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BRISTOL, SS SUPERIOR COURT
FILED

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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

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

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**DEFENDANT'S MEMORANDUM OF LAW RESPECTING
DEFENDANT'S NON-DUTY TO PROVIDE INFORMATION TO POLICE**

During the charge conference on April 3, 2015, the Commonwealth opposed the defendant's request for an instruction that he had no obligation to provide information to the police by citing Mass. Gen. Laws ch. 268, § 40. On its face, that statute does appear to impose a duty to report upon an individual who witnesses, *inter alia*, a murder. However, the statute imposes such a duty to report only when said person can do so "without danger or peril to himself or others." There is no reported Massachusetts case law construing this statute, but in order to pass constitutional muster, "danger or peril" must necessarily encompass the individual's state and federal constitutional privilege against self-incrimination.

Other states have specifically interpreted analogous statutes to preclude enforcement where reporting a crime could tend to incriminate the reporter. *See, e.g., State v. Wardlow*, 20 Ohio App. 3d 1, 484 N.E.2d 276 (1985)(*per curiam*); *State v. Carson*, 274 S.C. 316, 262 S.E.2d 918 (1980). The federal courts have similarly refused to apply the misprision of a felony statute (18 U.S.C. § 4)

in such circumstances. *See, e.g., United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979); *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976); *United States v. King*, 402 F.2d 694 (9th Cir. 1968).

In the instant case, it is self-evident that Hernandez had a constitutional right not to report what he may have known about Lloyd's death to law enforcement authorities since such a report would infringe upon his fundamental privilege against self-incrimination. Under the circumstances of this case, ch. 268, § 40 could not constitutionally be applied to Hernandez. Accordingly, the Commonwealth's citation of this statute adds nothing to its argument, and the instruction requested by the defendant should be given by the Court.

Respectfully submitted,

AARON HERNANDEZ

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by hand to: William McCauley on April 6, 2015.



Charles W. Rankin