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December 16, 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 an attorney for Mr. Hernandez in the above-entitled indictments. Enclosed herewith for filing are the following:

1. ***Aaron Hernandez's Reply To The Commonwealth's Opposition To Defendant's Motion To Exclude Firearms Analysis Testimony Based On PCAST;***
2. ***Defendant's Motion to Continue Hearing On Defendant's Motion To Suppress The Contents Of His Cell Phone; and***
3. ***Defendant's Motion For Discovery of Witness Triple III Records***

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

Sincerely



George J. Leontire
GJL

cc: Patrick Haggan, Esq.
Janis DiLorento Smith, Esq.
Teresa K. Anderson, Esq.

CERTIFICATE OF SERVICE

I, George J. Leontire, hereby certify this 16th day of December 2016 that a true copy of the within documents: *Aaron Hernandez's Reply to the Commonwealth's Opposition to Defendant's Motion to Exclude Firearms Analysis Testimony Based on PCAST; Defendant's Motion to Continue Hearing on Defendant's Motion to Suppress the Contents of His Cell Phone; and Defendant's Motion For Discovery of Witness Triple III Records* were sent via First Class Mail, postage prepaid, and by email to all counsel of record as follows:

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

**SUPERIOR COURT DEPARTMENT
SUCR2014-10417
SUCR2015-10384**

COMMONWEALTH

v.

AARON HERNANDEZ

**AARON HERNANDEZ'S REPLY TO THE COMMONWEALTH'S OPPOSITION
TO DEFENDANT'S MOTION TO EXCLUDE FIREARMS ANALYSIS
TESTIMONY BASED ON PCAST**

Now comes the Defendant in the above-captioned matter and submits this reply memorandum in response to the Commonwealth's Opposition to Defendant's Motion to Exclude Firearms Analysis Testimony Based on PCAST.

It should be noted that there were several prayers to the Defendant's Motion:

1. That the Court exclude any comparative firearms analysis from presentation before the jury;
2. That the Court exclude any expert testimony, including firearms analysis testimony, from presentation before the jury unless experts can opine within a "reasonable degree of scientific or forensic discipline certainty";
3. That the Court report the questions of firearm analysis/reasonable degree of certainty to the Appeals Court with a request for a full review by the SJC, pursuant to Rule 34 of the Massachusetts Rules of Criminal Procedure;

4. That the Court require that all quality management system documents, internal validation studies, or independent black box studies of generic firearm analysis contracted by the Forensic Division, Firearm Analysis Unit/Crime Lab Unit of the Boston Police Department be both given to the Defendant and published online for other scientists to review;
5. Once the Commonwealth has turned over any alleged independent firearms validation studies under number 4 above, that the Court require the Commonwealth to prove the validity of any firearms analysis and studies in this case in a *Daubert* hearing using independent black box studies; and
6. That the Court allow this motion to be made both under State due process requirements and to federalize same under federal due process or other constitutional requirements.

The Defendant respectfully requests the Court rule on each of the six prayers for relief.

The Commonwealth's Opposition to Defendant's Motion relies on press releases from the National District Attorney's Association and the Bureau of Alcohol, Tobacco and Firearms objecting to PCAST. Such opposition is not substantive in nature and must be expected given the vested interests of these groups.

Scientific critique is usually met with data not rhetoric, and PCAST invited stakeholders to submit independent data to supplement the 2000 documents/studies that were attached to the PCAST report.

Invitation to Provide Follow-up Information to PCAST Regarding its Forensics Report

In September 2016, the President's Council of Advisors on Science and Technology (PCAST) released its Report to the President on "Forensic Science in the Criminal Courts: Ensuring Scientific Validity Of Feature-Comparison Methods." See https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

As a follow-up to this work, PCAST invites you to reply by **Wednesday, December 14** to the following request:

1. Please identify any relevant scientific reports that (i) have been published in the scientific literature, (ii) were not mentioned in the PCAST report; and (iii) describe appropriately designed, research studies that provide empirical evidence establishing the foundational validity and estimating the accuracy of any of the following forensic feature-comparison methods, as they are currently practiced:
 - a. DNA analysis of mixed samples with three or more contributors, in which the contributor in question represents less than 20% of the sample.
 - b. Bitemark analysis.
 - c. Firearms analysis to associate ammunition with an individual gun (as opposed to analysis to identify class characteristics).
 - d. Footwear analysis to associate an impression with an individual item of footwear (as opposed to analysis to identify class characteristics).
 - e. Hair analysis.
2. Please indicate how the scientific reports establish foundational validity and estimate the accuracy of the relevant method.

PCAST plans to review the findings of its Report in light of the additional relevant information.

Please send replies to pcast@ostp.eop.gov by **December 14, 2016**.

The Commonwealth did not cite any new studies or independent data to refute the findings of the PCAST report. The studies cited by the Commonwealth were all available to PCAST and/or are easily determined **not to be independent** black box studies that could be peer reviewed, reproduced, and could eliminate determinations about subjective feature comparison methods by subjective individual comparators - **much like was done for decades in the now debunked bite-mark analysis and microscopic hair matching**. In fact, most of the documents now being relied upon by the Commonwealth do not contain error rates or any large enough statistical group to be informative on the issue. The Commonwealth has not provided any scientific basis to refute the findings made in the PCAST report other than to disagree with the validity and evaluation of the research and studies of the PCAST Commission.

There is an attempt to have an experimental database based on 3D Exemplars validate tool mark analysis of firearms and cartridges, as noted in the Zhang and Chumbley article listed, but the authors clearly state that his test was not yet scientifically valid and had only "reached preliminary **experimental** results." (emphasis added)

The Defendant also notes that on the day of the initial filing of this Motion in regard to firearms analysis, the Court ordered the Commonwealth to ask the Boston Police

Laboratory if it had performed any studies on the validity of comparative firearms and cartridge analysis or any black box studies. Based on the failure to include a response in the Commonwealth's reply, we assume such studies do not exist.

We are aware of Judge Locke's prior opinion in the November 2016 case of Commonwealth v. Legore that held as follows:

The report recommends, however, that if such evidence is admitted, it should be accompanied by testimony regarding the known error rates as found in Ames Laboratory's "black-box study" Based on the Supreme Judicial Court's comprehensive consideration of the issues relating to comparative ballistics evidence, and the Court's determination that such evidence, properly presented may aid a fact-finder at trial, this Court sees no reason to conduct a formal Daubert/Lanigan hearing based on the report issued by the President's Council.

ORDER

The Defendant's motion is **DENIED**. The Commonwealth shall be permitted to present expert testimony regard a forensic ballistics examination and comparison, subject to the conditions and limitations outlined in Commonwealth v. Heang, *supra*, and further subject to the requirement that the Commonwealth shall elicit testimony regarding known error rates based on studies identified in the PCAST report. Moreover, nothing herein shall limit defendant's counsel from cross-examining any firearms expert witness based on the findings and content of the PCAST report.


Justice of the Superior Court

Dated: November 17, 2016

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In light of the Court's decision in Commonwealth v. Legore, *supra* and the significant questions of law raised in this Motion, the Defendant respectfully requests the Court to refer this matter to the Appeals Court under Rule 34 of the M.R.C.P. The Supreme Judicial Court noted in Commonwealth v. Heang, 458 Mass. 827 (2011), citing the 2008 National Research Council (NRC) report, "Although the NRC report called into question the exactitude with which a forensic ballistics expert could declare a "match," there was no

evidence before the judge suggesting that firearms examiners could not assist the jury by using their technical expertise to observe and compare toolmarks found on projectiles and cartridge cases. *Id.* at 845. Hernandez understands that **this Court** in Legore denied a *Daubert v, Merrell Pharmaceuticals, 509 U.S. 579 (1993)* hearing to defendant Legore in that matter, holding that the history/practices of this area have been accepted by the SJC ruling in **Heang, supra**. Petitioner here, as the Court indicated in Legore, and as was noted in prior hearings does not believe *Daubert* offers any legitimate relief because it is clear that the methodology employed by the Commonwealth's expert here is the accepted methodology in the community of firearms comparative experts who usually testify as ballistics experts. As noted, even the SJC in *Heang, supra*. used the term ballistics for comparative firearm analysis. But that history of accepted methodology does not make it scientifically valid, as now proved by cases in arson analysis and other forensic areas such as bite-mark analysis. Therefore, we again ask the court to rule upon this motion based on PCAST- an official government report, supporting exhibits, which as previously argued is a different avenue than *Daubert, supra*.

The 2016 PCAST report goes well beyond the findings of the NRC. PCAST has concluded that there are no valid studies behind this long accepted firearm testimony, and that the limitation by an expert that an opinion is within a reasonable degree of scientific or ballistic certainty is erroneous, misleading, prejudicial, and clearly false. This unsettled question of law needs to be readdressed by the highest court in the Commonwealth given the serious implications for this case and all other cases involving expert comparative testimony that is no longer deemed scientifically validated after years of review by the blue ribbon PCAST.

Because Commonwealth v. Heang, 45 Mass. 827 (2011) held that the expert in the area of firearms analysis may not use the words “within a reasonable degree of scientific” but can use “within a reasonable degree of ballistic certainty,” the Commonwealth further alleges that this issue need not be revisited after PCAST. The Supreme Judicial Court in Heang, supra, made this determination after its review of the National Academy of Sciences (“NAS”) report entitled “Strengthening Forensic Science in the United States: A Path Forward,” in 2009. However, that 2009 report was an early report which questioned the use of certain alleged sciences or comparative sciences as they were commonly called, in the courtroom. Ballistics, which is actually the study of a projectile in flight, was for years misused as the code word for any evidential testimony dealing with the comparison of cartridges and firearms. It is now properly called firearms comparative analysis evidence.

The PCAST report, seven years after the NAS report, went much further than the NAS report because of issues of non-validation. The NAS report brought the issues to the forefront and suggested that properly validated studies be performed to determine whether the comparative sciences used as forensic evidence in the courtroom could withstand proper scientific challenges. PCAST found that in the seven years following the NAS report that, in fact, there have been no validation studies for firearms comparative analysis, with the exception of the one black box study which has never been peer reviewed, a fundamental requirement to determine scientific validity. Therefore, the Heang, supra, decision which allows an expert to testify as to a reasonable degree of ballistic certainty is not only misleading, its probative value is seriously prejudicial since there is no ballistics certainty. Thus, it also violates the due process clause of the Federal United States

Constitution and any comparative requirements in the Massachusetts Declaration of Rights. As a result the Department of Justice, as we noted in our moving brief, now forbids any expert to testify within a reasonable degree of their area's certainty.

This issue was not addressed in Heang, *supra*, and, given the SJC's desire to move forward from the outdated acceptability of forensic evidence in the courtroom, this issue is ripe for determination.

It has been the Defendant's position, as noted at our last hearing, that this Motion relying on PCAST is not a Daubert motion live testimony hearing request of the type Judge Locke denied above. Instead, this Motion does not necessitate live testimony to explain what PCAST means. PCAST speaks for itself. Rather, this Motion is itself a hearing on evidential submission and can therefore be decided based on the evidentiary attachments that Mr. Hernandez filed with his motion - PCAST and the approximate 2,000 pages of reports it reviewed.

We also ask the Court, when it makes its ruling, to confirm that Mr. Hernandez shall be allowed to further cross-examine and elicit testimony about PCAST, the issues discussed in its report, known error rates and any other areas of cross examination that challenge forensic firearm and cartridge comparison studies (incorrectly noted by many as ballistics). We further ask that the Court not preclude any requested submissions regarding jury charges about this issue.

**Respectfully submitted
for the Defendant, Aaron Hernandez**



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Dated: December 16, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

**SUPERIOR COURT DEPARTMENT
SUCR2014-10417
SUCR2015-10384**

COMMONWEALTH

v.

AARON HERNANDEZ

**DEFENDANT'S MOTION TO CONTINUE THE HEARING ON DEFENDANT'S
MOTION TO SUPPRESS THE CONTENTS OF HIS CELL PHONE**

Now comes the Defendant in the above-captioned matter and requests the Court to Continue the Hearing On Defendant's Motion To Suppress The Contents Of His Cell Phone.

Defendant states the following in support of his motion:

1. On November 15, 2016, Mr. Hernandez, by and through counsel, filed a Motion to Suppress the Contents of his Cell Phone.
2. On December 7, 2016, this Court set a hearing on the motion for December 20, 2016.
3. At the December 7, 2016 hearing, undersigned counsel represented that their central witness, Attorney Brian Murphy, is domiciled in California. Counsel further advised that he could make no representations as to Brian Murphy's availability.
4. After the December 7, 2016 hearing, undersigned counsel promptly contacted Brian Murphy's counsel, Attorney Thomas Butters.

5. Attorney Thomas Butters represented that on the scheduled date Brian Murphy would be on a West Coast business travel trip.
6. Attorney Butters represented that Brian Murphy will be unavailable on December 20, 2016 due to long standing business and travel obligations.

Respectfully submitted
for the Defendant, Aaron Hernandez

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Dated: December 16, 2016

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF THE COMMONWEALTH

Suffolk, SS.

SUFFOLK SUPERIOR COURT
SURCR2014-10417; SUCR2015-
10384

COMMONWEALTH

v.

AARON HERNANDEZ

Defendant

DEFENDANT'S MOTION FOR DISCOVERY OF WITNESS TRIPLE III RECORDS

Now comes the Defendant in the above captioned matter and respectfully moves this Honorable Court to order pursuant to MA Rules of Criminal Procedure 14 (a) (1) (D) the following:

- 1) the Commonwealth notify the Probation Department of all witnesses identified pursuant to Rule 14 subdivisions (a)(1)(A)(iv); and
- 2) the probation department provide the Defendant with the Triple III records for such witnesses including prior complaints, indictments and dispositions.

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



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Date: 12/16/16