COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS

SUPERIOR COURT DEPARTMENT
INDICTMENT No. 2013-CR-00983

COMMONWEALTH

v.

AARON HERNANDEZ

MOTION AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO ABATE PROSECUTION

Introduction

On the morning of April 19, 2017, the defendant, Aaron Hernandez, killed himself at his place of imprisonment, Souza-Baranowski Correctional Center. Hernandez hung himself in his prison cell slightly more than two years after his conviction by a Bristol County jury. On April 15, 2015, Hernandez was convicted of murder in the first degree, unlawful possession of a firearm and unlawful possession of ammunition. Hernandez's conviction followed a trial that lasted almost 3 ½ months, during which more than 130 witnesses testified and 439 exhibits were introduced into evidence.

During the sentencing hearing following his conviction, Hernandez was fully informed of his appellate

rights and the court later appointed counsel to represent him on appeal. With credit for time already served, the two firearm-related sentences were completed when Hernandez killed himself.

On April 20, 2017 Hernandez's appellate attorneys filed a motion seeking the abatement of all of his convictions and the dismissal of the indictments *ab initio*, His attorneys ask this court to erase the jury's verdicts and restore the presumption of innocence, which the defendant was entitled to before his convictions.

However, because doing so would: (1) give force to a legal doctrine that lacks any identifiable historical or legal basis; (2) be inconsistent with the emerging law of many other jurisdictions, including decisions of the United States Supreme Court, see Dove v. United States, 423 U.S. 325 (1976) (rejecting abatement policy), that favors striking a reasonable balance between the rights of victims and defendants; (3) reward the defendant's conscious, deliberate and voluntary act, contrary to settled waiver and forfeiture principles; and (4) ignore the defendant's negligible probability of success on appeal had review been undertaken in the ordinary course, the Commonwealth opposes the defendant's motion, and requests this Court to exercise

its broad discretion under existing Massachusetts law to deny the defendant's motion.

Facts

On the evening of June 16, 2013, the defendant contacted Odin Lloyd and requested that they get together to "step" - i.e. socialize - as the two men had done two days earlier when they visited "Rumor" a Boston nightclub. The victim reluctantly agreed to the proposal. The defendant then immediately contacted his co-defendants, Ernest Wallace and Carlos Ortiz, and directed them to come to North Attleboro, where the defendant met them at his house, just before 1 AM.

The evidence at trial established that the defendant had no intention of socializing with Odin. After extensive preparation, during which the defendant's home surveillance video showed the defendant carrying a Glock handgun, the defendant and his two associates left the house.

The defendant drove a rented Nissan Altima to Odin Lloyd's house in Dorchester and picked up Odin at approximately 2:30 AM. At that time all of the clubs in the City of Boston and the Commonwealth were closed. The defendant brought Odin to a remote and isolated field within an industrial park located near the defendant's home. Video Surveillance, cellphone tower information,

Department of Transportation photographs and records confirmed the route of travel and entry into the killing field at approximately 3:24 AM.

While the defendant was seated inside of the vehicle, he fired the first of six rounds at Odin from his Glock .45. A shell casing with the defendant's DNA on it was later recovered by a rental car company employee from beneath the defendant's seat. After firing the first shot, the defendant exited the car and moved from the driver's side of the vehicle toward the passenger's side, the side that Odin got out of. A footwear impression of a size 13 Air Jordan Retro 11 was found at the scene, along the path the defendant took around the car, and expert testimony identified the defendant wearing that same shoe the night of the killing.

Forensic evidence showed that the next three shots struck the victim while he was standing or crouching near the vehicle. The final two shots were fired into the victim's chest as he lay helpless on the ground. Those last two rounds penetrated the victim's body completely on the right and left side of the chest and the projectiles were found lodged in the ground underneath his body.

A marihuana cigarette, containing both the defendant's and the victim's DNA, was recovered next to Odin's body.

Also near the body were tire tracks that were later matched/individualized to the rented Altima.

Approximately four minutes after entering the field, the defendant drove Ortiz and Wallace from the murder scene. Along the escape route, the defendant disposed of a small-caliber handgun that he obtained through a straw-purchase in Florida. The flight from the scene was captured on video surveillance and within minutes, the defendant and his associates arrived at Hernandez's nearby house to rest, relax and socialize. Again, the defendant was seen with the murder weapon on his home surveillance video. Upon his arrival and inside of the house, the defendant was seen directing the actions of his associates. With his fiancée and infant child sleeping on the second floor of the house, the defendant and his associates retreated to the basement and turned off his video surveillance.

Contrary to suggestions that Odin was his friend, when video surveillance resumed in the afternoon, the defendant was observed to be relaxed, playful and happy. Again the defendant was seen to direct the actions of his associates and his fiancée. Video surveillance showed the defendant removing a handgun magazine from inside of the rental car.

Later in the day, the defendant returned the rented Altima and obtained a new rental car. The car was not

scheduled to be returned. The defendant made false statements about damage to the car. Fingerprint and other evidence confirmed that the three defendants and Odin had been in the car.

Following the discovery of Odin's body in the late afternoon, the defendant engaged in conduct calculated to get rid of evidence and hide his own guilt. The defendant directed the movements of his associates and his fiancée while he was voluntarily at the North Attleboro police station. The defendant gave instructions for the destruction of his video-surveillance system and he made payments to his associates, all the while directing their flight from the Commonwealth.

On June 18, 2013, and throughout the following days, the defendant engaged in additional conduct designed to prevent investigators from learning of his guilt. Among other things, the defendant asked his fiancée to dispose of a box that the jury could have only concluded contained the murder weapon; he lied to family members, friends, co-workers, and his employer; he tried to secure the silence of the women who cleaned his home; and he continued to assist in the flight of his co-defendants.

There was also significant evidence presented to the jury of the defendant's knowledge and possession of

firearms. In addition to evidence that he kept firearms in his home, there was video evidence indicating that, shortly before and immediately after the murder, the defendant personally possessed a firearm similar to the type of weapon used to kill the victim.

Following his convictions, the defendant was sentenced to imprisonment at the Massachusetts Department of Correction ("DOC"). On the charge of first-degree murder, the defendant was sentenced to be imprisoned for the rest of his life, without the possibility of parole.

In the early morning hours of April 19, 2017, the defendant was found hanged inside his single-occupancy cell. The defendant took steps to prevent being seen from the outside, he jammed cardboard into the track of the door to prevent its automatic functioning and he left notes evidencing his intention to kill himself. The death certificate (see attached), dated April 20, 2017, lists the manner of death as "suicide."

Analysis

1. The basic principle. The courts of the Commonwealth have permitted abatement *ab initio* of a defendant's conviction when a defendant dies while his appeal is pending. See Commonwealth v. Latour, 397 Mass. 1007 (1986); Commonwealth v. Harris, 379 Mass. 917 (1980).

However, the authority for such action derives from customary practice; abatement of an underlying conviction is not authorized by either the federal or state constitution, or by any Massachusetts statute. See Commonwealth v. Latour, 397 Mass. 1007, 1007 (1986); United States v. Rorie, 58 M.J. 399, 405-06 (C.A.A.F. 2003). The Court has itself expressed uncertainty as to the basis of the principle. Commonwealth v. De Le Zerda, 416 Mass. 247, 250 (1993)(identifying two policy reasons that "arguably" provide rationale for abatement). Where a court exercises its discretion to abate a conviction, all of the prior proceedings that resulted in the judgment, including the jury verdict of guilt beyond a reasonable doubt, are rendered a complete nullity.

However, abatement is by no means required in all cases where a defendant dies before he has received appellate review. Commonwealth v. Squires, 476 Mass. 703,704 (2017); See De La Zerda, 416 Mass. at 250 (1993) (abatement not required where "special circumstances" indicate that abating conviction not consistent with interests of justice).

A defendant who dies without asserting a direct appeal is not entitled to have his convictions abated. This happens, for example, where a defendant chooses not to

lodge an appeal, where he neglects to perfect his appeal, or where he chooses to withdraw his appeal. In such cases, the presumption of regularity that attaches to all trial court judgments is sufficient to support the conviction.[1] Likewise, a defendant who dies while his collateral appeal is pending is not entitled to abatement of his convictions. See De La Zerda, 416 Mass. at 249-250. Death during the pendency of a direct appeal does not always require abatement, at least where, as here, a defendant's death is the result of his own conscious, deliberate and voluntary act. In this circumstance a balance must be struck between the policy interests advanced by abatement, the effect of the defendant's actions in frustrating the interests of justice and the interests in maintaining the validity of the conviction. In this circumstance, the underlying conviction, consistent with the law of the Commonwealth, should remain intact.

2. The practice of abatement *ab initio* lacks any solid historical or public policy basis.

Only a few Massachusetts appellate decisions have addressed the practice of abatement *ab initio*, including De

[1] It is precisely because of the presumption of regularity that an appeal does not stay the execution of a defendant's sentence in a criminal case. Because the conviction is presumptively valid, the sentence usually commences immediately.

La Zerda, supra, Latour, supra, Harris, supra, and Commonwealth v. Eisen, 368 Mass. 813, 814 (1975). Eisen, which embodies the modern Massachusetts pronouncement of the practice, offers a very weak rationale; "This is the general practice elsewhere." Eisen, 368 Mass. at 813. The "elsewhere" in question appears to be Durham v. United States, 401 U.S. 481 (1971) and State v. Carter, 299 A.2d 891 (Maine 1973), both specifically cited in Eisen. However, the Supreme Court later overruled Durham in Dove. Carter, to the extent that it relied upon, at least in part, Durham is also of questionable precedential value. See State v. Carter, 299 A.2d at 895.

Other courts, reviewing the practice through the lens of modern sensibilities, have emphasized the practice's lack of any solid basis in law or public policy. See State v. Benn, 364 Mont. 153 (2012) ("We conclude that we manifestly erred [in a prior decision] . . . *Stare decisis* does not require that we follow a manifestly wrong decision"). Cf. People v. Ekinici, 743 N.Y.S.2d 651 (2002) (noting that the rationale for the abatement rule originates in antiquity and the reasons supporting it are lost there). In Massachusetts, the Court's attempts to find a justification for abatement have not been compelling. De La Zerda, 416 Mass. at 250 ("One policy

interest said to be served by the practice...is forestalling the imposition of any impossible punishment...." The other primary policy advanced...has been said to be based on the interests of justice.")

Commentators have also noted the absence of any clear basis in law or policy for the doctrine. For example, Professor Timothy Razel begins his analysis of abatement's history as follows: "The origins of the abatement doctrine are unclear." "Dying to get away with it: How the abatement doctrine thwarts justice," *Fordham L. Rev.* 2193, 2208 (2007).[2] In short, both the historical and legal bases for abatement are vague - and decidedly murky in Massachusetts. And, the Court has declined to abate convictions with very little analysis as to whether the policy basis is served. Squires, 476 Mass. at 707.

3. Abatement is inconsistent with emerging law in peer jurisdictions, including the federal jurisdiction, which generally favors striking a sensible balance between the rights of victims and defendants.

The concept of abating criminal convictions when a defendant dies while he is awaiting appeal is by no means the universal rule in the United States. Indeed, many

[2] Razel notes that in List v. Pennsylvania, 131 U.S. 396, 396 (1888) (mem.), the Supreme Court acknowledged that the defendant had died and ordered abatement and dismissal of the writ of error. Its sole rationale was that "it appear[s] ... that this is a criminal case."

states have never allowed it, including the neighboring jurisdiction of Connecticut. See, e.g., State v. Trantolo, 549 A.2d 1074, 1074 (Conn. 1988) (per curiam). As noted, the United States Supreme Court has rejected the doctrine. See Dove, 423 U.S. at 325. At present, about half of the states follow this practice in some form. See Surland v. State, 392 Md. 17, 19 (2006).[3] However, the number has been steadily declining over the past few decades as courts have increasingly sought to balance the rights of criminal defendants and victims. This shift follows a broad national trend toward increased recognition of the interests of those impacted by crime generally.[4] It also

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[3] In Surland, the court rejected the abatement doctrine, putting in place the following new procedure: "Upon notice of the death of the appellant and in conformance with Md. Rule 1-203(d), all time requirements applicable to the deceased defendant and the setting of the case for argument (if that has not already occurred) will be automatically suspended in order to allow a substituted party (1) to be appointed by the defendant's estate, and (2) to elect whether to pursue the appeal. If a substituted party is appointed and elects to continue the appeal, counsel of record will remain in the case, unless the substituted party, contemporaneously with the election, obtains other counsel. If no substituted party comes forth within the time allotted by Rule 1-203(d) and elects to continue the appeal, it will be dismissed, not for mootness but for want of prosecution, and, as with any appeal that is dismissed, the judgment will remain intact."

[4] The range of specific alternative practices includes: (1) dismissing the appeal but leaving the underlying judgment intact; (2) dismissing the appeal and abating the conviction, but leaving any restitution orders in place; (3) resolving the appeal, either with or without a

takes stock of other relevant factors, such as the due process implications of a criminal conviction and the practical effects of abatement on innocent third parties.

States that have rejected a mechanical abatement rule have done so on the basis of three principal rationales. First, rejecting abatement reflects a strong public policy of respect for jury verdicts. After conviction, a defendant is no longer presumed innocent but is, in fact, presumed guilty. See McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 436 (1988) ("[a]fter a judgment of conviction has been entered . . . a defendant is no longer protected by the presumption of innocence"). See also Herrera v. Collins, 506 U.S. 390, 399 (1993). Thus, convictions "have significance and should not be treated as inconsequential simply because the defendant has died." Surland, 392 Md. at 19. As the court noted in Whitehouse v. State, 266 Ind. 527 (1977):

> The presumption of innocence falls with a guilty verdict. At that point . . . we presume the judgment to be valid, until the contrary is shown. *To wipe out such a judgment, for any reason other than a showing*

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substituted party; and (4) dismissing the appeal "and direct[ing] that a note be placed in the record that the judgment of conviction removed the presumption of the defendant's innocence, that an appeal was noted, and that, because of the death of the defendant, the appeal was dismissed and the judgment was neither affirmed nor reversed." Each of these options attempts to balance competing public policies.

> *of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results . . . in more instances than it would avert an injustice* (emphasis added).

See also People v. Peters, 449 Mich. 515 (Mich. 1995) ("The conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right. We therefore find it inappropriate to abate a criminal conviction"); State v. Clements, 668 So. 2d 980, 981-82 (Fla. 1996) ("[A] judgment of conviction comes for review with a presumption in favor of its regularity or correctness . . . We therefore conclude . . . that the death of the defendant does not extinguish a presumably correct conviction and restore the presumption of innocence which the conviction overcame").

Along these lines, it is important to recall that, in order to obtain a conviction in the first place, the government is required to prove each element of the offenses charged beyond a reasonable doubt. Further, at least where, as here, a defendant was represented by competent counsel, every contested aspect of the Commonwealth's case was subjected to scrutiny and intra-trial review and the defendant, a public person, was afforded a highly scrutinized public trial, there is absolutely no reason to disturb the defendant's lawful

criminal convictions. In these circumstances public faith and confidence in jury verdicts is undermined by application of the abatement doctrine without advancing any of the "arguabl[e]" policy reasons for the abatement principle.

The defendant was serving his punishment at the time he took his own life. He has now served the entirety of his sentences. The sentences for his ammunition and firearm convictions were concluded some time prior to his suicide. By his death, he has completed his lawful sentence for his murder conviction, just as death completes the sentence of every murderer in the Commonwealth. Abating the defendant's convictions has the effect of making his period of imprisonment void of a legitimate basis and has no effect on the possibility or impossibility that a further sentence is warranted.

Similarly, abatement undermines the intrinsic value of the defendant's conviction for the victim's family. Abatement precedes our adoption of the victim's rights statute that recognizes the unique role that trials, verdicts and the affording of dignity to the survivors of victims of violent crimes plays in our system of justice. Abating a conviction without regard to these policy

concerns further undermines the value of a jury verdict after a public trial.

Abatement could, in many cases, affect collateral consequences[5] such that the practice of abatement in cases where a defendant commits suicide is contrary to sound public policy. For example, restitution orders (as well as orders relating to court costs and fines) are extinguished by abatement. See State v. Korsen, 141 Idaho 445 (2005), ("a criminal conviction and any attendant order requiring payment of court costs and fees, restitution or other sums to the victim, or other similar charges, [should] not [be] abated, but [should] remain intact"). Further, civil damages awards to victims, at least where liability was established by means of collateral estoppel, might be imperiled - a matter of significant potential concern in the present case. When third-party civil actions are begun against criminal defendants, the civil proceedings are often stayed as a matter of course at the criminal defendant's request because of the constitutional

[5] In State v. Devin, 158 Wn.2d 157, 171 (2006), the court concluded that "important collateral consequences," at least in this context, included "emotional distress, lessened ability to recover a civil judgment, and potential impacts on family court proceedings."

implications of making a criminal defendant provide answers to discovery or submit to questioning at a civil trial.

As the Court is likely aware, such a third-party action was filed against this defendant and it was stayed early in the discovery phase at the defendant's request. As the defendant's suicide has not yet been raised in that case (the defendant filed his abatement motion one day after the defendant killed himself) it is not possible to predict the course of that litigation. Nevertheless, the policy implications of allowing abatement in this case are clear. It would allow the defendant to control, not only the course of his own criminal litigation, but all litigation against him.

A defendant, who can cut off his own criminal appeal by suicide and stall civil litigation by a stay of proceedings and then prevent application of collateral estoppel, has the reins of the entire justice system in his own hands. If the defendant is now permitted to impair the rights of other parties to that litigation through his voluntary conduct, it will work precisely the same form of prejudice to third parties that the Court proscribed in

Squires, supra. See n.3, supra.[6] Such a circumstance could only serve to undermine the legitimacy of our public justice system.

Finally, states have rejected abatement on grounds that "it is based on the outdated premise that convictions and sentences serve only to punish criminals, and not to compensate their victims." Devin, 158 Wn.2d at 157 (2006). That is certainly not in line with either the public's current expectations for the fair administration of justice or the articulated policy objectives of the Massachusetts General Court. See G. L. c. 258B, § 3, relating to the rights of victims and witnesses of crimes.[7] See also 18 U.S.C. § 3771 (cognate federal statute). The current "conception [of criminal convictions, with its] . . . increased focus on victims' rights, . . . [has] caused courts to reconsider their previous use of the abatement doctrine. In the mid-1990s several states abandoned their previous use of abatement. This trend continued in the

[6] Needless to say, the "interests of justice" referenced by the Court in Squires cannot refer narrowly to the interests of a criminal defendant only.

[7] The SJC, acknowledged the importance of convictions as a restorative measure, and observed that: "In enacting G. L. c. 258B, § 3 (f), the Legislature clearly intended to confer on victims the right to ensure the prompt trial and, if convicted, the prompt sentencing of the perpetrators of the crimes against them." Hagen v. Commonwealth, 437 Mass. 374, 375 (2002).

mid-2000s, with four states and the U.S. military abandoning the doctrine." Razel, supra, at 2208.

As the Court said in Korsen, citing then-recent victims' rights legislation in that jurisdiction, "abatement of the conviction would deny the victim of . . . fairness, respect and dignity . . . and closure." In sum, the emerging approach to abatement, in virtually every jurisdiction where the practice has been tested in recent years, has been to transform a needlessly rigid doctrine into a flexible rule attuned to modern conceptions of restorative justice. See Wheat v. State, 907 So. 2d 461, 464 (Ala. 2005) quoting People v. Robinson, 298 Ill. App. 3d 866, 873 (1998) (recognizing "'the callous impact'" that vacating a conviction "'necessarily has on the surviving victims of violent crime'").

In view of all of these factors, the Court should take a narrow view of the abatement doctrine. Prior cases provide discretion in determining whether or not to abate a conviction in any particular case. See De La Zerda, 416 Mass. at 250. The Court should use its broad discretion and refrain from doing so here.

4. Waiver and forfeiture principles preclude abatement when the defendant commits suicide.

Even if the Court determines that the abatement doctrine has some continuing vitality in Massachusetts – despite growing repudiation of the policy elsewhere - the defendant here has waived his right to its benefit in any event.

Criminal defendants have the right to direct review of their convictions, but that right is a statutory right and may be waived, either through affirmative actions or through the failure to act. There is nothing exceptional about that premise and it happens many times a day in the Commonwealth. Not every defendant convicted of a crime takes advantage of his appellate rights and their failure to do so raises no concern.

Here, the defendant, by deliberately, purposely and voluntarily ending his life prior to the exhaustion of his appellate rights, manifested his intention to abandon his appeal or otherwise waived his right to review, or at the very least, forfeited any claim for abatement of his convictions. Just like any other defendant who voluntarily forsakes his appellate rights - for whatever reason - he is not entitled to any additional form of relief.

Accordingly, the Court should take no action with respect to the underlying convictions; that is, the Court should place the defendant in exactly the same position he

would be in *had he abandoned his appeal through any other means*.

This is precisely the approach adopted by the federal district court in United States v. Dwyer, 654 F. Supp. 1254, 1255 (M.D.Pa. 1987). In Dwyer, the court began by noting that there is a fundamental difference between a criminal defendant who commits suicide and one who dies of natural causes. Id. at 1255-1256. As the judge put it, "suicide is an act of one's own volition." Id. The court then concluded that "[i]t defies common sense to allow [the defendant] to be absolved of criminal liability so carefully arrived at by a jury because he intentionally took his own life before the appeal process could run. *By his suicide Mr. Dwyer waived his right to appeal*" (emphasis added). Id.

Similarly, in State v. McDonald, 138 Wis. 2d 366, 368-369 (1987), the court held that the abatement doctrine is inapplicable when the death is a suicide. The court began its analysis by observing that "[i]n the absence of contrary evidence, we are entitled to assume that the person who takes his own life does so by choice." Id. at 368. The court then went on to state that: "A defendant who chooses death pending a request for post-conviction relief deprives himself of a final determination of his

case's merits. Justice does not require abatement or vacation of a conviction when the defendant himself prevents a review of the merits, whether by suicide, a failure to appeal or a request that an appeal be dismissed." Id. at 368-369. The policy basis of the court's decision in McDonald was plain: "Were we to hold otherwise, a convicted defendant could use suicide to ensure the "return to the status quo before commencement of" the criminal action . . . Whatever the view of the courts, a return to that status quo would justify the public and the victim, or the victim's family, in believing that the defendant succeeded through suicide when he would have lost on appeal."

Finally, in United States v. Chin, 633 F. Supp. 624,627 (E.D. Va. 1986), rev'd on other grounds, United States v. Chin, 848 F.2d 55 (1988) (original appellant lacked standing), the court held that "a criminal proceeding will not be abated if the Court finds that the criminal defendant did not intend to file an appeal." The manner of the defendant's death - a suicide - was, the court determined, a crucial factor in assessing his intent. "The Court also finds it important that [the defendant's] death was suicidal and not due to natural or accidental causes. [His] suicide indicates to this Court that he

chose to take his life instead of pursuing the appeals procedure that he knew would have been available to him. It seems contrary to our system of justice to allow [a defendant] . . . to be absolved of all criminal liability because he intentionally took his own life at a time when he had not been afforded a right to appeal. [The defendant] had a choice: his life or an appeal. Sadly and regrettably he chose to die and although he is now unable to present his case on appeal, the Court cannot help but conclude that such a choice was a conscious and deliberate one." Id. at 627-628.

All of the same factors that weighed in favor of the defendant's waiver of any right to abatement in McDonald, Dwyer and Chin are also present here. Not only did the defendant have an opportunity to appeal, he had experienced appellate counsel working diligently on his case. However, in spite of that, he voluntarily terminated his appellate rights through suicide. Not only would abatement work a tremendous unfairness to the victims of his offenses and send a dangerous policy message about the potential benefits of obtaining a dismissal of even the most serious criminal charges through a mechanism available to every criminal defendant, it would also conflict with settled law regarding appellate waiver generally. The Court,

therefore, should find that the requisite "special circumstances" exist here to deny the defendant's motion on the basis of the defendant's voluntary decision to take his own life. See Commonwealth v. Edwards, 444 Mass. 526, 534 (2005)("'[N]o one shall be permitted to take advantage of his own wrong....'" quoting Reynolds v. Washington, 98 U.S. 145, 159 (1878)).

Furthermore, applying waiver or forfeiture doctrine to the consequences of a defendant's actions is nothing new in the Commonwealth. Our SJC has repeatedly held that actions can cause the waiver or forfeiture of even Constitutional rights. Abatement, whatever the basis of the doctrine is, is neither a constitutional or statutory right, nor is it grounded in either. See e.g. Commonwealth v. Morganti, 467 Mass. 96, 102 (2014)(counsel can waive defendant's Sixth Amendment, public trial right, by not objecting to closure); Edwards, 444 Mass. at 532 (adopting the principle of "forfeiture by wrongdoing"). Indeed, the Court has even found forfeiture of a Sixth Amendment right by a defendant when the defendant engaged in constitutionally protected conduct. Commonwealth v. Szerlong, 457 Mass. 858, 860 (defendant's marriage to witness resulted in forfeiture of confrontation and hearsay rights).

5. Abatement is not indicated in a case where a defendant had a negligible probability of success on appeal.

One final factor weighing against abatement in this case is the fact that the defendant had, at best, a negligible chance of success on appeal. This consideration weighed into the outcomes in both Dwyer and Chin, supra. As the court observed in the latter case: "Although the court recognizes that the determination of the merits of an appeal is solely within the jurisdiction of the Appellate Court, it cannot help but note that the record in the instant case does not reflect one that warrants an appeal . . . [the potential bases for appeal] were not very strong." Along the same lines, the judge in Dwyer observed that "it is highly unlikely that [the defendant] would have succeeded on appeal . . . Our recollection of the trial is that there were no grounds whatsoever upon which the defendant could hope to succeed upon appeal."

In the present case, the defendant likewise had little or no chance of success on appeal, due, first and foremost, to the overwhelming strength of the government's case. See Commonwealth v. DiBenedetto, 458 Mass. 657, 670 (2011); Commonwealth v. Grace, 397 Mass. 303, 306 (1986) (inculpatory force of government's case key factor in assessing prejudice of any alleged deprivation of rights).

The defendant was convicted on the basis of extensive video surveillance, DNA, ballistic, forensic, cellular telephone communication, text message, and cell tower evidence; as well as expert testimony related to the characteristics of Glock firearms, and soil, tire tread, and shoe impression analysis and eyewitness testimony. The defendant lured Odin Lloyd to his death, under a false pretense of friendship designed to get Odin into the Nissan Altima. Having succeeded in getting Odin into the car, the defendant drove Odin to the isolated location of the murder. The evidence conclusively proved, and the defense conceded, that the defendant was physically present during the killing. The defendant owned the gun that was the murder weapon and he was seen on video surveillance with it just prior to and just after the time of the murder. The defendant orchestrated a conspiracy to conceal evidence of his participation in the enterprise, provided automobiles and other instrumentalities to facilitate the murder, and evinced strong consciousness of guilt in the hours and days following the crime. In the face of the overwhelming evidence of defendant's guilt, the defense he mounted, that the murder was an independent act of one of his associates during a PCP induced fit of violence, was rejected by the trial jury.

The fact that the government pursued a joint venture theory of criminal liability, amid the particular facts of the case here, made conviction a virtual certainty. Moreover, the most hotly-contested evidentiary points were resolved in the defendant's favor in any event. There is no issue of factual innocence - and certainly none has arisen since trial. No motion for new trial had been filed in the two years since the defendant's conviction. In these circumstances, as in Dwyer and Chin, abatement is simply not warranted.

Conclusion

As in State v. McDonald, supra at 368, "[i]n the absence of contrary evidence," the Court here must "assume that the person who takes his own life does so by choice." Id. at 368. Further, "[a] defendant who chooses death pending a request for post-conviction relief deprives himself of a final determination of his case's merits. Justice does not require abatement or vacation of a conviction when the defendant himself prevents a review of the merits, whether by suicide, a failure to appeal or a request that an appeal be dismissed." Id. at 368-369. This is the rule that should govern here - and for precisely the same reasons. If the Court holds otherwise, convicted defendants "could use suicide to ensure the

return to the *status quo* before commencement of the criminal action," and so obtain "through suicide" what they could not have hoped to obtain through appeal. Ibid. It is in the interest of justice that this defendant should not be allowed to avoid a conviction for the murder of Odin Lloyd by deliberately, consciously and voluntarily taking his own life.

WHEREFORE, the Commonwealth respectfully requests that the Court deny the defendant's motion to abate his convictions and dismiss the indictments.

RESPECTFULLY SUBMITTED,

THOMAS M. QUINN, III
DISTRICT ATTORNEY

BY: _____

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Dated: May 1, 2017

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Form R-363-07012014

Commonwealth of Massachusetts
Registry of Vital Records and Statistics

DEATH CERTIFICATE ATTESTATION COPY

DECEDENT – NAME FIRST: AARON | MIDDLE: JOSEF | LAST: HERNANDEZ | GENERATIONAL ID:

DATE OF DEATH	SEX	PLACE OF DEATH – CITY/TOWN	DATE OF BIRTH
APRIL 19, 2017	MALE	LEOMINSTER	NOVEMBER 06, 1989

MEDICAL RECORD NUMBER	PLACE OF DEATH
---	HOSPITAL - DOA

HOSPITAL OR OTHER INSTITUTION – NAME: HEALTHALLIANCE HOSPITAL

PART I – CAUSE OF DEATH – SEQUENTIALLY LIST IMMEDIATE CAUSE THEN ANTECEDENT CAUSES THEN UNDERLYING CAUSE

		APPX INTERVAL
a) Immediate Cause	ASPHYXIA BY HANGING	--- MIN.
b) Due to	---	---
c) Due to	---	---
d) Due to	---	---

PART II – OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH: ---

ME NOTIFIED?	AUTOPSY PERFORMED?
YES	YES - ME

AUTOPSY FINDINGS AVAILABLE PRIOR TO COMPLETING CAUSE OF DEATH? NO

MANNER OF DEATH	ME CASE NUMBER	DATE OF INJURY	TIME OF INJURY	INJURY AT WORK?
SUICIDE	2017-5201	APRIL 19, 2017	UNKNOWN	NO

PLACE OF INJURY	TRANSPORTATION INJURY
PRISON CELL	---

LOCATION/ADDRESS OF INJURY: 1 HARVARD ROAD, SHIRLEY, MASSACHUSETTS 01464

DESCRIBE HOW INJURY OCCURRED: HANGED HIMSELF

DID TOBACCO USE CONTRIBUTE TO DEATH? NO

APPX TIME OF DEATH: 04:07 AM

IF FEMALE, PREGNANCY STATUS AT TIME OF DEATH: ---

ME DATE PRONOUNCED: APRIL 19, 2017

ME TIME PRONOUNCED: 04:07 AM

MEDICAL CERTIFIER INFORMATION – NAME/TITLE: HENRY M. NIELDS, MD

HOUR OF DEATH: ---

MEDICAL CERTIFIER INFORMATION – ADDRESS: 720 ALBANY STREET, BOSTON, MASSACHUSETTS 02118

LICENSE #: 78065

MEDICAL CERTIFIER DESIGNATION: MEDICAL EXAMINER

MEDICAL CERTIFIER FAX NUMBER TO RECEIVE ATTESTATION FORM	MEDICAL CERTIFIER PHONE NUMBER
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PROVIDER IN CHARGE OF PATIENT'S CARE – NAME/TITLE: ---

RN/PA/NP PRONOUNCEMENT?	IF YES, DATE	IF YES, TIME	PRONOUNCER INFORMATION – NAME/TITLE
NO	---	---	---

On the basis of examination and/or investigation in my opinion death occurred at the time, date, and place and due to the cause(s) stated.

/s HENRY M. NIELDS, MD

DATE SIGNED (MM/DD/YYYY): APRIL 20, 2017