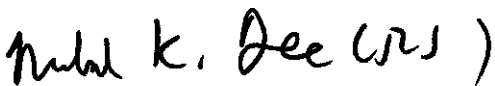
### III. APPLICATION OF LAW TO FACTS

Based on the testimony of Jennifer Mercado, the jury could clearly find by a preponderance of the evidence that Wallace and Ortiz were under the influence of PCP on the night of June 16, 2013. The jury may or may not find her testimony credible, and the jury may or may not choose to draw that inference. But if they do, Dr. Greenblatt's expert testimony about the effects of PCP on the human brain and behavior, including its well-documented association with violent outbursts, is clearly relevant, and the defendant has a right to present it. Based upon evidence respecting their presence at the scene of the shooting and the fact that they have been indicted for the murder of Odin Lloyd, Wallace and Ortiz clearly qualify as potential third party culprits. Accordingly, the defendant has a constitutional right to present evidence that they, rather than Hernandez, committed the crime charged, and the Commonwealth's motions to exclude the testimony of Dr. Greenblatt should be denied.

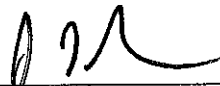
Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing document upon the Commonwealth, **IN HAND**, to: William McCauley, Assistant District Attorney, Bristol County, 888 Purchase Street, New Bedford, MA 02740 on April 3, 2015.

  
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Charles W. Rankin