

No.

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2018-2019

JOSE HERNANDEZ,  
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS  
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME JUDICIAL COURT FOR  
THE COMMONWEALTH OF MASSACHUSETTS

APPENDIX

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## **TABLE OF CONTENTS**

Full Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, <u>Commonwealth v. Jose Hernandez</u> , No. SJC-11467, as published as <u>Commonwealth v. Hernandez</u> , 481 Mass. 189, 113 N.E.2d 828, 2019 Mass. LEXIS 4. (2019) .....	Appendix A
<i>Petition for Rehearing</i> , <u>Commonwealth v. Jose Hernandez</u> , Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (filed January 22, 2019; docketed January 23, 2019) .....	Appendix B
<i>Notice of Denial of Petition for Rehearing</i> , <u>Commonwealth vs. Jose Hernandez</u> , Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (March 6, 2019) .....	Appendix C
<i>Docket Entries</i> , <u>Commonwealth v. Jose Hernandez</u> , Essex Superior Court No. 1077CR00143 (ESCR2010-00143) .....	Appendix D
<i>Docket Entries</i> , <u>Commonwealth v. Jose Hernandez</u> , Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 .....	Appendix E
Trial Exhibit #12 .....	Appendix F
<i>Verdict Slip</i> , <u>Commonwealth v. Jose Hernandez</u> , Essex Superior Court Indictment ESCR2010-143-001 (Murder – 1 <sup>st</sup> Degree).....	Appendix G

## **APPENDIX A**

## Commonwealth v. Hernandez

Supreme Judicial Court of Massachusetts

November 9, 2018, Argued; January 9, 2019, Decided

SJC-11467.

### Reporter

481 Mass. 189 \*; 113 N.E.3d 828 \*\*; 2019 Mass. LEXIS 4 \*\*\*; 2019 WL 137661

**COMMONWEALTH vs. JOSE HERNANDEZ.**

**Prior History:** [\*\*1] Essex. INDICTMENT found and returned in the Superior Court Department on February 3, 2010.

A motion to dismiss was heard by *Timothy Q. Feeley*, J., the case was tried before *David A. Lowy*, J., and a motion for a new trial, filed on July 27, 2015, was heard by *Timothy Q. Feeley*, J.

### Core Terms

motor vehicle, witness's, new trial, cross-examination, shooting, testifying, motion for a new trial, exculpatory evidence, informant, questions, heroin, cooperate, crime scene, firearm, newly discovered evidence, grand jury, credibility, proficiency, motivation, impeach, confidential, deficiencies, posttrial, disclose, happened, argues, newly, hit, recross-examination, unsatisfactory

### Case Summary

#### Overview

**HOLDINGS:** [1]-The trial judge did not improperly curtail defendant's cross-examination of a witness because the objections regarding the timing of the decision of the witness to come forward to cooperate and his reason for doing so were properly sustained based on the characterization of the cooperation agreement as the deal of a lifetime and defendant was permitted to rephrase the questions; [2]-The motion judge did not abuse his discretion in denying defendant's motion for a new trial because the new evidence would not have been a real factor in the jury's deliberations since although investigators failed to conduct a

comprehensive search of the victim's vehicle, the investigator at issue was not involved in the search, thus, the evidence of his performance issues had no bearing on the defense that defendant raised based on that investigator's work performance.

#### Outcome

Judgment is affirmed; order denying motion for a new trial affirmed.

### LexisNexis® Headnotes

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

#### HN1 **Brady Materials, Brady Claims**

It is well settled that prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury. It is only when the prosecutor possesses exculpatory evidence that would greatly undermine either the credibility of an important witness or evidence likely to affect the grand jury's decision, or withholds exculpatory evidence causing the presentation to be so seriously tainted, that the prosecutor must present such evidence to the grand jury.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

#### HN2 **Criminal Process, Right to Confrontation**

## Commonwealth v. Hernandez

Both the *Sixth Amendment to the United States Constitution* and *Mass. Const. Decl. Rights art. 12* guarantee a criminal defendant's right to confront the witnesses against him or her through cross-examination.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > New Trial

**HN6**  **Postconviction Proceedings, Motions for New Trial**

A judge may grant a new trial at any time if it appears that justice may not have been done. *Mass. R. Crim. P. 30 (b)*. The appellate court only disturbs the denial of a motion for a new trial where there has been a significant error of law or other abuse of discretion. When the motion judge was not the trial judge, and as the motion judge conducted a nonevidentiary hearing, the appellate court is in as good a position as the motion judge to assess the trial record.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

**HN3**  **Plain Error, Definition of Plain Error**

The appellate court reviews testimony objected to at trial for prejudicial error. In the absence of an objection and exception, although the appellate court may still find reversible error under *Mass. Gen. Laws ch. 278, § 33E*, it will do so only upon a showing of grave prejudice or substantial likelihood that a miscarriage of justice has occurred.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

Criminal Law & Procedure > Trials > Witnesses > Presentation

Evidence > ... > Examination > Cross-Examinations > Scope

**HN4**  **Witnesses, Presentation**

A judge certainly has wide discretion to limit repetitive or redundant cross-examination.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

**HN8**  **Postconviction Proceedings, Motions for New Trial**

Newly discovered evidence must have been unknown to defense and not reasonably discoverable at time of trial.

Evidence > Types of Evidence > Testimony > Lay Witnesses

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

**HN5**  **Testimony, Lay Witnesses**

A lay opinion is admissible only where it is (a) rationally based on the witness's perception; (b) helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge. *Mass. G. Evid. § 701 (2018)*.

**HN9**  **Postconviction Proceedings, Motions for New Trial**

Even if evidence is exculpatory, a defendant seeking a new trial must still establish prejudice.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > Defenses > Burdens of Proof

## Commonwealth v. Hernandez

**HN10**  **Defenses, Burdens of Proof**

The inadequacy of a police investigation is a permissible ground for defense.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

**HN11**  **Postconviction Proceedings, Motions for New Trial**

Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial.

**Headnotes/Summary****Headnotes**

MASSACHUSETTS OFFICIAL REPORTS  
HEADNOTES

*Homicide > Grand Jury > Evidence > Grand jury proceedings > Exculpatory > Cross-examination > Opinion > Practice, Criminal > Capital case > Grand jury proceedings > Dismissal > New trial*

There was no merit to a criminal defendant's claim of error in the denial of his motion to dismiss an indictment charging him with murder in the first degree, where the defendant did not meet his burden to show that the prosecutor's failure to present to the grand jury a confidential informant's uncorroborated statement affected the credibility of the testimony of any of the witnesses who testified before the grand jury. [191-192]

At a murder trial, the judge did not improperly curtail the defendant's cross-examination of a certain witness, where the defendant had ample opportunity to explore fully the witness's motivation to cooperate with the government through both cross- and recross-examination. [192-193]

At a murder trial, the judge's exclusion of lay opinion testimony about how a person reacts when suffering from heroin withdrawal did not deny the defendant a meaningful opportunity to present a complete defense, where the judge properly precluded the lay witness from testifying as an expert. [194]

A Superior Court judge did not abuse his discretion in denying the criminal defendant's motion for a new trial, where, although information regarding the fact that a chemist who testified as a Commonwealth witness had failed proficiency tests should have been disclosed as exculpatory evidence, the defendant did not suffer prejudice from the nondisclosure, in that the new evidence would not have been a significant factor in the jury's deliberations. [194-198]

**Counsel:** David H. Mirsky (Joanne T. Petito also present) for the defendant.

Catherine Langevin Semel, Assistant District Attorney, for the Commonwealth.

**Judges:** Present: GANTS, C.J., GAZIANO, BUDD, & CYPHER, JJ.

**Opinion by:** BUDD

**Opinion**

[\*\*830] **BUDD**, J. On the evening of June 7, 2009, the defendant, Jose Hernandez, shot and killed Roberto Plaza as Plaza sat in his [\*190] motor vehicle. The defendant was convicted of murder in the first degree on a theory of deliberate premeditation in connection with the shooting death. We consolidated his direct appeal with his appeal from the denial of his motion for a new trial. After full consideration of the trial record and the defendant's arguments, we affirm the defendant's conviction and the denial of his motion for a new trial, and we decline to grant extraordinary relief pursuant to G. L. c. 278, § 33E.

**Background.** We summarize the facts as the jury could have found them, reserving certain details [\*\*\*2] for discussion *infra*. On the evening of June 7, 2009, the defendant and his friend, Jorge Santiago, were drinking beer and using heroin at the defendant's home in Lawrence. As the defendant was inspecting a firearm that Santiago showed him, the victim knocked at the door, announced himself, and said he wanted to purchase narcotics. Without opening the door, the defendant told the victim to "[g]et away" and to "[c]all [his] workers." The victim persisted, knocking again and stating that the defendant's workers "do not answer the phones." The defendant opened the door and began to argue with the victim.

## Commonwealth v. Hernandez

The victim eventually walked back to his motor vehicle, which was parked in front **[\*\*831]** of the defendant's home, and started the engine. The defendant walked up to the passenger side of the motor vehicle, where the argument continued. The defendant then pulled the handgun from his pocket, fired it into the vehicle, and walked away. The victim's motor vehicle thereafter proceeded a short way down the street, left the roadway, knocked down a fence, and crashed into motor vehicles parked in a nearby lot. Neighbors found the victim breathing but unable to respond to questions. He **[\*\*\*3]** died soon after from a gunshot wound to the chest.

In the meantime, after the shooting, the defendant hid the firearm in a tree stump located in the backyard of a neighboring home and then contacted a friend, Miguel Sierra, who retrieved (and later sold) the firearm and provided the defendant with travel arrangements to Connecticut the next day. In November 2009, the defendant was located and arrested in Connecticut.

*Discussion.* On appeal, the defendant challenges the denial of his motion to dismiss the indictment and certain evidentiary rulings by the trial judge. He also appeals from the denial of his motion for a new trial based on newly discovered and improperly withheld evidence. Finally, the defendant asks this court to reduce the verdict to manslaughter pursuant to our authority under G. L. c. 278, § 33E.

**[\*191]** **[¶]** 1. *Grand jury presentment.* Three days after the victim was killed, a confidential informant advised police that an individual claimed that he was "putting a hit out" on the victim because the victim previously had failed to pay for heroin that the individual had provided to the victim. The confidential informant further reported that the day after the shooting, when the informant asked the individual **[\*\*\*4]** about the "hit," the individual told the informant, "[D]on't worry about [it], I already had it taken care of."

The defendant argues that the information from the confidential informant should have been presented to the grand jury as exculpatory evidence that raised a "fundamental doubt as to the credibility of the prosecution's entire case" against the defendant, and that therefore his motion to dismiss the indictment was improperly denied. We disagree.

**HN1** **[¶]** It is well settled that "[p]rosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury." Commonwealth v. McGahee, 393 Mass. 743, 746, 473 N.E.2d 1077 (1985), citing

Commonwealth v. O'Dell, 392 Mass. 445, 447, 466 N.E.2d 828 (1985). "It is only when the prosecutor possesses exculpatory evidence that would greatly undermine either the credibility of an important witness or evidence likely to affect the grand jury's decision, or withholds exculpatory evidence causing the presentation to be 'so seriously tainted,' that the prosecutor must present such evidence to the grand jury." Commonwealth v. Wilcox, 437 Mass. 33, 37, 767 N.E.2d 1061 (2002), quoting O'Dell, supra.

The defendant has made no such showing here. The informant's uncorroborated statement about another individual putting a "hit" out on the victim did not affect the credibility of the testimony of any of the grand jury witnesses. This **[\*\*\*5]** includes Santiago, who testified before the grand jury about the argument between the defendant and the victim just prior to the shooting, and further testified that he witnessed the defendant point the firearm at the motor vehicle where the victim was sitting, and shoot. Given this evidence, the omission of the informant's statement cannot be said to have affected the grand jury's decision **[\*\*832]** to indict the defendant in this case.<sup>1,2</sup> See Commonwealth v. [\*1921] Buckley, 410 Mass. 209, 220-221, 571 N.E.2d 609 (1991).

**[¶]** 2. *Limits on cross-examination.* **HN2** **[¶]** Both the *Sixth Amendment to the United States Constitution* and *art. 12 of the Massachusetts Declaration of Rights* guarantee a criminal defendant's right to confront the witnesses against him or her through cross-examination. Commonwealth v. Miles, 420 Mass. 67, 71, 648 N.E.2d 719 (1995), and cases cited. The defendant argues that the judge improperly curtailed his cross-examination of Sierra, thereby denying him the ability to demonstrate to the jury the witness's true motivation for testifying against the defendant, i.e., that in exchange Sierra would receive a "deal" on then-pending charges. Contrary to his assertion, the defendant had ample opportunity to explore fully Sierra's motivation to cooperate with the government through both cross- and recross-examination.

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<sup>1</sup> Even if such a statement was made to the confidential informant, it would not have necessarily exculpated the defendant, as the statement would not have been inconsistent with the defendant having been the one who performed the "hit."

<sup>2</sup> We note that the defendant chose not to present this evidence at trial, opting instead to claim self-defense. This strategy made sense given the strength of the evidence that the defendant was the shooter.

## Commonwealth v. Hernandez

On direct examination, Sierra acknowledged that he was cooperating with the Commonwealth in exchange for a "deal" [\*\*\*6] on two drug charges. During cross-examination, trial counsel explored thoroughly the particulars of the cooperation agreement — that is, in exchange for testifying, Sierra received a prison sentence of from two and one-half to three years on a drug charge from 2008 and expected to receive a probation sentence of five years on a pending drug charge from 2009.<sup>3</sup> Sierra also conceded on cross-examination that he came forward to cooperate only after he had been charged in a second drug case, and that he expected to receive immunity for the assistance he gave the defendant after the shooting. The initial cross-examination began and ended with Sierra acknowledging all of the particulars of the "deal."

On redirect examination, the Commonwealth sought to minimize the significance of the benefits Sierra was to receive by asking if there were other reasons why he was testifying at trial. Sierra responded: "The only reason I'm testifying is because I want his family to know what really happened to this kid, because I don't think they know what really happened ..." <sup>4</sup>

[\*193] [\*\*833] On recross-examination the defendant

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<sup>3</sup> Both charges carried a five-year mandatory minimum prison sentence that could have been imposed consecutively.

<sup>4</sup> Miguel Sierra initially responded, "The main reason is that they said the family, they stab me in the back." Trial counsel objected to the response, and the judge held a voir dire. When asked during the voir dire why he was testifying, Sierra responded: "I just want this family to know what really happened to their son and I want them to know I've got nothing to do with their son's death. It's my biggest concern. That's what I want to say." The judge allowed the question and answer. Any error resulting from the judge's failure to rule on the defendant's objection to Sierra's initial answer does not amount to a substantial likelihood of a miscarriage of justice, let alone prejudicial error. See Commonwealth v. Martinez, 431 Mass. 168, 173, 726 N.E.2d 913 (2000) HN3 [↑] (we review testimony objected to at trial for prejudicial error); Commonwealth v. Garcia, 379 Mass. 422, 439, 399 N.E.2d 460 (1980) ("In the absence of an objection and exception, although this court may still find reversible error under G. L. c. 278, § 33E, it will do so only 'upon a showing of grave prejudice or substantial likelihood that a miscarriage of justice has occurred'"). Sierra's initial statement had to do with his motive for testifying apart from the "deal," which is permissible for a party to elicit during questioning. See Commonwealth v. Allison, 434 Mass. 670, 682-683, 751 N.E.2d 868 (2001) (not error to allow witness's answer because prosecutor's question was directed at witness's motive for testifying).

sought to reemphasize the "deal" in an attempt to establish it as the "real reason" Sierra was [\*\*\*7] testifying. Although the defendant contends that, during his recross-examination, the judge improperly precluded him from demonstrating Sierra's bias by sustaining the Commonwealth's objections, we are hard pressed to understand the concerns he raises. The Commonwealth's first two objections were to questions that had been asked and answered previously and had nothing to do with Sierra's motivation to cooperate with the government.<sup>5</sup> The judge was well within his discretion to limit repetitive questions. See Commonwealth v. Watson, 377 Mass. 814, 837, 388 N.E.2d 680 (1979) HN4 [↑] ("A judge certainly has wide discretion to limit repetitive or redundant cross-examination, and there was no showing that the judge's action on these matters unfairly impaired the defendant's right of cross-examination").

The remaining two objections were to questions regarding the timing of Sierra's decision to come forward to cooperate and his reason for doing so. The objections properly were sustained based on the characterization of the cooperation agreement as "the deal of a lifetime" and a "huge break." See Commonwealth v. O'Brian, 445 Mass. 720, 729 n.12, 840 N.E.2d 500, cert. denied, 549 U.S. 898, 127 S. Ct. 213, 166 L. Ed. 2d 171 (2006). However, the defendant was permitted to rephrase the questions and was not precluded from eliciting from Sierra that he came forward with information about [\*\*\*8] the shooting in order to get a deal from the government. There was no error.

[\*194] [↑] 3. *Lay opinion testimony*. At trial the defendant asserted that he killed the victim in self-defense. The defendant sought to demonstrate that the reason for the victim's behavior was that the victim was in need of heroin and the defendant would not provide him with any. On cross-examination of Santiago, the judge sustained objections to general questions posed to Santiago about what happens when one is "coming down" from a heroin high. The defendant now argues that he was denied a meaningful opportunity to present a complete defense because the judge curtailed testimony from Santiago regarding the reason for the victim's behavior. We disagree.

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<sup>5</sup> Trial counsel asked Sierra to reconfirm that he was not present at the time of the shooting, and that he sold the firearm used in the shooting. The objection to the second question was sustained further as being beyond the scope of the redirect examination. See Commonwealth v. O'Brien, 419 Mass. 470, 476, 645 N.E.2d 1170 (1995).

## Commonwealth v. Hernandez

**HN5** A lay opinion is admissible only where it is (a) rationally based on the witness's perception; (b) helpful to a clear understanding of the witness's testimony or in determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge. Mass. G. Evid. § 701 (2018). See Commonwealth v. Canty, 466 Mass. 535, 541, 998 N.E.2d 322 (2013). Here, the judge was careful to ensure that Santiago, a lay witness, did not answer general questions about how a person reacts when suffering from heroin withdrawal, as such testimony would require **9** specialized knowledge.<sup>67</sup> As the judge **834** properly precluded a lay witness from testifying as an expert, there was no error and no abuse of discretion. See e.g., Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 330, 930 N.E.2d 91 (2010) (error to allow lay witnesses to testify to whether defendant showed "overt signs of a mental illness" because such witnesses were not qualified as experts).

**4. Motion for new trial.** At trial, chemist Erik Koester testified as the crime scene supervisor. He testified that at the scene he inspected the outside of the vehicle and searched the surrounding area. He also testified regarding gunshot residue on the victim's **195** clothes. Prior to oral argument on the defendant's direct appeal, the defendant's appellate counsel became aware that Koester had work-related performance issues on his record and had since resigned from the State police crime laboratory (crime lab). Oral argument was postponed to allow the defendant to file a motion for a new trial based on this information. The motion was remanded to the Superior Court, where it was denied after a nonevidentiary hearing. The defendant now argues that the motion was improperly denied

because the information on Koester's performance deficiencies raises doubts as to the accuracy and **10** reliability of the evidence collection in his case.

**HN6** A judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). We only disturb the denial of a motion for a new trial where there has been a "significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307, 491 N.E.2d 246 (1986). As the motion judge was not the trial judge,<sup>8</sup> and as the motion judge conducted a nonevidentiary hearing, we are in "as good a position as the motion judge to assess the trial record" (citation omitted). Commonwealth v. Phinney, 446 Mass. 155, 158, 843 N.E.2d 1024 (2006), S.C., 448 Mass. 621, 863 N.E.2d 496 (2007). We conclude that although information regarding Koester's failed proficiency tests should have been disclosed as exculpatory evidence, the motion judge did not abuse his discretion in denying the motion for a new trial.

**a. Nondisclosure of exculpatory evidence.** The trial in this case began on March 21, 2012. On March 9, 2012, Koester was informed that the "satisfactory" result he had previously received on his 2011 crime scene proficiency test had been rescinded and that instead he received an "unsatisfactory" result due to his method of measuring blood spatter. On March 15, 2012, a member of the crime lab quality assurance management section was informed that Koester received "unsatisfactory" **11** results on his 2010 crime scene proficiency test, also as a result of improperly measured blood spatter evidence. This information was not disclosed to the defense prior to trial.

<sup>6</sup>We are generally wary of lay opinion regarding the behavioral effects of intoxicants. See, e.g., Commonwealth v. Canty, 466 Mass. 535, 544, 998 N.E.2d 322 (2013) (police officer may not offer opinion on whether defendant was operating motor vehicle while under influence of alcohol or whether ability to operate motor vehicle safely was diminished due to alcohol); Mass. G. Evid. § 702 (2018). Contrast Commonwealth v. Feinstein, 426 Mass. 200, 203, 687 N.E.2d 638 (1997) (psychiatrist testified that inability to control impulses not typical of heroin withdrawal); Commonwealth v. Fielding, 371 Mass. 97, 110-111, 353 N.E.2d 719 & nn.18-19 (1976) (physicians testified at length describing symptoms and signs of withdrawal from heroin).

<sup>7</sup>The judge did, however, allow trial counsel to elicit from Santiago testimony regarding his own experience with heroin and whether he recognized similar characteristics in the victim's behavior prior to the shooting.

This court had occasion to consider the implications of failing to disclose Koester's performance deficiencies to the **835** defense in another case in which Koester was involved. See Commonwealth v. Sullivan, 478 Mass. 369, 85 N.E.3d 934 (2017). In Sullivan, we concluded that, because the information possessed by the prosecution at the time of trial could have been used to impeach Koester, it was exculpatory and should have been disclosed to the defense prior to trial. *Id.* at 380-381. The same is true for those performance deficiencies known at the time of Hernandez's trial. See *id.* at 380, citing Commonwealth v. Martin, 427 Mass.

<sup>8</sup>A Superior Court judge who was not the trial judge decided the motion because the trial judge had since been appointed to this court.

## Commonwealth v. Hernandez

816, 823-824, 696 N.E.2d 904 (1998) (Commonwealth has duty to disclose exculpatory evidence possessed by prosecution team, including information in possession of State police crime laboratory chemists who participate in case).<sup>9</sup> See also United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (government's constitutional obligation to disclose such evidence applies even if defendant did not request it). Notwithstanding the motion judge's ruling to the contrary,<sup>10</sup> HN7 "[e]vidence tending to impeach an expert witness for incompetence or lack of reliability falls within the ambit of the Commonwealth's \*\*\*12 obligations under Brady." Sullivan, 478 Mass. at 381. See Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

In addition, after the trial it was determined that Koester had failed a trace evidence proficiency test that he took in 2011.<sup>11</sup> Because this information concerned an event that occurred prior to trial but was discovered posttrial, it may fairly be considered as newly available evidence. See Grace, 397 Mass. at 306 HN8 (newly discovered evidence must have been unknown to defense and not reasonably discoverable at time of trial). However, as discussed *infra*, none of the evidence of Koester's performance deficiencies warrants granting a new trial.<sup>12</sup>

<sup>9</sup>We note that although Erik Koester's supervisors had been made aware of his 2010 test results prior to trial, Koester himself was not informed until after the trial had concluded. We have not opined on whether the duty to disclose exculpatory evidence extends to supervisors of chemists on the prosecution team; however, the Commonwealth concedes this point.

<sup>10</sup>The motion judge determined that because Koester testified to only factual events, the evidence of his work performance would not have been admissible for impeachment purposes.

<sup>11</sup>The initial satisfactory result was rescinded after the defendant's trial had taken place, and Koester instead received an unsatisfactory result.

<sup>12</sup>The bulk of the evidence upon which the defendant relied in his motion for a new trial concerned failed proficiency tests and other performance-related incidents that took place after the defendant's conviction. Because the events themselves occurred posttrial, they do not qualify as newly discovered evidence. Accord Commonwealth v. Stewart, 422 Mass. 385, 389, 663 N.E.2d 255 (1996) (posttrial polygraph results not newly discovered evidence for purposes of new trial motion). See Commonwealth v. Freeman, 442 Mass. 779, 790, 817 N.E.2d 727 (2004) (posttrial plea agreements with prosecution witnesses not newly discovered evidence). Cf. Reporters'

b. *Effect of nondisclosure.* HN9 Even if evidence is exculpatory, a defendant seeking a new trial must still establish prejudice. Com[\*1971] monwealth v. Murray, 461 Mass. 10, 20-21, 957 N.E.2d 1079 (2011). Here, because the defendant did not specifically request information relating to Koester's work performance, we view the undisclosed evidence and the \*\*\*836 newly available evidence under the same prejudice standard, that is, "whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial." Id. at 21, quoting Commonwealth v. Tucceri, 412 Mass. 401, 413, 589 N.E.2d 1216 (1992).

We conclude, as we did in Sullivan, 478 Mass. at 382-383, that the motion judge did not abuse his discretion in denying the defendant's motion for a new trial because the new evidence \*\*\*13 would not have been "a real factor in the jury's deliberations." Grace, 397 Mass. at 306, citing Davis v. Boston Elevated Ry., 235 Mass. 482, 495-496, 126 N.E. 841 (1920).

The defendant testified that he shot the victim in self-defense when he saw the victim reach for something shiny that the defendant believed was a gun. The prosecution presented evidence that the only items found in the motor vehicle in which the victim sat were a steering wheel locking device, a baseball hat, a cigarette lighter, a cellular telephone, and a twenty dollar bill, and argued that none of these items could have been mistaken for a firearm.

In his motion for a new trial, the defendant claimed that the Commonwealth used Koester to bolster generally the credibility of the investigation and that the Koester deficiency evidence could have been used to raise doubts as to the thoroughness of the search of the vehicle. This argument fails. First, although Koester was involved in the investigation, he neither searched the motor vehicle at the scene nor participated in the more thorough search that took place at the tow yard. In fact, his participation in the investigation at the crime scene yielded nothing of evidentiary value. Further, although Koester was present at the crime scene in a supervisory role, \*\*\*14 he supervised other crime scene analysts, not the police sergeant who searched the vehicle at the scene. Koester's only substantive testimony at trial pertained to the \*\*\*198 gunshot residue recovered on

Notes (1973) to Rule 60, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 1255 (LexisNexis 2018) ("It is ... settled practice that the phrase 'newly discovered evidence' refers to evidence in existence at the time of trial but of which the moving party was excusably ignorant").

## Commonwealth v. Hernandez

the victim's clothes, an issue that was ultimately made moot by the defendant's own admission that he shot the victim.

At trial, the defendant sought to demonstrate through cross-examination, and argued at closing, that investigators failed to conduct a comprehensive search of the victim's vehicle. In his motion for a new trial, although the defendant attempted to connect Koester's performance issues with the thoroughness of the investigation, because Koester was not involved in the search of the motor vehicle, the evidence of his performance issues had no bearing on the *Bowden* defense that the defendant raised. See *Commonwealth v. Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482 (1980) HN10[<sup>15</sup>] (inadequacy of police investigation is permissible ground for defense).

As the evidence regarding Koester's competence could have been introduced only to impeach him, its absence does not rise to the level of prejudice entitling the defendant to a new trial. See *Sullivan*, 478 Mass. at 383, quoting *Commonwealth v. Lo*, 428 Mass. 45, 53, 696 N.E.2d 935 (1998) HN11[<sup>15</sup>] ("Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily [\*\*15] be the basis of a new trial"). The motion judge did not abuse his discretion in denying the defendant's motion.

5. *Review under G. L. c. 278, § 33E*. Finally, the defendant asks us to exercise our extraordinary power to grant relief under *G. L. c. 278, § 33E*. We have reviewed the record in its entirety and see no basis to set aside or reduce the verdict of murder in the first degree.

[\*\*837] *Conclusion*. The judgment is affirmed. The order denying the motion for a new trial is also affirmed.

So ordered.

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**APPENDIX B**

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Chief Justice  
Supreme Judicial Court  
John Adams Courthouse, Suite 1400  
One Pemberton Square  
Boston, MA 02108-1724

Re: Commonwealth v. Jose Hernandez  
Supreme Judicial Court No. SJC-11467

Dear Chief Justice Gants:

This is a Petition for Rehearing pursuant to Mass. R. A. P. 27, as to the January 9, 2019 decision in this case. See Commonwealth v. Hernandez, 481 Mass. 189 (2019). Mr. Hernandez respectfully requests the Honorable Court for a rehearing, to reverse his conviction and grant him a new trial, or to reduce his conviction to manslaughter. G. L. c. 278, § 33E.

I. This Court acknowledged the prosecution's violations under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), but then failed to apply the standard of materiality required by the Fourteenth Amendment's Due Process Clause, Kyles v. Whitley, 514 U.S. 419 (1995), and United States v. Bagley, 473 U.S. 667 (1985), for determining whether the Erik Koester evidence that was withheld improperly by the prosecution should result in a new trial for the defendant.

[T]he government violates the Constitution's Due Process Clause "if it withholds evidence

that is favorable to the defense and *material* to the defendant's guilt or punishment." Smith v. Cain, 565 U.S. 73, 75 . . . (2012) (emphasis added) (summarizing Brady<sup>1</sup> holding).

Turner v. United States, 137 S. Ct. 1885, 1888 (2017).

In . . . United States v. Bagley, 473 U.S. 667 . . . (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes[.] . . . Bagley held that regardless of request, favorable evidence is *material*, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different (emphasis added)."

Kyles, 514 U.S. at 433-434 (quoting Bagley, 473 U.S. at 682 (footnote omitted)). One shows a Brady violation

by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict (emphasis added).

Kyles, 514 U.S. at 435 (footnote omitted). Bagley materiality is defined "in terms of suppressed evidence considered collectively, not item by item." Kyles, 514 U.S. at 436. Contrary to the requirements of Kyles v. Whitley, supra, in this case, this Court held the following:

we view the undisclosed evidence and the newly available evidence under the same prejudice standard, that is, "whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial (emphasis added)."

Commonwealth v. Hernandez, 481 Mass. 189, 197 (2019)

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<sup>1</sup> Brady v. Maryland, 373 U.S. 83 (1963).

(quoting Commonwealth v. Murray, 461 Mass. 10, 21 (2011) (quoting Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992))). The “substantial risk” standard is exceedingly demanding, intended to enforce the preference that trial error be preserved at trial and not raised for the first time on appeal. See, e.g., Commonwealth v. Randolph, 438 Mass. 290, 294-295, 297 (2002) (“A substantial risk of a miscarriage of justice exists when we have ‘a serious doubt whether the result of the trial might have been different had the error not been made.’ [Commonwealth v. Azar,] 435 Mass. [675,] 687 [(2002)], quoting Commonwealth v. Lefave, 430 Mass. 169, 174 . . . (1999). Errors of this magnitude are extraordinary events and relief is seldom granted. Commonwealth v. Amirault, [424 Mass. 618,] 646-647 [(1999)].”) To the contrary, Brady v. Maryland and its progeny are intended to impose a heavy burden on the prosecution that is intended to compel compliance with the 14<sup>th</sup> Amendment Due Process requirements of disclosure. Kyles v. Whitley, 514 U.S. at 438-439. That is why redress of a Brady violation requires only a demonstration that confidence in the verdict is undermined, see Kyles, 514 U.S. at 435, and not that there is a “substantial risk” that the verdict would have been “not guilty.” As stated in Wearry v. Cain, 136 S. Ct. 1002 (2016):

[E]vidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." [Giglio v. United States, 405 U.S. 150,] 154 [(1972)] (quoting Napue v. Illinois, 360 U.S. 264, 271 . . . (1959)). To prevail on his Brady claim, [defendant-petitioner] Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U.S. 73, \_\_\_, 132 S. Ct. 627, 630 (2012) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to "undermine confidence in the verdict" (emphasis added). Ibid.

Wearry v. Cain, 132 S. Ct. at 1006. Reviewing courts are not permitted to impose any different test as between exculpatory and impeachment evidence for Brady purposes. See Kyles, 514 U.S. at 433 ("In . . . United States v. Bagley, 473 U.S. 667 . . . (1985), the Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes[.]"). Contra Hernandez, 481 Mass. at 198 ("As the evidence regarding Koester's competence could have been introduced only to impeach him, its absence does not rise to the level of prejudice entitling the defendant to a new trial."). Further, the Koester evidence was materially and substantively relevant.

II. This Court has failed to acknowledge the substantive relevance and materiality of the Koester evidence.

This Court has concluded erroneously that

although Koester was present at the crime scene in a supervisory role, he supervised other crime scene analysts, not the police sergeant who searched the vehicle.

Hernandez, 481 Mass. at 197. Koester's deficiencies are relevant substantively as the presence of an incompetent and unreliable evidence collection supervisor raises reasonable doubt as to the actual contents of Plaza's vehicle and whether it contained a shiny object capable of appearing in the dark to be a firearm.

In his trial testimony, Erik Koester described his duties as a crime scene analyst at the State Police Crime Laboratory as follows:

Essentially, I'm on call 24 hours a day, every day. When a crime scene comes in, I'm notified. I then dispatch the appropriate personnel. And if it's a complicated scene, such as a homicide, I'll go and supervise the scene, make sure that evidence is being processed, collected.

(Tr. Vol. 3/67-68) On June 7, 2009, Koester responded to the vicinity of Plaza's vehicle; Koester and the others did an investigation into the surrounding parking lots, looking for anything he considered to have evidentiary value. Although Koester did not go to the tow yard where the vehicle was examined or do that examination (Tr. Vol. 3/67-70), Koester did go to the scene of the accident and he examined the exterior of the vehicle, though not thoroughly. (Tr. Vol. 3/74)

The Koester Criminalistics Report (Motion Exhibit 7, at 1-3 (S.R.A.101-103)), dated July 20, 2009, and authored

by Koester, indicates that of the items of evidence pertaining to the June 7, 2009 shooting of Roberto Plaza that were examined, including items specifically labeled as having been obtained from the "Cutlass", no cell phone or steering wheel lock was examined. See S.R.A.101-103. This report indicates that Koester was involved in evidence collection regarding Plaza's vehicle. See id. The Maxwell Report (Motion Exhibit 6, at 1-3 (S.R.A.97-99)), indicates that on June 7, 2009, Chemist Kerrie Donovan, Crime Scene Analyst Erik Koester, and Chemist Justin L. Maxwell, reported to 490 Hampshire Street in Lawrence at approximately 12:15 a.m. on June 8, 2009, where they met with Trooper Stephen J. O'Connor, Trooper James C. Dowling, Lieutenant Michael Holleran, Trooper James Crump, Trooper Michael O'Connor, and Trooper Brian Lombard, and examined a 4-Door Oldsmobile Cutlass vehicle that was found partway through the fence separating the parking lot of 490 Hampshire Street from the sidewalk alongside Hampshire Street. See S.R.A.97-98. The Maxwell Report indicates that when the Oldsmobile Cutlass was examined at Coady's Towing in Lawrence at approximately 1:30 a.m., "On the front passenger side floor was a baseball cap, a cell phone and a steering wheel lock", and that of these items found on the passenger side floor, the cell phone and the steering wheel

lock were not "collected from the scene and transported to the Crime Laboratory". See S.R.A.98. The Maxwell Report indicates that Koester was involved in evidence collection regarding Plaza's vehicle. See S.R.A.97-99.

State Trooper James Crump, with Crime Scene Services in the Danvers laboratory, had a limited role in the collection of evidence from Plaza's vehicle. He documented the scene by digital photography; he took exterior photographs of the vehicle but didn't go any further than what he could see through the windows. (Tr. Vol. 4/78-81) At the commercial yard where the car was towed, Crump engaged in documentation, photography, but also assisted in examining and searching the vehicle. (Tr. Vol. 4/81-82) Crump submitted reports detailing what he did with respect to this investigation; he did not document searching the interior of the vehicle, searching under the seats of the vehicle or searching for ballistics evidence. Crump testified: "I didn't recover the evidence, I merely took photographs." (Tr. Vol. 4/91-94)

State Police Sergeant Stephen O'Connor, on June 7, 2009, working with Troopers Schena and Dowling, responded to the crash of Mr. Plaza's Oldsmobile. They called in Crime Scene Services which included another Trooper

O'Connor, Lieutenant Michael Holleran, and Crump. Erik

Koester was also on the scene. (Tr. Vol. 3/40-42) Sergeant Stephen O'Connor viewed the vehicle, the interior of that vehicle, and made note of items inside that car. (Tr. Vol. 3/47-48) Sergeant Stephen O'Connor testified:

I observed a -- there was a baseball cap on the front passenger's floor. There was a cigarette lighter and a cell phone in there, as well, in the vehicle, and there was a vehicle security device, a club, they call it. It's a red metal bar type of thing that attaches to the steering wheel to prevent or to help prevent your vehicle from getting stolen.

(Tr. Vol. 3/48) The red metal vehicle security device, the club, was on the front passenger floor. O'Connor was not sure if the cell phone was on the passenger or the driver's floor. (Tr. Vol. 3/48) Crime Scene Services searched underneath the front passenger seat, "when it was processed." Sergeant Stephen O'Connor testified that he did not search the vehicle. (Tr. Vol. 3/57-59)

On June 7, 2009, Lawrence Police Officer Carleton Trombly responded to the location of Plaza's vehicle. (Tr. Vol. 2/69-72) Trombly testified: he looked into the interior of the car and never saw a firearm; he only recalled seeing blood on the steering wheel, not any other objects; he never undertook an exhaustive search of the

interior of the vehicle and was unaware of anyone who did that. (Tr. Vol. 2/87-89)

Trial Exhibit #12 (S.R.A.77-78), discussed at oral argument, is absent from this Court's opinion. See Hernandez, 481 Mass. 189. Trial Exhibit #12 (S.R.A.77-78) made it appear to the jury as if the cell phone, the cigarette light, the red metal vehicle security device, and the baseball cap, were not in Mr. Plaza's vehicle at the time it was recovered. See id. Trial Exhibit #12 gains materially in significance after one learns of Koester's deficiencies: it undermines confidence in the verdict. See Kyles, 514 U.S. at 435.

**III. The exclusion of significant Koester evidence violates Brady and its progeny, and Massachusetts law.**

This Court's exclusion of the "bulk" of the defendant's motion for new trial evidence on the basis that "[b]ecause the events themselves occurred posttrial, they do not qualify as newly discovered evidence", Hernandez, 481 Mass. at 196 n. 12, is erroneous. The excluded evidence describes the character and behavior of Koester, which are relevant to the jury's evaluation of Koester's testimony that as supervisor he would make sure the evidence was collected. 14<sup>th</sup> Amendment Due Process requires consideration of all of the undisclosed evidence at issue, collectively, to

determine whether it undermines confidence in the verdict. Kyles, 514 U.S. at 435-436. Exclusion of this substantively relevant evidence violates the purposes of Mass. R. Crim. P. 30(b), G. L. c. 278, § 33E, and Art. 12, that justice should be done. The excluded evidence is admissible as newly discovered evidence under Commonwealth v. Cowels, 470 Mass. 607 (2015) (applying newly discovered evidence of DNA testing not available until after the convictions were affirmed) and Commonwealth v. Chiappini, 72 Mass. App. Ct. 188 (2008) (applying newly discovered evidence of alleged victim's admission during plea colloquy to material facts which he had denied at the defendant's trial.) Commonwealth v. Sullivan, 478 Mass. 369 (2017). Here, Koester claimed he would make sure that evidence was being collected, when the contents of the car were not clearly established. In Sullivan, DNA testing, which Koester did not do, identified the defendant. Id., at 371-372.

Respectfully submitted,  
JOSE HERNANDEZ

JANUARY 22, 2019

By his Attorney,   
David H. Mirsky, Esquire  
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Exeter, NH 03833  
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## **APPENDIX C**

**sjccommclerk@sjc.state.ma.us**

3/6/2019 4:02 PM

## **SJC-11467 - Notice: Petition for Reconsideration Denied**

To dmirsky@comcast.net

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: No. SJC-11467

COMMONWEALTH  
vs.  
JOSE HERNANDEZ

### **NOTICE OF DENIAL OF PETITION FOR REHEARING**

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Francis V. Kenneally, Clerk

Dated: March 6, 2019

To:  
Catherine L. Semel, A.D.A.  
David H. Mirsky, Esquire  
Essex Superior Court

## **APPENDIX D**

[Skip to main content](#)

## 1077CR00143 Commonwealth vs. Hernandez, Jose Cotto

- Case Type  
Indictment
- Case Status  
Open
- File Date  
02/03/2010
- DCM Track:  
C - Most Complex
- Initiating Action:  
MURDER c265 §1
- Status Date:  
02/03/2010
- Case Judge:
- Next Event:

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

### Party Information

#### Commonwealth

- Prosecutor

#### Alias

#### Party Attorney

- Attorney  
• Graydon, Esq., Elin H
- Bar Code  
• 208140
- Address  
• Essex District Attorney  
Ten Federal St  
Salem, MA 01970
- Phone Number  
• (978)745-6610

[More Party Information](#)

#### Hernandez, Jose Cotto

- Defendant

#### Alias

#### Party Attorney

- Attorney  
• Mirsky, Esq., David H
- Bar Code  
• 559367
- Address  
• Mirsky & Petito, Attorneys at Law  
PO Box 1063  
Exeter, NH 03833
- Phone Number  
• (603)580-2132

[More Party Information](#)

### Party Charge Information

- **Hernandez, Jose Cotto**
- - Defendant
- Charge # 1 :  
265/1-0 - Felony MURDER c265 §1

- Original Charge
- 265/1-0 MURDER c265 §1 (Felony)
- Indicted Charge
- Amended Charge
- 

**Charge Disposition**

Disposition Date

Disposition

03/28/2012

Guilty Verdict

**Events**

<b>Date</b>	<b>Session</b>	<b>Location</b>	<b>Type</b>	<b>Event Judge</b>	<b>Result</b>
03/05/2010 08:00	Criminal 1 - AM	K	Arraignment		Held as Scheduled
04/08/2010 08:00	Criminal 1 - AM	K	Pre-Trial Conference		Rescheduled
05/13/2010 08:00	Criminal 1 - AM	K	Pre-Trial Conference		Held as Scheduled
06/21/2010 08:00	Criminal 1 - AM	K	Hearing on Compliance		Rescheduled
07/14/2010 08:00	Criminal 1 - AM	K	Hearing on Compliance		Rescheduled
08/18/2010 08:00	Criminal 1 - AM	K	Hearing on Compliance		Held as Scheduled
09/23/2010 08:00	Criminal 1 - AM	K	Status Review		Held as Scheduled
10/25/2010 08:00	Criminal 1 - AM	K	Trial Assignment Conference		Rescheduled
02/01/2011 08:00	Criminal 1 - AM	K	Status Review		Held as Scheduled
03/01/2011 08:00	Criminal 1 - AM	K	Jury Trial		Rescheduled
03/07/2011 08:00	Criminal 1 - AM	K	Motion Hearing		Rescheduled
03/22/2011 08:00	Criminal 1 - AM	K	Non-Evidentiary Hearing to Dismiss		Rescheduled
04/26/2011 08:00	Criminal 1 - AM	K	Non-Evidentiary Hearing to Dismiss		Held as Scheduled
06/09/2011 08:00	Criminal 1 - AM	K	Trial Assignment Conference		Held as Scheduled
07/21/2011 08:00	Criminal 1 - AM	K	Hearing on Motion to Continue		Held as Scheduled
09/07/2011 08:00	Criminal 1 - AM	K	Final Pre-Trial Conference		Held as Scheduled
10/11/2011 08:00	Criminal 1 - AM	K	Jury Trial		Rescheduled
			Jury Trial		Rescheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
10/17/2011 08:00 AM	Criminal 1 - K				
11/02/2011 08:00 AM	Criminal 1 - K		Status Review		Held as Scheduled
01/11/2012 09:30 AM	Criminal 1 - K		Final Pre-Trial Conference		Rescheduled
01/26/2012 09:30 AM	Criminal 1 - K		Status Review		Held as Scheduled
02/13/2012 09:30 AM	Criminal 1 - K		Jury Trial		Rescheduled
03/12/2012 09:30 AM	Criminal 1 - K		Jury Trial		Rescheduled
03/19/2012 09:00 AM	Criminal 3 - I		Jury Trial		Not Held
03/19/2012 09:30 AM	Criminal 1 - K		Jury Trial		Not Held
03/20/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/21/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/22/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/23/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/26/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/27/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/28/2012 09:00 AM	Criminal 3 - I		Jury Trial		Held as Scheduled
03/28/2012 09:00 AM	Criminal 3 - I		Hearing for Sentence Imposition		Held as Scheduled
03/23/2016 02:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Hearing on Motion for New Trial	Lowy, Hon. David A	Not Held
06/14/2016 02:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Hearing on Motion for New Trial		Rescheduled
06/23/2016 02:00 PM	Criminal 2 - J	SALEM-5th FL, CR J (SC)	Hearing on Motion for New Trial	Lowy, Hon. David A	Not Held
12/21/2016 10:00 AM	Criminal 3 - I	SALEM-5th FL, CR I (SC)	Motion Hearing	Feeley, Hon. Timothy Q	Held as Scheduled

### Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Conversion Attorney Mismatch	02/03/2010	03/14/2015	1	
Pre-Trial Hearing	03/05/2010	03/05/2010	0	06/10/2013
Final Pre-Trial Conference	03/05/2010	02/14/2011	346	06/10/2013
Case Disposition	03/05/2010	02/28/2011	360	06/10/2013

## Docket Information

Docket	Docket Text	File Ref Nbr.	Image Avail.
<u>Date</u>			
02/03/2010	Indictment returned	1	
02/03/2010	Notice & copy of indictment & entry on docket sent to Sheriff		
02/03/2010	Notice & copy of indictment sent to Chief Justice Barbara Rouse	2	
02/03/2010	Notice & copy of indictment sent to Atty General Martha Coakley	3	
03/05/2010	Deft arraigned before Court		
03/05/2010	Appearance of Commonwealth's Atty: James P Gubitose		
03/05/2010	Appearance of Deft's Atty: Michael T Phelan	4	
03/05/2010	Notice of assignment of counsel filed. c4751288-3	5	
03/05/2010	Deft waives reading of indictment		
03/05/2010	RE Offense 1:Plea of not guilty		
03/05/2010	Bail: Defendant held without bail (Lu, J)	6	
03/05/2010	Assigned to track "C" see scheduling order		
03/05/2010	Tracking deadlines Active since return date		
03/05/2010	Case Tracking scheduling order (John Lu, Justice) mailed 3/5/2010	7	
04/08/2010	Motion for funds for an Investigator Allowed (Feeley, J.)	8	
04/08/2010	Motion for Funds for Interperter Services Allowed (Feeley, J.) Copy sent J.P.G. A.D.A. and M.T.P. Def.	9	
05/13/2010	Motion for discovery #2 allowed and agreed	10	
10/25/2010	Oral motion for new counsel DENIED (Feeley, J)		
01/20/2011	Deft files motion for disclosure of promises inducements or rewards, Agreed.	11	
01/20/2011	Deft files motion for disclosure of confidential informant.	12	
03/07/2011	Motion to dismiss filed in court	13	
04/26/2011	After hearing motion to dismiss taken under advisement (Feeley, J)		
04/27/2011	Defendant's MOTION to dismiss the indictment is Denied. (Copy sent)	14	
09/07/2011	Filed: Joint Pre-Trial Memorandum	15	
09/07/2011	Deft files motion for criminal records, allowed. (Whitehead, J.)	16	
09/08/2011	Deft files motion for criminal records.	17	
09/08/2011	Deft files motion for disclosure of promises inducements or rewards relative to Marcus Pena.	18	
09/29/2011	Appearance of Deft's Atty: Aviva E Jeruchim	19	
01/11/2012	Motion to continue allowed until 3/12/12 for trial (Lu, J)	20	
01/25/2012	Motion for funds for transcription of witness interviews allowed not to exceed \$750.00 (Lu, J) copy sent	21	
01/25/2012	Motion for funds to hire an investigator allowed not to exceed \$750.00 (Lu, J) copy sent	22	
01/25/2012	Motion for funds for spanish interpreter allowed not to exceed \$750.00 (Lu, J) copy sent	23	
01/26/2012	After hearing defendant is found indigent (Lu, J)		
03/05/2012	Second Motion for funds to hire an investigator allowed not to exceed \$750.00 (Lu, J) copy sent	24	

<b>Docket Date</b>	<b>Docket Text</b>	<b>File Ref Nbr.</b>	<b>Image Avail.</b>
03/06/2012	Motion to continue trial allowed the time is excluded by agreement for rule 36 purposes (Lu, J.)	25	
03/20/2012	Memo of Trial filed	25.1	
03/20/2012	Deft files motion in limine exclude segment of murder indictment to be read to the jury.	25.2	
03/20/2012	Deft files first motion in limine to exclude evidence of prior convictions and/or prior bad acts.	25.3	
03/20/2012	Deft files motion for sequestration of witnesses, Allowed. (Lowy, J.)	25.4	
03/20/2012	Commonwealth files proposed voir dire questions.	25.5	
03/20/2012	Commonwealth files motion for an additional individual voir dire question.	25.6	
03/20/2012	Commonwealth files motion in limine for jury view, Allowed. (Lowy, J.)	25.7	
03/20/2012	Deft files motion for examination of jurors.	25.8	
03/20/2012	Hearing held on pre-trial motions, colloquy done with the defendant regarding a waiver of potential conflict of interest between Atty. Jeruchim and a witness, waiver is accepted.		
03/21/2012	Commonwealth files list of witnesses.		
03/26/2012	Deft files motion for required finding of not guilty at close of commonwealth's case, Denied. (Lowy, J.)	25.9	
03/26/2012	Deft files motion for required finding of not guilty at close of all the evidence, Denied. (Lowy, J.)	26	
03/26/2012	Colloquy done in open court with the defendant regarding his decision to testify.		
03/27/2012	Deft files request for jury instructions.	27	
03/28/2012	Mittimus issued to Cedar Junction MCI (Walpole)	29	
03/28/2012	RE Offense 1:Guilty verdict	28	
03/28/2012	ORDERED remanded to the custody of the Essex Correctional Facility (Middleton)	30	
03/28/2012	Defendant sentenced on ESCR2010-143. Defendant sentenced to Life without parole committed to Massachusetts Correctional Institution, Cedar Junction. Defendant deemed to have 704 jail credit days. (David Lowy, Justice)		
03/28/2012	Sentence stayed until 3/29/2012 (David Lowy, Justice)		
03/28/2012	Victim-witness fee assessed: \$90.00.		
03/29/2012	Attorney, Aviva E Jeruchim's MOTION to withdraw as counsel of record for Jose Hernandez, and appointment of appellate counsel. Allowed. (Lowy, J.)	31	
03/29/2012	NOTICE of APPEAL FILED by Jose Hernandez	32	
03/29/2012	After hearing N.A.C. form forwarded to C.P.C.S. Boston.		
03/29/2012	Court Reporter McDonald, Maryann is hereby notified to prepare one copy of the transcript of the evidence of 04/26/2011 hearing on motion to dismiss		
03/29/2012	Court Reporter ON DIGITAL RECORDING DEVICE is hereby notified to prepare one copy of the transcript of the evidence of 03/20/2012		
03/29/2012	Court Reporter Pietrella, Paula is hereby notified to prepare one copy of the transcript of the evidence of 03/21-28/2012 trial before Lowy,J		
03/29/2012			

<u>Docket</u>	<u>Docket Text</u>	<u>File Ref</u>	<u>Image Avail.</u>
<u>Date</u>		<u>Nbr.</u>	
	Court Reporter Flaherty (Suf), Patricia S. is hereby notified to prepare one copy of the transcript of the evidence of 03/26/2012		
04/02/2012	Notice of appeal from sentence to Cedar Junction MCI (Walpole) filed by Jose Hernandez	33	
04/24/2012	Letter transmitted to the Appellate Division. All parties notified 4/24/2012	34	
04/30/2012	Victim-witness fee (\$90.00) paid as assessed	35	
07/16/2012	Notice of assignment of counsel #C47511306 for Atty. David Mirsky filed.	36	
07/18/2012	Appearance of Dft's Atty: David H Mirsky	37	
11/13/2012	Court Reporter McDonald, Maryann is hereby notified to prepare one copy of the transcript of the evidence of 04/26/2011		
11/13/2012	Transcript of testimony received from Court Reporter McDonald, Maryann (4/26/11).		
12/10/2012	Transcript of testimony received 5 volumes on cd dated 3/21,22,23,27,28/12 from Transcript of proceedings from Court Reporter Pietrella, Paula		
12/12/2012	Transcript of testimony received 1 volume on cd from Transcript of proceedings from Court Reporter Flaherty (Suf), Patricia S.		
05/20/2013	Transcript of testimony received 1 volumes dated 3/20/12 on cd from Transcript of proceedings from Court Reporter ON DIGITAL RECORDING DEVICE		
05/29/2013	transcripts sent to all parties		
06/04/2013	Notice of assembly of record; mailed to Supreme Judicial Court	38	
06/04/2013	Notice of completion of assembly of record sent to clerk of SJC and attorneys for the Commonwealth and defendant.		
06/10/2013	Notice of Entry of appeal received from the Supreme Judicial Court	39	
07/28/2015	Defendant's Motion for new trial pursuant to rule 30(b) of the Massachusetts rules of criminal procedure, memorandum of law in support of and affidavit filed. Copy of Motion, Memorandum and original bound copy of Affidavit to Judge Lowy.	40	
07/29/2015	Endorsement on Motion for new trial , (#40.0): Other action taken  The Commonwealth is to respond on or before October 14, 2015 (David A. Lowy, Justice).		
07/30/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: David H Mirsky, Esq. Attorney: Elin H Graydon, Esq. Witness: Miguel Sierra Holding Institution: MCI - Cedar Junction (at Walpole)		
08/19/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: David H Mirsky, Esq. Attorney: Elin H Graydon, Esq.		
09/30/2015	Commonwealth's Request for additional time to respond to the defendant's motion for new trial. (Assented)	41	
10/02/2015	Endorsement on Request for additional time to respond to the defendant's motion for new trial (Assented to), (#41.0): ALLOWED  Notice sent D.H.M. and E.H.G.		
10/05/2015	The following form was generated: A Clerk's Notice was generated and sent to:		

<u>Docket</u>	<u>Docket Text</u>	<u>File</u>	<u>Image</u>
<u>Date</u>		<u>Ref</u>	<u>Avail.</u>
		<u>Nbr.</u>	
	Attorney: David H Mirsky, Esq. Attorney: Elin H Graydon, Esq.		
11/30/2015	Commonwealth 's Request for additional time to respond to the defendant's motion for new trial. (Assented to)(Copy to Lowy, J.)	42	
11/30/2015	Endorsement on Request to , (#42.0): ALLOWED		
01/15/2016	Opposition to paper #40.0 Motion for New Trial filed by Commonwealth copy sent to Lowy,J	43	
01/28/2016	Defendant 's Motion for leave to file reply memorandum and notice of intent to file discovery motion.	44	
03/03/2016	Habeas Corpus for defendant issued to MCI - Shirley returnable for 03/23/2016 02:00 PM Hearing on Motion for New Trial.		
03/07/2016	General correspondence regarding Status report and affidavit filed by David H. Mirsky, Esq. Attorney for Jose Hernandez. Copy given to Judge Lowy.	45	
03/22/2016	Event Result: The following event: Hearing on Motion for New Trial scheduled for 03/23/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: Request of Defendant		
06/08/2016	Habeas Corpus for defendant issued to MCI - Shirley returnable for 06/14/2016 02:00 PM Hearing on Motion for New Trial.		
06/10/2016	Event Result: The following event: Hearing on Motion for New Trial scheduled for 06/14/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
06/10/2016	Habeas Corpus for defendant issued to MCI - Shirley returnable for 06/23/2016 02:00 PM Hearing on Motion for New Trial.		
06/21/2016	Defendant 's Reply of Memorandum in support of motion for a new trial w/ Supplemental Affidavit of Atty. David H. Mirsky.	46	
06/22/2016	Event Result: The following event: Hearing on Motion for New Trial scheduled for 06/23/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: Request of Defendant		
10/21/2016	Notice of docket entry received from Supreme Judicial Court September 24, 2016 - STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Noted. Further status in 30 days regarding the pending motion for new trial in the Superior Court.)	47	<u>Image</u>
11/30/2016	Habeas Corpus for defendant issued to Essex County House of Correction returnable for 12/21/2016 10:00 AM Motion Hearing. first bus please		
12/21/2016	Event Result: The following event: Motion Hearing scheduled for 12/21/2016 10:00 AM has been resulted as follows: Result: Held as Scheduled		
12/27/2016	MEMORANDUM AND DECISION ON DEFENDANT'S MOTION FOR NEW TRIAL	48	<u>Image</u>
	ORDER: Hernandez's motion for new trial [D. 40] is DENIED.		
	Notice sent ADA E.G., ADA J.G. & Def Atty. D.M.		
12/27/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: David H Mirsky, Esq. Attorney: Elin H Graydon, Esq. Attorney: James P. Gubitose, Esq.		

<u>Docket</u>	<u>Docket Text</u>	<u>File</u>	<u>Image</u>
<u>Date</u>		<u>Ref</u>	<u>Avail.</u>
		<u>Nbr.</u>	
12/29/2016	Notice of appeal filed.  Applies To: Hernandez, Jose C (Defendant)	49	
01/10/2017	Court Reporter Kathy Carty is hereby notified to prepare one copy of the transcript of the evidence of 12/21/2016 10:00 AM Motion Hearing	50	
03/17/2017	Notice of docket entry received from Supreme Judicial Court March 1, 2017 STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Noted. Further status in 30 days regarding the transcription of the December 21, 2016 hearing.)  RE: Docket No. SJC-11467	51	
05/16/2017	Appeal: Statement of the Case on Appeal (Cover Sheet). Sent to Supreme Judicial Court along with cd dated 12/21/16	52	
03/29/2019	Rescript received from Supreme Judicial Court; judgment AFFIRMED The judgment is affirmed, The order denying the motions for new trial is also affirmed..	53	

### Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Disposed by Jury Verdict	06/10/2013	

**APPENDIX E**

**SUPREME JUDICIAL COURT**  
**for the Commonwealth**  
**Case Docket**

**COMMONWEALTH vs. JOSE HERNANDEZ**  
 THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID  
 SJC-11467

**CASE HEADER**

<b>Case Status</b>	Decided, Rescript issued	<b>Status Date</b>	03/06/2019
<b>Nature</b>	Murder1 appeal	<b>Entry Date</b>	06/05/2013
<b>Appellant</b>	Defendant	<b>Case Type</b>	Criminal
<b>Brief Status</b>		<b>Brief Due</b>	
<b>Quorum</b>	Gants, C.J., Gaziano, Budd, Cypher, JJ.		
<b>Argued Date</b>	11/09/2018	<b>Decision Date</b>	01/09/2019
<b>AC/SJ Number</b>		<b>Citation</b>	481 Mass. 189
<b>DAR/FAR Number</b>		<b>Lower Ct Number</b>	
<b>Lower Court</b>	Essex Superior Court	<b>Lower Ct Judge</b>	David A. Lowy, J.
<b>Route to SJC</b>	Direct Entry: Murder 1		

**ADDITIONAL INFORMATION**

Transcripts received: 8 volumes (on CD). Transcripts dates: 4/26/11, 3/20/11, 3/21/11, 3/22/11, 3/23/11, 3/26/11, 3/27/11 and 3/28/11. (Scanned)

Transcripts received: 1 volume (on CD). Transcript date 12/21/16. (Scanned)

Note: Appellee's brief and appellant's reply brief contain references to impounded materials.

**INVOLVED PARTY**

**ATTORNEY APPEARANCE**

**Commonwealth**  
 Plaintiff/Appellee  
 Red brief filed  
 2 Exts, 1201 Days

Catherine L. Semel, A.D.A.

**Jose Hernandez**  
 Defendant/Appellant  
 Blue br & suppl blue br filed  
 6 Exts, 1641 Days

David H. Mirsky, Esquire

**DOCUMENTS**

Appellant Hernandez Brief	Appellant Hernandez Supplemental Brief
Appellee Commonwealth Supplemental Brief	Appellant Hernandez Supplemental Reply Brief

**DOCKET ENTRIES**

**Entry Date** **Paper** **Entry Text**

06/05/2013	#1	Entered. Notice to counsel.
10/03/2013	#2	MOTION to extend to 02/28/2014 filing of brief of Jose Hernandez by David H. Mirsky, Esquire.
10/04/2013		ALLOWANCE of Paper #2 to 02/28/2014 for filing of brief of Defendant/Appellant Jose Hernandez. Notice to counsel.
02/28/2014	#3	MOTION to extend to 06/06/2014 filing of brief of Jose Hernandez by David H. Mirsky, Esquire. (Allowed to June 6, 2014.)

**DOCKET ENTRIES**

05/30/2014 #4 MOTION FOR STAY OF APPEAL, filed for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED. A stay of appellate proceeding is granted. Counsel to file status reports at 30 day intervals.) Notice sent.

07/01/2014 #5 STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Noted. Further status report due in 30 days.)

07/30/2014 #6 STATUS LETTER from David H. Mirsky, Esquire. See status on file. (Noted. Further status report due in 30 days.)

09/04/2014 #7 MOTION to extend to 10/24/2014 filing of brief of Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to October 24, 2014 for the reasons stated in the motion)

10/23/2014 #8 MOTION to extend to 12/05/2014 filing of brief of Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to December 5, 2014 for the reasons stated in the motion).

12/08/2014 #9 MOTION to impound record appendix (separately bound), filed for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED)

12/08/2014 #10 SERVICE of brief w/appendix and impounded record appendix for Defendant/Appellant Jose Hernandez by David H. Mirsky. (Note: Separate bound record appendix marked impounded.)

03/04/2015 #11 APPEARANCE of Catherine L. Semel, A.D.A. for Commonwealth.

03/04/2015 #12 MOTION to extend to 03/18/2015 filing of brief of Commonwealth by Catherine L. Semel, A.D.A.. (ALLOWED to March 18, 2015)

03/18/2015 #13 SERVICE of brief for Plaintiff/Appellee Commonwealth by Catherine L. Semel. (Note: Contains references to impounded materials.)

03/30/2015 #14 SERVICE of appellant's reply brief for Jose Hernandez by David H. Mirsky, Esquire. (Note: Contains references to impounded materials.)

04/09/2015 #15 ORDERED for argument on May 8. Notice sent.

05/07/2015 #16 MOTION to continue oral argument and for stay of appellate proceedings, filed for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED)

06/09/2015 #17 STATUS LETTER from David H. Mirsky, Esquire. See status on file.

07/27/2015 #18 MOTION FOR NEW TRIAL, filed for Jose Hernandez by David H. Mirsky, Esquire.

07/27/2015 #19 ORDER: Remanded to Essex Superior Court.

09/02/2015 #20 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

10/01/2015 #21 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

11/02/2015 #22 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

12/02/2015 #23 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

01/13/2016 #24 STATUS LETTER from David H. Mirsky, Esquire. See status on file.

02/16/2016 #25 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

03/18/2016 #26 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

04/20/2016 #27 STATUS LETTER from David H. Mirsky, Esquire. See status on file.

05/20/2016 #28 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

06/21/2016 #29 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

07/21/2016 #30 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

08/23/2016 #31 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

09/26/2016 #32 STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Noted. Further status in 30 days regarding the pending motion for new trial in the Superior Court.)

10/27/2016 #33 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

11/28/2016 #34 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

12/29/2016 #35 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

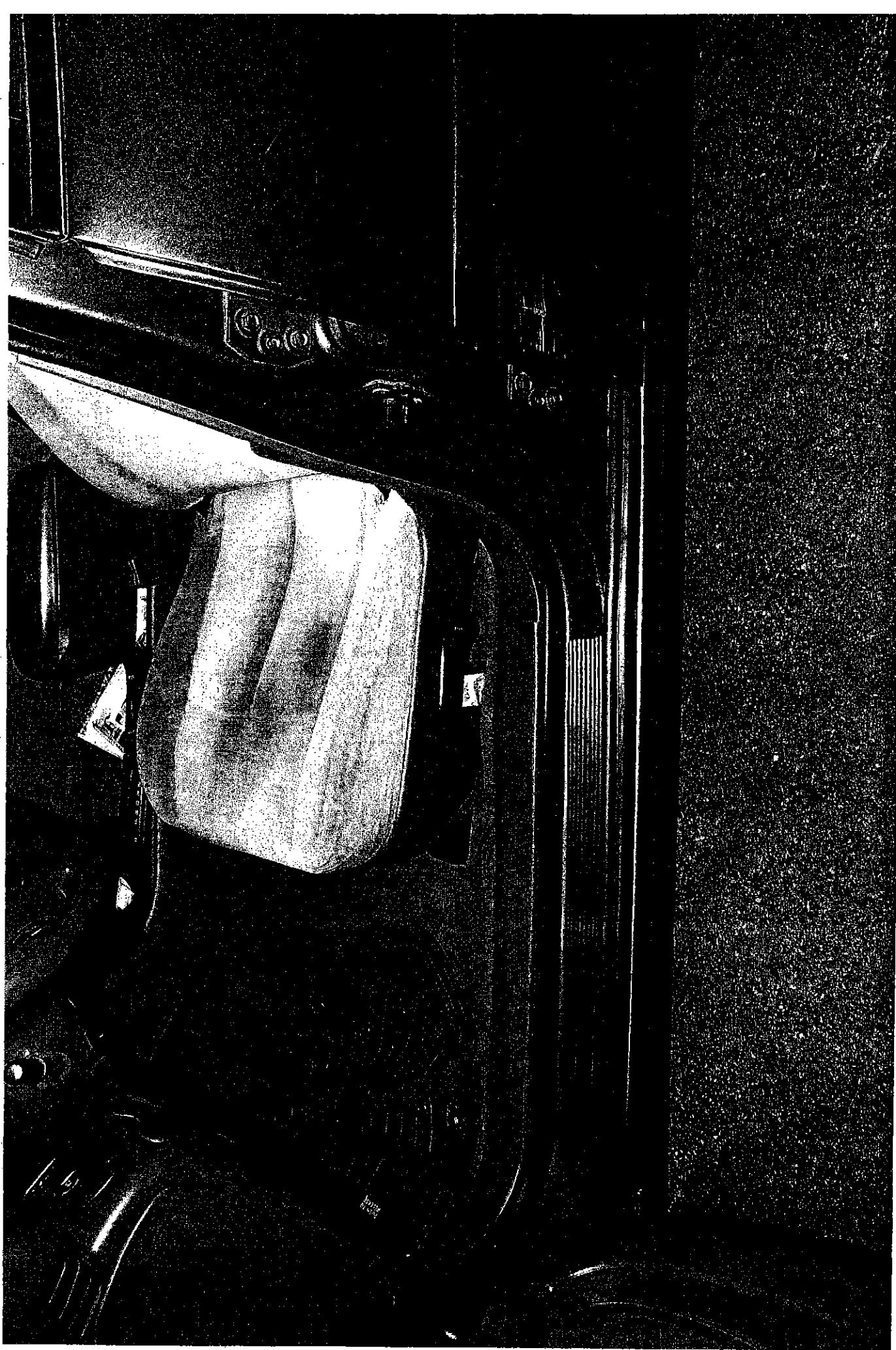
01/30/2017 #36 STATUS LETTER from David H. Mirsky, Esquire: See letter on file.

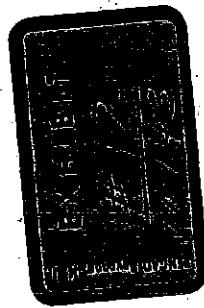
**DOCKET ENTRIES**

03/01/2017 #37	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Noted. Further status in 30 days regarding the transcription of the December 21, 2016 hearing.)
04/03/2017 #38	STATUS LETTER from David H. Mirsky, Esquire.
05/02/2017 #39	STATUS LETTER from David H. Mirsky, Esquire: See letter on file.
05/18/2017 #40	APPEAL ON DENIAL OF MOTION FOR NEW TRIAL. Brief/Appendix for Appellant due 6/28/2017. Appellee's brief due 7/28/2017.
06/21/2017 #41	MOTION to extend to 10/06/2017 filing of supplemental brief and appendix for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to October 6, 2017)
09/26/2017 #42	MOTION to extend to 12/08/2017 filing of brief of Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to December 8, 2017, for the reasons stated in the motion.)
12/04/2017 #43	MOTION to extend to 02/16/2018 filing of supplemental brief and appendix for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to February 16, 2018)
02/12/2018 #44	MOTION to extend to 03/23/2018 filing of Supplemental Brief and Supplemental Appendix for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to March 23, 2018).
03/19/2018 #45	MOTION to extend to 04/06/2018 filing of Supplemental Brief and Supplemental Record Appendix for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to April 6, 2018).
04/09/2018 #46	SERVICE of supplemental brief & appendix filed for Jose Hernandez by David H. Mirsky, Esquire.
05/04/2018 #47	MOTION to extend to 06/22/2018 filing of Supp. Br. for Commonwealth by Catherine L. Semel, A.D.A.. (ALLOWED to June 22, 2018)
06/29/2018 #48	MOTION to extend to 06/29/2018 filing of Supp. Br. for Commonwealth by Catherine L. Semel, A.D.A.. (ALLOWED)
06/29/2018 #49	SERVICE of supplemental brief filed for Commonwealth by Catherine L. Semel, A.D.A..
07/02/2018 #50	MOTION to enlarge time to file supplemental reply brief to August 31, 2018, for the Appellant by David H Mirsky, Esquire. (ALLOWED to August 31, 2018).
08/28/2018 #51	MOTION to enlarge time to file supplemental reply brief to 09/21/2018, for Jose Hernandez by David H. Mirsky, Esquire. (ALLOWED to September 21, 2018)
09/06/2018	Notice of 11/09/2018, 9:00 AM argument at John Adams Courthouse, Rm 1 (jac1) sent.
09/06/2018 #52	NOTICE of November argument sent.
09/24/2018 #53	SERVICE of appellant's supplemental reply brief for Jose Hernandez by David H. Mirsky, Esquire.
10/03/2018 #54	ORDERED for argument on November 9. Notice sent.
11/09/2018	Oral argument held. (Gants, C.J., Gaziano, J., Budd, J., Cypher, J.).
01/09/2019 #55	RESCRIPT (Full Opinion): The judgment is affirmed. The order denying the motion for a new trial is also affirmed. (By the Court)
01/23/2019 #56	PETITION FOR REHEARING, filed for Jose Hernandez by David H. Mirsky, Esquire.
03/06/2019 #57	DENIAL of petition for rehearing. (By the Court) Notice to counsel.
03/06/2019	RESCRIPT ISSUED to trial court.

As of 03/06/2019 20:00

**APPENDIX F**





## **APPENDIX G**

28  
COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

DOCKET NO. ESCR2010-143-001

*Received, at 10<sup>05</sup> AM*

*3/28/12*

*Released*

*Duchamps*

*asst Clerk*

VERDICT SLIP

COMMONWEALTH  
VS.

Jose Hernandez

Murder - 1<sup>st</sup> DEGREE

1. ( ) NOT GUILTY
2. (  ) GUILTY- Offense as Charged  
(  ) Deliberate Premeditation
3. ( ) GUILTY - Lesser Included Offense  
Murder - 2<sup>nd</sup> Degree
4. ( ) GUILTY - Lesser Included Offense  
Voluntary Manslaughter

DATE:

*3/28/12*

Margaret Sanders  
FOREPERSON OF THE JURY