No. SJC-12989

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH

vs.

ABDIRAHMAN YUSUF

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK COUNTY SUPERIOR COURT

AMENDED BRIEF FOR DEFENDANT-APPELLANT ABDIRAHMAN YUSUF

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ISSUE PRESENTED

Whether the Fourth Amendment to the United States Constitution and article 14 of the Massachusetts Declaration of Rights forbid police from videotaping the inside of every home to which they are admitted for any purpose, archiving and preserving those recordings forever, and reviewing them without a warrant any time any officer believes they may be pertinent to any ongoing investigation.

STATEMENT OF THE CASE

On June 28, 2017, a Suffolk County grand jury returned indictment #17-455, charging Abdirahman Yusuf with unlawful possession of a firearm, G.L. c.269, §10(h), having previously been convicted of a violent crime, *see* G.L. c.269, §10G; possession of a large-capacity firearm, G.L. c.269, §10(m); and unlawful possession of ammunition, G.L. c.269, §10(h) (R18–21).[1] Mr. Yusuf was arraigned on July 20, 2017, and pleaded not guilty (R3).

Mr. Yusuf filed a motion to suppress the evidence against him on July 12, 2018 (R22). An evidentiary hearing was held on September 5, 2018, before Judge Michael Ricciuti (R9). On September 24, the motion judge issued a written memorandum and order denying the motion (R39/A37).

On May 7, 2019, Mr. Yusuf waived his right to a jury trial in a colloquy with Judge Robert Tochka (R13). The trial judge heard evidence on May 7 and May 17, and took the case under advisement (R 13–14). On May 23, 2019, he found Mr. Yusuf guilty of unlawfully possessing a firearm and ammunition, but not guilty of possessing a

[1] "R" refers to the record appendix, "A" to this brief's addendum, "Tr" to the trial transcript, and "M" to the motion hearing transcript.

large-capacity firearm (Tr.3/3). No evidence was presented on the sentencing enhancement, and a not guilty finding entered as to that portion of the indictment (Tr.3/9). The judge sentenced Mr. Yusuf on count 1 to a term of two years in the house of correction, with a year of probation to follow on count 3 (Tr.3/8). Mr. Yusuf's timely notice of appeal was docketed on June 3, 2019 (R16,60). Following the allowance of Mr. Yusuf's application for direct appellate review, the matter was entered in this Court on July 23, 2020.

STATEMENT OF FACTS

Two brothers, Abdie and Yusuf Yusuf,[2] were charged with firearm offenses following the execution of a search warrant at the Dorchester apartment where they lived with their parents and the rest of their family. The warrant was the culmination of an investigation of Abdie by the Boston Police Department's Youth Violence Strike Force, also known as the Gang Unit (R40/A38). Officers in that unit believed that Abdie regularly possessed firearms, based in part on their monitoring of social media. In particular, beginning in June of 2016, police regularly viewed and recorded videos posted to a Snapchat account with the username "dee.fazo," several of which appeared to show Abdie handling firearms (R41/A39). Abdie was stopped and frisked on a number of occasions during that timeframe, but was never found to be carrying a gun (R44/A42).

In late 2016 or early 2017, Gang Unit Detective Brian Ball sent a "friend" request to the "dee.fazo" Snapchat account using an undercover Snapchat account (R41/A39). The request was accepted, and

[2] For ease of reference, this brief adopts the motion judge's use in his order of the brothers' first names to distinguish between them.

Ball began monitoring the account and preserving videos from it by playing them on one cellphone and recording them with another (R 41/A39). Several of the videos Ball preserved included images of Abdie with what appeared to be firearms (R42/A40). On February 25, 2017, Ball viewed one such video showing Abdie holding a gun in what looked like a bedroom, with a "distinctive curtain" behind him (R42/A40). Based on the video's appearance in the Snapchat interface and his experience with the application, Ball believed that the video had been recorded in the past 24 hours (R42/A40).

Detective Ball then attempted to develop probable cause as to the location where Abdie possessed the gun by viewing footage captured on February 10, 2017, by another police officer's body-worn camera when that officer responded to a call for a domestic disturbance at the Yusufs' apartment at 1 Ames Street in Dorchester (R43/A 41). A body-worn camera looks like a black box with a lens in the middle, and is worn in the center of a police officer's chest (M.46). When it is actively recording, a red light on it illuminates and it periodically emits an audible beep (R43/A41). Officers who are assigned bodycams upload their footage to a Boston Police Department hard drive at the end of each shift (M.51). The footage is then saved "forever," and can be "accessed if it's requested as a result of an ongoing investigation" (M.108,110).

Ball testified that he was not present when the bodycam footage was captured, but had been informed about its existence by Officer Brian Delahanty, who had burned it from a Boston Police Department hard drive onto a DVD that he kept in his desk, presumably after submitting such a request (M.43,45). Officer Delahanty did not

testify at the motion hearing, but Gang Unit Sergeant Detective Steven Broderick explained that as part of their investigation of Abdie, the unit "reviewed … calls for service for [his] address," and noticed that there had been a call from that address and that one of the responding officers was equipped with a body-worn camera (M.111). Detective Ball testified that when he heard that footage existed showing the inside of Abdie's home, he immediately knew it "could be relevant at some point to a possible search warrant" (M.53).

The bodycam footage was provided to the motion judge at the hearing (M.22), and a copy has been filed for this Court's review. It shows the officer wearing the camera arriving at 1 Ames Street to find other officers already present, speaking with two women on the first floor. One of the women appears to be Abdie's sister. She tells police that Abdie and his girlfriend have been "doing too much arguing," that she wants Abdie's girlfriend to leave, and that "they said they're getting dressed." The officer then goes up the stairs into the hallway outside Abdie's bedroom. Abdie is standing in the doorway to his bedroom, and his girlfriend can be seen in the bedroom zipping up the outer layer of her clothing. When the officer asks what's happening, Abdie reiterates that his girlfriend is "getting dressed and they're rushing her. Can she get dressed?" Once Abdie's girlfriend is fully dressed, police escort her and Abdie down the stairs, past Abdie's sister, and out of the house. During the course of these events, no one appears to notice the existence of the body-worn camera, and there is no discussion of it by anyone in the apartment. The motion judge found that "[n]o one at the [a]partment gave permission to the police to use the body-worn camera" (R43/A41).

When he compared the February 10 bodycam footage to the February 25 Snapchat video, Detective Ball believed that the curtain that can be seen through the door of Abdie's bedroom in the bodycam footage looked the same as the curtain behind Abdie in the Snapchat video (R43/A41). He therefore applied for a warrant to search the apartment at 1 Ames Street (R31). The warrant issued on February 27, 2017, and was executed on March 2 (R30,38). Various items were seized from the apartment, including the items that Abdie eventually was convicted of unlawfully possessing (R38).

SUMMARY OF THE ARGUMENT

The warrantless creation, retention, and analysis of video footage of the inside of Abdie's bedroom violated his constitutional right to be secure in his house against unreasonable searches. The filming of the inside of Abdie's bedroom was a search of his house both because it was accomplished by means of a physical intrusion, and because it impinged on his reasonable expectation of privacy in his home. *Infra*, at 17–18. In addition, the subsequent inspection of the footage for investigative purposes unrelated to the reason for the officer's presence in Abdie's home constituted a new, independent intrusion on his reasonable expectation of privacy that required a separate constitutional justification. *Infra*, at 23–24. *Any* warrantless search of a house is presumptively unreasonable and unconstitutional. Because no warrant was ever obtained, these searches of Abdie's home were unlawful. *Infra*, at 24–25.

The judge's conclusion that the recording was permissible simply because the officer who shot it was lawfully present in the house was error. Video recording the inside of someone's home is a

significantly greater intrusion on their privacy than simply entering the house in order to accomplish a particular task. *Infra*, at 18–23. Because no one gave permission for (or apparently even knew about) this invasion of the Yusufs' privacy, the officer's filming exceeded the scope of his consent to enter the home, and his physical intrusion was unlicensed and unreasonable to the extent it involved that filming. *Infra*, at 25–28. Nor could any emergency or exigency justify the recording, since it was not necessary to record the encounter in order to address the situation at hand. *Infra*, at 28–30.

It may be that the Constitution does not categorically forbid programmatic warrantless, suspicionless, nonconsensual filming of police responses to citizens' homes. Indeed, public policy may counsel in favor of a comprehensive police bodycam program in order to promote accountability and public trust. But in order for such a program to pass constitutional muster, it must be strictly divorced from the general police interest in law enforcement. The program implemented by the Boston Police Department, by which footage is archived and retained forever, and is readily available to any officer who believes it may assist in any ongoing investigation, impermissibly upsets the balance between individual freedom and government surveillance. A constitutional bodycam program ideally should incorporate limits on the retention of footage and severe restrictions on the permissible uses to which the footage may be put; the primary use of the footage should always be in service of the non–law enforcement purposes of the bodycam program. At the very least, inspection of a recording of the inside of someone's home offends constitutional principles in the absence of a warrant. *Infra*, at 30–35.

Argument

Abdie's motion to suppress should have been allowed because the warrantless creation, retention, and inspection of video footage of the inside of his bedroom violated his constitutional rights.

Abdie moved to suppress the evidence found when the warrant was executed, arguing, as pertinent to this appeal, that "[t]he video of the interior of [his] residence was obtained without a warrant, and should therefore be ... suppressed from consideration in support of [Detective] Ball's application for a search warrant" (R23). *See Commonwealth v. DeJesus*, 439 Mass. 616, 625 (2003) (unlawfully obtained information must be excluded from assessment of whether affidavit establishes probable cause to issue warrant). Abdie argued that the recording of the footage exceeded the scope of his sister's consent for police to enter their apartment, and that the subsequent retrieval and viewing by police of footage of the inside of Abdie's home violated his reasonable expectation of privacy (R23).

As Abdie argued below, without the bodycam footage to connect the Snapchat video to Abdie's bedroom, Detective Ball's affidavit fails to establish a nexus between any suspected contraband and the apartment at 1 Ames Street. *See DeJesus*, 439 Mass. at 626 (analyzing affidavit to determine whether, when stripped of references to unlawfully obtained evidence, it "contain[ed] sufficient information for an issuing magistrate to determine ... that the items reasonably may be expected to be located in the place to be searched"). *See generally Commonwealth v. Escalera*, 462 Mass. 636, 641–643 (2012) (discussing "nexus" requirement). Thus, if the bodycam footage was unlawfully obtained, the items seized pursuant to the search warrant must be suppressed as fruit of the poisonous tree. *See DeJesus*, *supra*.

The motion judge rejected Abdie's arguments and denied the motion. He held that the scene at 1 Ames Street on February 10 was too "chaotic" to reasonably expect the officer wearing the bodycam to obtain consent before filming the inside of Abdie's home (R49/A 47). The judge did not conduct any meaningful analysis of Abdie's claim that his reasonable expectation of privacy had been violated by the subsequent warrantless access to and use of the footage for investigative purposes unrelated to the reason the police had been admitted into his home. Instead, the judge merely asserted that the claim was "unsupported by any law on point," and declined to engage with the underlying legal principles "[i]n the absence of further guidance from the Appeals or Supreme Judicial Courts" (R51/A49).

In reviewing the judge's rulings, this Court must "accept [his] subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Tremblay*, 480 Mass. 645, 652 (2018), *quoting Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). Here, that independent review must lead to reversal. Abdie's sister's request for police to enter their apartment in order to remove Abdie's girlfriend from the premises did not reasonably convey permission for them to film the inside of Abdie's bedroom. And even if the recording had been permissibly made, the Gang Unit's subsequent access to it and investigative use of it was still a significant invasion of Abdie's privacy. Absent a warrant, such an invasion is unreasonable; it violated Abdie's rights under the Fourth Amendment to the United States Constitution and article 14 of the Massachusetts Declaration of Rights.

A. *Both the filming of the inside of Abdie's house and the later inspection of the footage by the Gang Unit were searches requiring constitutional justification*.

The Fourth Amendment and art. 14 protect the people of Massachusetts against "unreasonable searches" of their persons, houses, and possessions, by the government. Analysis of a claimed violation of these provisions begins by asking "whether a search in the constitutional sense took place." *Commonwealth v. Porter P.*, 456 Mass. 254, 259 (2010). Although the motion judge's order is not entirely clear on this point, his analysis suggests that he entertained doubts as to whether the creation and review of footage of the inside of Abdie's home constituted "searches" at all. Both did. And in the absence of either a warrant or some exception to the warrant requirement, both searches were unreasonable and therefore unconstitutional.

1. *The bodycam footage is "information" obtained through an "unlicensed physical intrusion" into Abdie's home*.

"When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 569 U.S. 1, 5 (2013), *quoting United States v. Jones*, 565 U.S. 400, 406 n.3 (2012). *Accord Commonwealth v. Leslie*, 477 Mass. 48, 49 (2017) ("analytical framework set out in *Jardines*" also applies to art. 14). The bodycam footage certainly is "information" that was obtained by police. "And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Jardines*, 569 U.S. at 6. More specifically, as discussed further *infra*, although police were lawfully admitted to Abdie's house for one purpose—to

remove his girlfriend from the house—they were *not* given permission to film the inside of his home for a later, completely unrelated, investigative use. Their "physical intrusion" into the house was therefore "unlicensed" insofar as it involved that filming. *Id.* at 7.

2. *The creation, indefinite retention, and later review of a video recording of the inside of a person's home intrude on that person's reasonable expectation of privacy*.

In addition to that straightforward "physical intrusion" analysis, a "search" also occurs any time an agent of the state intrudes on an individual's "reasonable expectation of privacy." *Porter P.*, 456 Mass. at 259, *citing California v. Ciraolo*, 476 U.S. 207, 211 (1986). "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *United States v. Karo*, 468 U.S. 705, 714 (1984). *See also Porter P.*, 456 Mass. at 260, *citing Kyllo v. United States*, 533 U.S. 27 (2001). Contrary to the motion judge's apparent conclusion, both the video recording of the inside of Abdie's house, and the Gang Unit's later retrieval and review of that footage, infringed on Abdie's reasonable expectation of privacy.

a. *A police officer videotaping the inside of someone's home is a much more significant intrusion on that person's privacy than the officer's mere presence*.

The motion judge's fundamental error was his apparent assumption that there is no difference, in terms of the intrusion on a person's reasonable expectation of privacy, between a police officer being present inside the person's home, and his video recording the interior of that home and preserving the recording "forever" (M.108) for later perusal and investigative use. But as this Court acknowl-

edged almost twenty years ago, the "intrusiveness" of a search of a home surely is enhanced by recording. *Commonwealth v. Balicki*, 436 Mass. 1, 11–12 (2002). "It is one thing to be present in a home" for a valid law enforcement purpose, "and of necessity ... in a position cursorily to notice many of its contents." *Id.* at 12. "It is quite another to inspect the contents of a home and to create a permanent record of it for inspection by police, prosecutors, expert witnesses, and others at any time in the future." *Id.* "This record can be played and replayed as many times as necessary or desired, and the images can be focused or enlarged to show each detail of every item in that citizen's home." *Id.* The intrusion occasioned by filming a police entry into a home is thus not only significant at the time it occurs, but remains so on an ongoing basis for as long as the video is retained. And the privacy harm is renewed when that video is later viewed.

The concerns animating this Court's analysis in *Balicki* gain even greater force in the context of the programmatic recording of ever more police interactions as the use of bodycams is steadily expanded. *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2218–2219 (2018), *citing Kyllo*, 533 U.S. at 36 (rule adopted must take ongoing advances in law enforcement surveillance technology into account). The permanent retention of bodycam footage will result, over time, in the creation of a vast archive of recordings of the inside of every home to which any officer has been admitted for any purpose, to which police have ready access any time they believe it may be pertinent to an ongoing investigation. As with other novel surveillance technologies, this risks running afoul of "the founders' intention 'to place obstacles in the way of a too permeating police surveillance.'"

Commonwealth v. McCarthy, 484 Mass. 493, 499 (2020), *quoting Carpenter*, 138 S. Ct. at 2214. Indeed, the privacy risks here are potentially greater than those occasioned by "technological advances in the surveillance of public space," *McCarthy*, 484 Mass. at 501, because they involve the creation of detailed records of the interiors of citizens' homes. *See Kyllo*, 533 U.S. at 37 ("In the home, ... *all* details are intimate details, because the entire area is held safe from prying government eyes"); *Camara v. Municipal Court*, 387 U.S. 523, 529 (1967), *quoting Johnson v. United States*, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance").

The judge's blithe assumption that the creation and retention of an indelible recording of a police entry into a private home poses no threat to privacy so long as police "photographed only what they saw in fulfilling their duties" (R50/A48) blinks reality. As the use of bodycams becomes commonplace, and particularly as advancing technology enables automated scanning of mountains of digital footage (potentially including facial recognition technology), such a holding would fail "to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,'" and instead "would leave homeowners 'at the mercy of advancing technology.'" *Carpenter*, 138 S. Ct. at 2214, *quoting Kyllo*, 533 U.S. at 34–35.[3] This is because, "in the pre-computer age, the great-

[3] As to whether the framers of art. 14, the Fourth Amendment, or particularly the Fourteenth Amendment (through which the Fourth was made applicable to the States), would have considered photog-

est protections of privacy were neither constitutional nor statutory, but practical." *McCarthy*, 484 Mass. at 499, *quoting Jones*, 565 U.S. at 429 (Alito, J., concurring). The degree of privacy previously secured not by law but merely by law enforcement's pragmatic limitations "must be preserved and protected as new technologies are adopted and applied by law enforcement" that enable previously impracticable infringements on privacy. *McCarthy*, 484 Mass. at 498, *quoting Commonwealth v. Almonor*, 482 Mass. 35, 41 (2019).

As this Court knows, "human memory does not function like a video recording." *Commonwealth v. Gomes*, 470 Mass. 352, 369 (2015). An officer responding to a domestic disturbance, while he may "cursorily" observe the house's décor, *Balicki*, 436 Mass. at 12, is highly unlikely to retain a detailed memory of the patterns on the curtains of a bedroom he stood outside of for less than twenty seconds. This is an example of the type of "practical" privacy safeguard lost when police are equipped with cameras that permanently record everything in their line of sight—including things they did not even see or notice at the time—for later inspection and analysis. *See United*

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raphy a more significant intrusion on privacy than mere observation, a clue may be found in Samuel Warren and Louis Brandeis's seminal article on the concept of privacy in American law. That article expressed alarm that "[i]nstantaneous photographs ... have invaded the sacred precincts of private and domestic life," and noted, with citations contemporaneous to the drafting of the Fourteenth Amendment, that "[f]or years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). *See also id.* at 213 ("The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for" a legal remedy).

States v. Johnson, 314 F. Supp. 3d 248, 255, 257 (D.D.C. 2018) (bodycam footage "by its nature contains a wealth of information that would not ordinarily be captured by more traditional materials, like written police reports," including "sensitive information in which witnesses and others depicted on the footage have a legitimate privacy interest"). *Cf. Commonwealth v. Eason*, 427 Mass. 595, 600–601 (1998) (audio recording presents distinct constitutional issue from police memory of overheard conversation).

Contrary to the motion judge's apparent conclusion, the mere fact that the officer was lawfully present at the time he made the recording does not obviate the Yusufs' privacy interest against photography of the inside of their home. *See, e.g.*, *Jardines*, 569 U.S. at 8–9 (opinion of the Court), 13–15 (Kagan, J., concurring) (lawfulness of officer's presence on front porch not dispositive of reasonableness of dog sniff conducted there); *Commonwealth v. Panetti*, 406 Mass. 230, 234 (1989) (officer eavesdropping on conversation from crawl space under apartment floor violated resident's reasonable expectation of privacy, even though officer was lawfully present in crawl space). *See also Florida v. Riley*, 488 U.S. 445, 464–465 (1989) (Brennan, J., dissenting) (noting agreement of majority of Court that reasonableness of homeowner's expectation of privacy against aerial surveillance does not depend on lawfulness of police presence in location from which they make observations), *and compare Dow Chemical Co. v. United States*, 476 U.S. 227, 237–238 & n.4 (1986) (approving aerial surveillance photography of *commercial* property in light of reduced expectation of privacy as compared to home and curtilage), *with Ciraolo*, 476 U.S. at 212–213 & n.1 (declining to pass on constitu-

tionality of aerial *photography* of home's curtilage even while holding "naked-eye observation" permissible).

b. *The subsequent inspection of the footage by other officers for purposes unrelated to its initial creation was a new and separate intrusion on Abdie's reasonable expectation of privacy in his home.*

Moreover, the retention of the footage of the inside of Abdie's home and its later retrieval and review by other officers for investigative purposes totally unrelated to the domestic disturbance that occasioned its creation constituted an independent infringement of Abdie's reasonable expectation of privacy. In examining technological advances that permit law enforcement to collect data that may reveal private details about citizens' lives, this Court has held that both the collection of the data *and* its subsequent retention and analysis are events of potential constitutional import that must be separately analyzed. *See, e.g.*, *McCarthy*, 484 Mass. at 506 (noting constitutional implications of "one-year retention period" for license plate reader data); *id.* at 513 (Gants, C.J., concurring) (suggesting that warrant may be required before police may analyze their own lawfully collected data if such analysis would violate reasonable expectations of privacy); *Commonwealth v. Norman*, 484 Mass. 330, 333 (2020), *citing Commonwealth v. Johnson*, 481 Mass. 710, 715 (2019) (even if initial collection of GPS data was constitutional, later analysis of it may still require warrant); *Commonwealth v. Arzola*, 470 Mass. 809, 817–818 (2015), *citing Maryland v. King*, 569 U.S. 435, 464–465 (2013) (DNA analysis of lawfully seized evidence could require warrant depending on what information will be obtained). *See also Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (requiring war-

rant for blood test but not breath test, in part because retention of blood sample gives rise to "potential" for future testing that could reveal private information, which "may result in anxiety"); *Landry v. Attorney General*, 429 Mass. 336, 354 (1999) ("indefinite storage" of DNA sample "creates some concern that the samples could be misused at some point in the future").

The same is true here. The availability of video footage of the inside of someone's home for viewing and analysis by any police officer who believes it may, if studied carefully enough, furnish some evidence of a crime, implicates serious privacy interests. The invasion of privacy entailed by the Gang Unit's acquisition and inspection of the bodycam footage was different both in degree and in kind from that previously accomplished by another officer's mere presence in Abdie's home. *See Balicki*, 436 Mass. at 11–12. *See also Camara*, 387 U.S. at 537 (search "aimed at the discovery of evidence of crime" is more invasive). Indeed, the ability to slow down, enhance, and magnify video footage potentially makes it possible for police later to discover not only details about the inside of the home that the officer who made the recording *happened* not to notice at the time, but also those that he *could not* have noticed. *See Karo*, 468 U.S. at 715 (search occurs when government uses surveillance technology to obtain information about interior of home "that it could not have otherwise obtained without a warrant").

The Gang Unit's acquisition and inspection of the footage therefore was itself a search requiring an independent constitutional justification. Given the absence of any exigency that would have prevented the Gang Unit from obtaining a warrant, their warrant-

less review of the footage violated the Fourth Amendment and art. 14. *See Almonor*, 482 Mass. at 47 n.15 ("As always, governmental conduct that invades reasonable expectations of privacy is ordinarily not permitted without a warrant, regardless of how such an invasion takes place"). *Cf. Riley v. California*, 573 U.S. 373, 392–393 (2014) (warrant required for search conducted at time of arrest if it entails "substantial additional intrusion on privacy beyond the arrest itself").

B. *The recording of the inside of the Yusufs' apartment was unconstitutional because it exceeded the scope of the permission granted to police to enter the home.*

"With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. *Accord, e.g.*, *Commonwealth v. Kaeppeler*, 473 Mass. 396, 400–401 (2015). The actions of whatever police officer entered and filmed the inside of the Yusufs' home on February 10, 2017, therefore constituted a presumptively unlawful warrantless search, which the Commonwealth bore the burden of justifying by showing that it fell within one of the few "jealously and carefully drawn" exceptions to the warrant requirement. *Commonwealth v. Tuschall*, 476 Mass. 581, 589 (2017), *quoting Jones v. United States*, 357 U.S. 493, 499 (1958).

The exception that applied to legitimize the officer's *entry* into Abdie's home was that Abdie's sister consented to it. There is no question that she was empowered to invite the police into the home that she also shared. *See Georgia v. Randolph*, 547 U.S. 103, 109 (2006). But it does not necessarily follow that the officer was thereby empowered to create, and preserve indefinitely, video documentation of the inside of the Yusufs' apartment. As discussed *supra*, the video

recording of the officer's search of the Yusufs' home rendered that search considerably more intrusive. And, as the motion judge acknowledged (R43/A41), no one had consented to that enhanced intrusion on the family's privacy.

"A search that is based on consent may not exceed the scope of that consent." *Commonwealth v. Ortiz*, 478 Mass. 820, 824 (2018), *citing Commonwealth v. Cantalupo*, 380 Mass. 173, 178 (1980) ("Because consent can legitimize what would otherwise be an unreasonable and illegal search, a search with consent is reasonable and legal only to the extent that the individual has consented"). And "[t]he scope of a search is generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). *See also Jardines*, 569 U.S. at 9 ("The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose").

The expressed object of the entry to which Abdie's sister consented was the removal of Abdie's girlfriend from the house. The officer's use of a bodycam to film the entire interaction was not necessary to accomplish that purpose. Certainly, no one would expect another professional invited into the home to accomplish a particular task—a plumber, say, or a cable installer—to videotape the service call without asking permission first. *Cf. Jardines*, 569 U.S. at 8 & n.2 (absent a warrant, police have no lawful authority to do anything that would not be "expected of ordinary visitors"). Just as, in *Jardines*, the fact that the officer was lawfully permitted to approach the front door and knock did not also permit him to conduct a dog sniff on the front porch, 569 U.S. at 8–9, so too here, the fact that the officer was lawfully permitted to enter the apartment to assist in de-

fusing the situation inside did not also permit him to film it. *See id.* at 7 ("an officer's leave to gather information is sharply circumscribed when he steps off [public] thoroughfares and enters the Fourth Amendment's protected areas").

The additional intrusion on the sanctity of Abdie's home that was occasioned by the use of the bodycam exceeded the scope of his sister's consent, and therefore was unreasonable. *See id.* at 9 ("Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics"). *Accord, e.g.*, *Commonwealth v. Gray*, 465 Mass. 330, 343–344 (2013) ("Although the police lawfully entered the apartment based on Alecia's consent, her consent did not thereby give police further permission to conduct a search of the premises"); *Commonwealth v. Augello*, 71 Mass. App. Ct. 105, 107 n.4, *S.C.*, 452 Mass. 1021 (2008) ("Allowing the police to enter the apartment to speak with them is not the same as giving permission to search the apartment"); *Commonwealth v. Thomas*, 67 Mass. App. Ct. 738, 741–742 (2006) (arrestee's request for police to lock his door did not permit them to search drawer in his bedroom for keys; scope of permissible police activity "limited to acts reasonably necessary to comply with the defendant's oral request to lock the apartment").

Moreover, even if Abdie's sister *had* given police permission to film, it is far from apparent that such consent would be valid as to the inside of Abdie's bedroom. "The reasonableness of a consent search 'is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.'" *Porter P.*, 456 Mass. at 262–

263, *quoting Randolph*, 547 U.S. at 111. And while there is a common understanding that one resident of a home may invite a visitor to enter, few would expect such an invitee to roam throughout the house and memorialize the contents of the other residents' private rooms for later perusal by his colleagues. *Cf. Commonwealth v. Lopez*, 458 Mass. 383, 399 (2010) (Gants, J., concurring) (discussing limitations on individuals' authority to consent to searches of parts of their homes that are occupied by others). This transgression of the "background social norms" that give shape to the broadly worded text of the Fourth Amendment and art. 14, *Jardines*, 569 U.S. at 9, rendered the filming of the inside of Abdie's room (where, it may be noted, his girlfriend was still getting dressed when the camera arrived) unreasonable and unconstitutional.

C. *The filming was not justified by the other exceptions to the warrant requirement alluded to by the motion judge.*

The motion judge grounded his holding that the filming was lawful in part on a kind of exigency analysis, opining that "[t]here was no reasonable opportunity for, or any rational reason to require, the police to halt their efforts to control what could have been a violent situation by seeking and obtaining consent—presumably from all of the angry parties—to permit recording" (R49/A47). Respect for the constitutional privacy interests of individuals in their homes—where "*all* details are intimate details," *Kyllo*, 533 U.S. at 37—would seem to be a sufficiently "rational reason" for requiring police to obtain consent before filming the inside of someone's house. And exigent circumstances cannot justify an intrusion on the privacy of the home absent probable cause of a crime, which no one

has ever contended was present here. *See Commonwealth v. Arias*, 481 Mass. 604, 615 (2019). Nor was the officer confronted with an emergency that required him and his camera (as opposed to other officers already on the scene) to intervene without delay.

Moreover, even assuming that the circumstances confronting the responding officers *had* been sufficient to trigger the emergency aid or exigent circumstances doctrines, those exceptions to the warrant requirement are to be "narrowly construed." *Arias*, 481 Mass. at 614–615. *See also id.* at 610 ("the search must not exceed the scope of the emergency"). As noted *supra*, there was no need to record the encounter in order to address the situation at hand; refraining from filming the inside of the Yusufs' home without their consent would not have required police to "halt their efforts to control" the situation (R49/A47). Indeed, had none of the responding officers been equipped with a bodycam, there is no reason to believe any part of the encounter would have gone any differently. And any exigency presented on February 10 *certainly* did not require indefinite retention of the recording, or warrantless access to it by other officers for an entirely unrelated investigation.

It has long been established that a search conducted pursuant to *any* of the exceptions to the warrant requirement must be "strictly circumscribed by the exigencies which justify its initiation." *Randolph*, 547 U.S. at 113 n.3, *quoting Mincey v. Arizona*, 437 U.S. 385, 393 (1978). *See also Wilson v. Layne*, 526 U.S. 603, 611 (1999), *quoting Maryland v. Garrison*, 480 U.S. 79, 87 (1987) ("The purposes justifying a police search strictly limit the permissible extent of the search"). Both this Court and the Appeals Court have repeatedly held unconstitu-

tional any police action more intrusive than necessary to deal with the emergency at hand. *See, e.g.*, *Kaeppeler*, 473 Mass. at 403–405; *Gray*, 465 Mass. at 345; *Commonwealth v. Entwistle*, 463 Mass. 205, 217 (2012); *Commonwealth v. Suters*, 90 Mass. App. Ct. 449, 457 (2016); *Commonwealth v. Sondrini*, 48 Mass. App. Ct. 704, 706–707 (2000); *Commonwealth v. Bass*, 24 Mass. App. Ct. 972, 974 (1987). And as discussed *supra*, the excessiveness of the intrusion here was substantial. The motion judge erred by failing to recognize that fact.

D. *The public policy concerns animating the motion judge's conclusion that the recording was lawful cannot justify programmatic suspicionless filming of the insides of people's homes for general law enforcement purposes.*

The motion judge's ruling was also motivated in part by his belief that the public policy considerations underlying the use of bodycams militate in favor of recording police interactions, even when they occur in private homes. In the judge's words, "[o]ne of the purposes of the body-worn camera is to ensure that police act in accordance with the law under tense circumstances like these; the law encourages, and does not prohibit, its use here" (R49–50/A47–48). The judge cited no authority for the proposition that "the law encourages" police to record the insides of people's homes during service calls without notice or consent.

As an initial matter, it is hardly self-evident that the public policy concerns driving the adoption of bodycams would be advanced by a holding that police may record everything they see and hear, archive those recordings forever, and review them whenever they think it might be useful to any ongoing investigation. "The purpose of body-worn-camera footage," even on the motion judge's account-

ing, is not general crime detection or prevention, but instead "is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building." *Patrolmen's Benevolent Ass'n of N.Y. v. De Blasio*, 171 A.D.3d 636, 637 (2019). *Accord* R50/A48 (describing purpose as ensuring lawfulness of police conduct). But if every encounter with a police officer may be recorded, preserved forever, and later painstakingly analyzed in the hope that it may furnish evidence of a crime unrelated to the encounter itself, citizens may justifiably hesitate before calling police for assistance or inviting them into their homes. Rather than furthering the "key objectives" of "accountability" and "public trust-building," *id.*, the motion judge's holding actually may threaten to undermine them.

In any event, general public policy considerations cannot trump enumerated constitutional rights. *See Wilson*, 526 U.S. at 612 ("Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down"). Even where a considered policy judgment is made by the Legislature, this Court "must, as always, provide an independent review of the constitutionality of the governmental conduct that is authorized by statute." *Johnson*, 481 Mass. at 723. And here, there is not even any legislative authorization for the search at issue. Instead, there is nothing more than a decision by the Boston Police Department to equip certain officers with cameras, archive the footage "forever," and allow any officer to access it upon request if they believe it relevant to an investigation (M.108,110).

"The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald v. United States*, 335 U.S. 451, 455–456 (1948). This is why "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." *Id.* at 456. The judge gave no reason why the Gang Unit's inspection of the bodycam footage—which "reveal[ed] a critical fact about the interior of [Abdie's home] that the Government [was] extremely interested in knowing and that it could not have otherwise obtained without a warrant," *Karo*, 468 U.S. at 715—should be exempted from this fundamental principle. *Cf. Johnson*, 481 Mass. at 715 (separately analyzing reasonableness both of initial imposition of GPS monitoring, and of "subsequent review of the historical GPS location data for investigatory purposes"). In fact, as noted *supra*, he did not conduct any reasoned analysis of that inspection at all.

The motion judge's holding essentially permits police to conduct warrantless, suspicionless searches, for general criminal investigative purposes, of any home any officer equipped with a bodycam has ever entered, in the guise of a program to enhance police transparency, accountability, and public trust. But this Court has made clear that "programmatic, suspicionless searches" are permissible "only when [they] minimally invad[e] already diminished expectations of privacy." *Commonwealth v. Feliz*, 481 Mass. 689, 699 (2019). Far from a "minimal" invasion of an "already diminished" expectation of privacy, the Gang Unit's review of footage of the inside of Abdie's bedroom was a significant intrusion on the sanctity of his home—the area where his reasonable expectation of privacy is at its

zenith. The judge's failure to grapple with that fact fatally undermines his scant legal analysis.

It may well be that the public policy considerations identified by the judge could justify *filming* the police action at issue here. But they could only do so if the subsequent *use* of the footage was strictly limited to the non–law enforcement purposes underlying the bodycam program. In that case, the filming potentially could be justified under the "special needs" exception to the warrant requirement. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). The hallmark of that exception is the existence of "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable." *Id.*, *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). The usefulness of bodycam footage in ensuring law enforcement accountability could, perhaps, qualify as such a "special need."

But the essence of the special needs doctrine is a need that is "divorced from the State's general interest in law enforcement." *Ferguson v. Charleston*, 532 U.S. 67, 79 (2001). Hence the holding that "warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.'" *Carpenter*, 138 S. Ct. at 2221, *quoting Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–653 (1995). Programmatic searches that are conducted without a warrant supported by probable cause may not constitutionally be "turned into 'a purposeful and general means of discovering evidence of crime.'" *Florida v. Wells*, 495 U.S. 1, 4 (1990), *quoting Colorado v. Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring). *Compare, e.g.*, *Acton*, 515 U.S. at 658 (drug

testing of students permissible because test results "disclosed only to a limited class of school personnel who have a need to know," are "not turned over to law enforcement authorities or used for any internal disciplinary function"), *with Ferguson*, 532 U.S. at 83 (warrantless drug testing of hospital patients unconstitutional where program "generat[ed] evidence *for law enforcement purposes*").

Abdie assumes *arguendo* that the need to "ensure that police act in accordance with the law" (R50/A48), which the judge concluded was the bodycam program's purpose, could be "important enough to override [his] privacy interest" in not having his bedroom filmed without his express consent. *Chandler v. Miller*, 520 U.S. 305, 318 (1997). Even so, the objectively reasonable expectation of the public logically should be that footage generated through that program will be put to use only for that purpose. *See Commonwealth v. Buccella*, 434 Mass. 473, 485 (2001) (citizens reasonably expect that materials gathered by government for particular purposes will be used "solely for the purposes intended and not disclos[ed] to others in ways that are unconnected with those intended purposes"). *Compare Johnson*, 481 Mass. at 727–728 (probationer should reasonably expect GPS data to be used "to deter and detect criminal activity during the probationary period," but "indiscriminate rummaging" in that data "might raise different, more difficult constitutional questions about objective expectations of privacy, even for a probationer").

This is not to say that, if police have good reason to think that particular bodycam footage contains evidence pertinent to an unrelated investigation, they *never* can get access to that footage. It is merely to say that before they may do so, their "obligation is a famil-

iar one—get a warrant." *Carpenter*, 138 S. Ct. at 2221. Given the serious intrusion on the sanctity of the home occasioned by ready police access to such footage, this is hardly an unreasonable requirement. There has been no suggestion that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara*, 387 U.S. at 533. Nor could there be; where the footage has already been retained and archived, interposition of a neutral magistrate between that footage and general law enforcement "rummaging," *Johnson*, 481 Mass. at 727, would not frustrate the objectives of any well-grounded search.

Conclusion

The unauthorized creation, retention, and analysis of video footage of the inside of Abdie's bedroom intruded on his reasonable expectation of privacy. Because no warrant was obtained and no exception to the warrant requirement applies, his motion to suppress that footage and its fruits should have been allowed.

Respectfully submitted,

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July 31, 2020

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 17-0455
NO. 18-0005

COMMONWEALTH

vs.

ABIRAHMAN YUSUF
YUSUF YUSUF

MEMORANDUM DEFENDANTS' MOTION TO SUPPRESS

The defendant, Abirahman Yusuf ("Abdie"), is charged with firearm offenses arising from the seizure by Boston Police of a firearm and ammunition following execution of a search warrant at his residence located at 1 Ames Street, Apartment 1, Dorchester ("the Apartment"). His brother, Yusuf Yusuf ("Yusuf"), is charged with possession of ammunition and possession of a Class D substance with intent to distribute, also arising from the search. The defendants raise several claims in connection with their motions to suppress the result of the search:

Franks/Amral: Abdie claims that he is entitled to a hearing under either Franks v. Delaware, 438 U.S. 154 (1978) or Commonwealth v. Amral, 407 Mass. 511, 522-23 (1990) because (1) the affiant of the search warrant affidavit omitted mention of numerous Field Interrogation/Observation Reports (FIOs) which showed that Abdie was not in possession of guns on dates before the search, the omission of which misled the magistrate; and (2) the affiant's allegation in the search warrant affidavit that Abdie was likely in possession of a "real" firearm was false or misleading,

Suppression of Evidence Seized Pursuant to a Search Warrant: Abdie moves to suppress the results of the search warrant on several grounds: (1) that the warrant was based on

footage of the Apartment improperly taken with a body-worn camera and improperly preserved by police; (2) that the warrant was based on videos posted by Abdie on a popular cellular phone application called SnapChat which were improperly accessed and improperly recorded; and (3) that since the warrant did not permit photographs to be taken during the execution of the warrant, all such photographs should be suppressed.

Standing: To the extent he has standing, Yusuf seeks to join in Abdie's suppression motion.

Miranda issue: Abdie argues that statements he made at booking should be suppressed as the fruits of the illegality mentioned above or because they were taken in violation of Miranda.

An evidentiary hearing on the motion was conducted on September 5, 2018, after which Yusuf submitted a supplemental memorandum.[1] In light of the arguments made by counsel and the facts presented, and for the reasons stated below, the defendants' motions are **DENIED**.

FINDINGS OF FACT

Boston Police Detective Brian Ball testified. I fully credit his testimony. Ball is a detective in the Youth Violence Task Force, colloquially known as the Gang Unit. He has been a police officer with the Boston Police for almost 16 years, has spent some 2.5 years in the Gang Unit, and specializes in collecting firearm and other evidence in support of cases brought by the Gang Unit through the application for search warrants and otherwise.

In January 2017, the Gang Unit was engaged in an investigation of Abdie, a suspected gang member, and had collected information that Abdie unlawfully possessed firearms. Ball

1 At the conclusion of the hearing, the Court directed the Commonwealth to produce, in camera, the SnapChat identity that its officer used to access Abdie's SnapChat account to determine whether the defense was entitled to further discovery of that information and to assess the Amral claim. After review of that information, the Court has determined that no further discovery is warranted.

became involved in the investigation shortly thereafter, and began monitoring Abdie's SnapChat account. SnapChat is an application used typically with cellular telephones in which users can take photographs and record videos and share them with other users to whom the SnapChat user has granted access as "friends." Ball requested such access in late 2016 or early 2017 using an undercover account and undercover identity. The undercover identity did not use Ball's real name or identify Ball as a police officer; instead, it used a fictitious nickname and substituted an "emoji," a digital cartoon, for a photograph of that user. Abdie, who used the name "dee.fazo" on SnapChat, granted Ball access through this account. Thereafter, Ball monitored the posts on SnapChat that Abdie allowed him to see. While SnapChat videos are usually automatically deleted after 24 hours, others which are posted on the "My Story" portion of the site are not automatically deleted and remain available to the user's "friends" until the user removes them or takes some other action to limit access to them. Ball reviewed those videos and preserved them by playing them with one cellular telephone and recording them using another cellular phone.

Before Ball began monitoring Abdie's SnapChat account, at least two other Boston Police officers had done so since about June 2016. Ball testified that those other officers who monitored Abdie's SnapChat account before him did so following the same procedure that he had followed – using a pseudonym to request Abdie's permission to access his SnapChat account, which Abdie provided. The parties stipulated that Boston Police had viewed and recorded 27 SnapChat videos from Abdie's account, which were dated between June 2016 and February of 2017. Ball reviewed these videos. Several of them showed Abdie with firearms. Indeed, Ball was brought into the investigation to assist the officers in gathering sufficient evidence to establish probable cause to search Abdie for the firearms because there were so many of them in

the videos and the officers (and later Ball) believed the firearms displayed by Abdie were real firearms, not replicas.

After Ball "friended" Abdie, he frequently checked his SnapChat for posts, as Abdie frequently posted videos. Ball did not save all of the videos he watched. Many were of Abdie walking down streets smoking marijuana, which Ball decided were of no evidentiary value, but he deemed others to be significant and recorded them. Some of the videos which were saved were introduced into evidence. They show Abdie displaying guns. One such video includes the caption "I got mine on me too." Another includes the caption "Watch who you call bro." These posts do not appear to be targeted at Abdie's friends, but rather appear to be threats directed at Abdie's rivals, presumably in other gangs, who may be viewing the videos.

On February 25, 2017, Ball viewed a video on Abdie's SnapChat account, which was entered into evidence. It showed Abdie in what appeared to be a bedroom with a gun. Ball was familiar with Abdie and recognized him in the video. The video showed that it had been posted on February 25. SnapChat videos are typically created and posted at the same time. SnapChat reflects the time a video is posted, which typically corresponds to when the video was created. Although it is possible to record a video and post it later, SnapChat videos often provide evidence that this was the case – in most cases, there would be a camera roll icon in the video, showing that the video was posted from the user's archives. Ball did not see this icon in the video posted on February 25 and saw no evidence to suggest the video was created and posted earlier than on February 25. As noted above, it was not unusual that Abdie was displaying a gun during a SnapChat video, as he had done so several times over the previous several months. However, Ball noticed a distinctive curtain in the background of the video.

Ball was aware that a few weeks previously, on February 10, 2017, Boston Police had been called to Abdie's apartment for a domestic disturbance. An officer responding to the call was wearing a body camera. Body-worn cameras of the type used on February 10, 2017, are worn on the chest of the officer, and emit an audible beep and red light. The footage from that camera was preserved by Boston Police and by Ball.[2] A video of that footage was entered into evidence. It showed Boston Police officers entering the Apartment, in which both Abdie and Yusuf lived. No one at the Apartment gave permission to the police to use the body-worn camera. The scene inside was chaotic: two women from the first floor were yelling at and about Abdie and a woman, evidently his girlfriend, on the second floor. The women on the first floor wanted Abdie's girlfriend to leave, but continued yelling about the situation and at the police as the offices tried to remove the girlfriend from the Apartment. As part of that effort, the police interacted with Abdie outside of his bedroom, which was depicted in the video. In Abdie's bedroom hung the same curtain Ball had seen in the SnapChat video. From this, Ball determined that there was probable cause to believe that Abdie had possessed the firearm in the SnapChat video in his bedroom, and did so on February 25.

Because that video showed the location at which Abdie possessed the firearm, Ball focused on it in preparing a search warrant affidavit. On February 27, 2017, Ball applied for and obtained a search warrant for the Apartment. In the search warrant affidavit, Ball noted that the guns Abdie possessed in a number of SnapChat videos were real because Abdie "has been observed on several occasions loading firearms with ammunition," which showed the guns were

2 Another officer, Sergeant Detective John Broderick, became aware of the video from a body-worn camera that related to the Apartment when he saw a call for service at that location and determined that one of the officers was wearing a camera. He requested the footage and said that as far as he knew, the body-worn camera video relied upon in the search warrant affidavit was saved permanently by Boston Police, but could only be accessed if it was requested in an investigation.

not replicas. Further, Ball is an experienced detective who has used, seized, seen and handled firearms and been involved in firearm investigation for some 16 years, and Ball believed the firearms Abdie possessed in the SnapChat videos were real based on their appearance. The affidavit also noted that Abdie was an active member of the Franklin Field gang, had been active in gang violence and firearm activities, and on February 14, 2017, had posted "a video of himself in a rival gang's territory" on SnapChat, minutes after which there was a shooting in that area.[3] Shortly after the shooting, Abdie posted a video on SnapChat alluding to the shooting. Further, on February 17, 2017, officers believed Abdie had a gun when he exited 1 Ames Street and entered a car. When officers tried to stop the vehicle, it escaped at a high rate of speed. The affidavit added that Abdie was neither licensed to carry a firearm nor old enough to do so.

Prior to the search, Abdie was subject to several Field Interrogation Observation ("FIO") interactions with the police, in which he came into contact with the police. The police documented these encounters in FIO Reports.[4] In none of those interactions were firearms seized from Abdie. Abdie had also posted numerous videos showing him in possession of firearms, but none had been recovered from him. Ball did not include these facts in the search warrant affidavit.

The search warrant was executed on March 2, 2017. The warrant and supporting affidavit were submitted into evidence. Ball took part in the execution of the warrant. During the search, officers recovered a firearm and found narcotics throughout the apartment. They

3 As part of his claim for a Franks/Amral hearing, Abdie claims that the affidavit described this shooting as "confirmed" but that police reports did not yield ballistics or evidence of it. Abdie, however, submitted no evidence on this point. The Court thus does not address it.

4 See, e.g., Commonwealth v. Warren, 475 Mass. 530, 532 n. 5 (2016) (citation omitted) ("'A "field interrogation observation" (FIO) has been described as an interaction in which a police officer identifies an individual and finds out that person's business for being in a particular area.' FIOs are deemed consensual encounters because the individual approached remains free to terminate the conversation at will").

found ammunition and marijuana in what they understood to be Yusuf's bedroom. Yusuf and Abdie were arrested at the scene. The search warrant did not seek to seize the curtains in Abdie's bedroom, and they were not seized. Photographs were taken during the search, but were not listed on the search warrant return.

Sergeant Detective John Broderick testified. I fully credit his testimony. Broderick has 25 years of experience with the Boston Police Department. He was part of the team that executed the search warrant at the Apartment on March 2, 2017. There were five to eight people in the apartment, including Abdie and Yusuf. Broderick showed the warrant to the parents of Abdie and Yusuf and explained what the officers were doing. He then read all of the occupants, who had been gathered in the living room, their Miranda rights from a Miranda card, reading the warnings line by line. Yusuf and Abdie were present while he did so. Neither made any statements. Broderick was not present at the booking of Abdie and Yusuf. Broderick did not think Abdie's demeanor was confrontational, although Abdie was upset. Yusuf was calm and cooperative.

Detective Stephen Ridge testified. I fully credit his testimony. Ridge has been a Boston Police Officer for 25 years, 16 of them as a detective. On March 2, 2017, he was present during the booking of Yusuf and Abdie. They were booked at the same time. Each was searched and asked booking questions. During that process, Abdie told the booking officer not to charge Yusuf with ammunition because "it was mine." Abdie also said he was glad the police only found one gun, and glad that "I got that sh--t out of there." These statements were unprompted by any questions. Ridge described Abdie's demeanor as gentlemanly when he claimed the ammunition was his, but "fresh" when he claimed that the police failed to seize more weapons.

The defense called Daniel Loper. Loper is a consultant in digital forensics. In that role, he analyzes computers, laptops, and cellphones for digital content. He has conducted investigations involving SnapChat for over 3 to 4 years and was familiar with SnapChat's security settings. He testified that a user can post videos on SnapChat and select the "friends" who are permitted to see it, or post the video on the "My Story" section, which he claimed would automatically delete after 24 hours. He added that the "My Story" settings can limit access to videos to a select number of "friends," but that if a "friend" could view the video, that friend had access to it.

CONCLUSIONS OF LAW

1. Standing

Yusuf is charged with the possession of drugs and ammunition. For possessory offenses, a charged defendant has automatic standing to challenge the seizure. See Commonwealth v. Amendola, 406 Mass. 592, 601 (1990) ("[w]hen a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence"); Commonwealth v. Frazier, 410 Mass. 235, 243 (1991) ("[t]he dispositive issue in determining whether a defendant has automatic standing is whether 'possession of the seized evidence at the time of the contested search is an essential element of guilt'"). In addition, however, such a party must allege a reasonable expectation of privacy. Commonwealth v. Mubdi, 456 Mass. 385, 391 (2010), citing Frazier, 410 Mass. at 244 n.3 ("the question of standing remains separate from the question of reasonable expectation of privacy"). "Where the defendant has automatic standing, the defendant need not show that he has a reasonable expectation of privacy in the place searched," just "that someone had a reasonable

expectation of privacy in the place searched, because only then would probable cause, reasonable suspicion, or consent be required to justify the search." Mubdi, 456 Mass. at 392-93 (citations omitted) (emphasis added).

Since the evidence is that Yusuf and Abdie lived in the same address, and that the ammunition with which Yusuf is charged was claimed by Abdie at booking as his own, Yusuf has standing to join in Abdie's motion to suppress. Commonwealth v. Lawson, 79 Mass. App. Ct. 322, 326 (2011)) (defendant may assert the constitutional rights of someone involved with his allegedly criminal conduct), overruled in part on other grounds, Commonwealth v. Campbell, 475 Mass. 611, 617 n.9 (2016).

2. Franks/Amral

Abdie is not entitled to a hearing under either Franks v. Delaware, 438 U.S. 154 (1978) or Commonwealth v. Amral, 407 Mass. 511, 522-23 (1990).

Under Franks,

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155–156. "Thus, judicial inquiry into the veracity of the underlying facts contained in a search warrant affidavit is limited to whether the affidavit did in fact contain misstatements by the affiant and whether the misstatements were made intentionally or with reckless disregard for the truth." Amral, 407 Mass. at 520 (citation omitted).

Under Amral,

> the Supreme Judicial Court held that a defendant, under a less stringent test than Franks, may be entitled to an in camera hearing to determine whether he or she must receive a Franks hearing. The court held "that the public interest in deterring police misconduct requires the trial judge to exercise his or her discretion to order an in camera hearing where the defendant by affidavit asserts facts which cast a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential informant.

Commonwealth v. DeMatos, 77 Mass. App. Ct. 727, 733–34 (2010). Material omissions of fact, as opposed to affirmative misstatements, may also justify an Amral hearing. Commonwealth v. Ramos, 72 Mass. App. Ct. 773, 778 (2008).

In this case, the defendant here has not satisfied his substantial preliminary showing that the affidavit contains any false statement, misstatement or material omission that were the result of perjury or recklessness, nor has he shown any facts which cast a reasonable doubt on the veracity of the material representations that were made in the affidavit. Abdie's claim that the police misled the magistrate by not disclosing the FIOs showing that Abdie was not in possession of firearms on prior occasions is not a material omission. The fact that a suspect has not previously been found to be committing a crime, here illegal possession of firearms, would rarely be necessary to include in an affidavit to satisfy the Franks or Amral standards, and certainly was not necessary in this case. See Commonwealth v. Luce, 34 Mass. App. Ct. 105, 111 (1993) ("An affiant who sets out information adding up to probable cause to make a search is not bound to recite investigative efforts that did not pan out"). Indeed, the fact that the police had failed to find Abdie in personal possession of firearms in the past bolstered the conclusion that he was hiding them somewhere, and made more likely, not less likely, that they would be found in his residence. The facts regarding the previous FIOs also showed that Abdie was subject to frequent contact with the police and thus had reason to conceal the guns that he clearly possessed on the SnapChat videos somewhere other than on his person, such as within his residence. In short, the

omission of the FIO facts simply did not undermine Ball's conclusion that Abdie was keeping guns in his bedroom, but rather enhanced that conclusion.

To the extent that Abdie claims there is a need for a Franks or Amral hearing on the ground that Ball's assertion that the firearms he was filmed with were real was somehow false, the Court finds that claim meritless. Ball was highly experienced with firearms and had a good faith basis for concluding that the guns he had seen in the videos were not replicas, including that in the SnapChat videos, Abdie loaded firearms, that they appeared real, and that Abdie taunted rival gangs, all of which made it likely that Abdie was handling actual weapons. Further, Abdie has adduced no facts suggesting that replicas played any role in this case – and only a real firearm, and no replicas, were seized during the search itself.

3. Suppression of Search

A. Body-Worn Camera Use and Preservation

Abdie claims that his rights to privacy were violated when officers responding to his home wore a body-worn camera and did not receive permission from anyone in the Apartment to do so. He also argues that the Boston Police's preservation and use of that footage also violated his rights.

Abdie cites to no case that supports his claim that a police officer wearing a body camera during a visit to his home ten days prior to the warrant violated his rights. Even if there were some right to notice and consent to such recording, it would seem inapplicable here. The police were called to the Apartment for a domestic disturbance and encountered a chaotic scene. There was no reasonable opportunity for, or any rational reason to require, the police to halt their efforts to control what could have been a violent situation by seeking and obtaining consent – presumably from all of the angry parties – to permit recording. One of the purposes of the body-

worn camera is to ensure that police act in accordance with the law under tense circumstances like these; the law encourages, and does not prohibit, its use here.[5]

Abdie's claim that the police had no right to preserve the footage is also unsupported by any law on point. The police did not exceed the scope of their purpose while they were inside the Apartment – they were properly present in the home and photographed only what they saw in fulfilling their duties. Abdie relies on Commonwealth v. Balicki, 436 Mass. 1 (2002) in support of his claims, but the situation here is different from that at issue in Balicki. In that case, the government exceeded the scope of a warrant by inspecting items in every room of a residence, all the while photographing and videotaping the items:

> While such a search would have been improper even without the use of the video and still cameras, their use not only documented the offending nature of the search, it also contributed to its intrusiveness. It is one thing to be present in a home carrying out the directives of a warrant, and of necessity being in a position cursorily to notice many of its contents. It is quite another to inspect the contents of a home and to create a permanent record of it for inspection by police, prosecutors, expert witnesses, and others at any time in the future. This record can be played and replayed as many times as necessary or desired, and the images can be focused or enlarged to show each detail of every item in that citizen's home. The use of videotape and photographs in this case goes far beyond the limited photographic preservation of the condition of a search scene (to protect the police from allegations of damage), or the photographic preservation of evidence, in situ, that the police otherwise have the right to seize pursuant to a warrant or any exception thereto. Such limited intrusions are not offensive to the privacy interests protected by art. 14. This search, and the use of the videotape and photographs to document it, was.
>
> We do not agree with the Commonwealth that the officers acted properly because they videotaped and photographed only that which was in plain view. The fact that the officers seized certain items pursuant to the plain view doctrine does not mean that the Commonwealth can extend that rationale to support a general

5 Yusuf cited to the Boston Police Department's policy governing the use of body-worn cameras, but did not produce this policy in evidence. Even were the Court to take judicial notice of it, it would not aid the defendants' claims. The policy does not require officers to obtain consent to record using the devices in exigent circumstances. The Court finds that the circumstances within the Apartment on February 10 were exigent. See Brigham City, Utah v. Stuart, 547 U.S. 398, 403–06 (2006) ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury... The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties").

> exploratory search of the home, photographing or videotaping anything they might find to be interesting or suspicious.

Balicki, 436 Mass. at 11–13 (citations, footnotes omitted). In the absence of further guidance from the Appeals or Supreme Judicial Courts, the police properly took the video, retained it and used it in the subsequent investigation.

B. SnapChat Access and Preservation

Abdie argues that he has an expectation of privacy in his SnapChat account, without which he cannot show that a search even occurred. Under these facts, he did not have an expectation of privacy.

"For a search to have taken place, the defendant must have had a subjective expectation of privacy, and that expectation must have been one that society recognizes as objectively reasonable." Commonwealth v. Pina, 406 Mass. 540, 544 (1990), citing Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). In the abstract, the question as to whether and to what extent a user of a social media account has a reasonable expectation of privacy poses difficult questions in light of the fact that the communications are maintained by a third party, and not the user himself or herself. Compare United States v. Miller, 425 U.S. 435, 443 (1976) (bank customer had no reasonable expectation of privacy over certain banking records held by a third party, the bank) Smith v. Maryland, 442 U.S. 735, 741-42 (1979) (telephone subscriber had no reasonable expectation of privacy over numbers dialed using a telephone and communicated to the telephone company) with Carpenter v. United States, 138 S. Ct. 2206 (2018) (an individual maintains an expectation of privacy in cell-cite location records maintained by a third party, the cell phone service carrier). Yet even assuming a SnapChat user has an expectation of privacy if, as was the case here, he or she limits access to his or her account, Abdie's claim nonetheless fails on these facts.

At the outset, Abdie argues he excluded people from having access to his SnapChat account whom he did not "know personally," but submitted no evidence to support this claim. There is thus no basis to conclude that he, in fact, had a subjective expectation of privacy of that account and, accordingly, that any "search" occurred. See, e.g., Commonwealth v. Netto, 438 Mass. 686, 697 (2003) (citations omitted) ("the burden is initially on the defendants to demonstrate that they had a reasonable expectation of privacy ...It is not the Commonwealth's burden to show that there was no such reasonable expectation of privacy at that time. Thus, if the record is unclear ...it is the defendants—not the Commonwealth—who have failed to meet their burden of proof, as they are the ones who must show that a 'search' in the constitutional sense occurred").

Leaving this concern aside, Abdie's claim would fail on other factual grounds. In this case, the government contends that Abdie gave them consent to access his account. The government can obtain consent to receive otherwise private communications by using informers or undercover posing as criminal confederates of a suspect. See, e.g., Hoffa v. United States, 385 U.S. 293, 302-03 (1966) (no Fourth Amendment right violated where government used a cooperating witness who reported incriminating statements made by the petitioner; cooperator was present "with petitioner's consent," and petitioner took the risk that the cooperator would not maintain his confidence); Lewis v United States, 385 U.S. 206, 208 (1966) ("[I]n the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents"). In contrast, the government generally cannot validly obtain consent to access private locations where that consent is based on the government agent's posing as a law-abiding private citizen; for instance, if the police gain access to a house while posing as a gas company employee searching for a gas leak, the consent is unlawful. See, e.g., United States v. Giraldo,

743 F. Supp. 152, 153 (E.D.N.Y.1990) (invalid consent to enter residence where a police officer pretended to work for the gas company and told the defendant she was checking for a gas leak). In this case, Ball used neither of these approaches; he did not pose as a criminal or as a person with some legitimate claim to access, like a SnapChat service representative, but instead used a false name and emoji image, plainly concealing his true identity. Abdie did not grant access to his SnapChat because he believed Ball was a criminal confederate or a service-provider of some type, he provided access to a complete stranger.[6] Abdie thus assumed the risk that the user might be friend or foe. The Court infers the reason for this; at least some of the videos do not appear to be communications aimed at friends but threats targeted at rival gangs, warning them that Abdie was armed and dangerous and was actively encroaching on their "territory," and that Abdie granted access to his SnapChat account to unknown persons because he wanted to disseminate his threatening message to rival gang members who had reason to conceal their identities from him. Under these facts, Abdie did not have a subjective or a reasonable expectation of privacy in the SnapChat videos simply because they were not private at all. Abdie did not take "normal precautions to protect his privacy." Pina, 406 Mass. at 545. This case is thus similar to Commonwealth v. D'Onofrio, 396 Mass. 711 (1986). There the Supreme Judicial Court found that the police did not violate the Fourth Amendment by misrepresenting their identities in order to infiltrate private club where the club did not enforce a policy to exclude the public:

> To establish a reasonable expectation of privacy, it is not enough for the defendants to show that they had an unenforced "policy" of restricting access to

6 Since the police had consent to receive the SnapChat communications, their warrantless monitoring of the SnapChat account did not violate federal or state wiretap law. See 18 U.S.C. §2511(c) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception"); G.L. c. 272, §99(B)(4) ("The term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication").

> [the club] to members and guests of members. In Commonwealth v. Simmons, 392 Mass. 45, 50 (1984), we noted the relevancy to "the expectation of privacy calculus" of "whether the defendant 'took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy.'..." We said in Commonwealth v. Cadoret, 388 Mass. [148,] at 151 [(1983)], that "[f]ailure to enforce limitations on admittance would warrant the conclusion that the persons operating the club had no reasonable expectation of privacy." That conclusion is required in the absence of reasonable enforcement efforts. ... In the absence of evidence that the defendants made reasonable efforts to corroborate the claims of guest status made by persons seeking admission to the club, the evidence fails to show that the public was not freely admitted there. If the public was freely admitted, the defendants did not have a reasonable expectation of privacy, and [the officer's] entrance into the club and observations of things in plain view did not violate the defendants' Fourth Amendment rights.

D'Onofrio, 396 Mass. at 716–17 (citations omitted). That Abdie accepted a request from a user who was unknown to him undercuts his argument that he relied on the safeguards that he put in place to protect his privacy as it pertains to his SnapChat posts. See, e.g., Everett v. State of Delaware, 186 A.3d 1224, 1236 (Del. 2018) ("[T]he Fourth Amendment does not guard against the risk that the person from whom one accepts a 'friend request' and to whom one voluntar[ily] disclosed such information might turn out to be an undercover officer or a 'false friend'"); United States v. Gatson, No. 13–705, 2014 WL 7182275, at *22 (D.N.J. 2014) (no search warrant required for police officer to use undercover account to become Instagram "friends" with defendant); United States v. Meregildo, 883 F. Supp. 2d 523, 525-526 (S.D.N.Y. 2012) (social media user's "legitimate expectation of privacy ended when he disseminated posts to his 'friends' because those 'friends' were free to use the information however they wanted – including sharing it with the Government"). Even had Abdie subjectively believed that his SnapChat communications were private, a conclusion belied by his apparent intent for his videos to broadcast threats to others not closely associated with him, that belief is not reasonable under these circumstances where he did not enforce a privacy policy and mistakenly relied upon the trustworthiness of a SnapChat user whose identity he did not know. See Pina, 406 Mass. at 544-

545; D'Onofrio, 396 Mass. at 716-718; see also Hoffa, 385 U.S. at 303, quoting Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting) ("The risk of being . . . betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society" and "is the kind of risk we necessarily assume whenever we speak"). There may be a case in which a social media user's expectation of privacy in his or her communications to others is reasonable under other factual circumstances, but here the facts do not support a conclusion that a search took place in the meaning of the Fourth Amendment and art. 14. See Pina, 406 Mass. at 544.

Abdie's claim that the police improperly recorded the SnapChat videos that were posted on his SnapChat account fails for the same reasons as his complaint that the body-worn camera footage should not have been preserved – that no law prohibited the police from taking the video and preserving it thereafter. See Balicki, 436 Mass. at 13 n. 13 ("We need not decide in this case whether the videotaping and photographing of a proper search would be unconstitutional"). Nor did the recording exceed the scope of Abdie's consent. "A search that is based on consent may not exceed the scope of that consent. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Commonwealth v. Ortiz, 478 Mass. 820, 824 (2018) (citations, internal punctuation omitted). Under this standard, "the focus is solely on what a typical reasonable person would understand the scope of the consent to be, based on the words spoken and the context in which they are spoken, not on what a police officer may understand." Id., 478 Mass. at 824. A reasonable person in Abdie's position would have understood that giving access to the SnapChat account allowed viewers to use a number of readily-available techniques to preserve those videos.

Because the facts from SnapChat and the body camera were properly included in the search warrant affidavit, the information from those sources is properly considered in determining if the affidavit establishes probable cause.

An inquiry into the sufficiency of a search warrant application always begins and ends with the "four corners of the affidavit." Commonwealth v. Barbosa, 92 Mass. App. Ct. 1114 (2017) (Rule 1:28 decision), citing Commonwealth v. O'Day, 440 Mass. 296, 297 (2003). When reviewing a warrant for probable cause, a judge must determine whether, based on the affidavit in its entirety, the magistrate had a substantial basis to conclude that a crime had been committed, that the items described in the warrant were related to the criminal activity, and that those items would probably be located in the place to be searched. Commonwealth v. O'Day, 440 Mass. 296, 298 (2003). In addition,

> [t]his probable cause inquiry requires a "nexus between the items to be seized and the place to be searched." When the place to be searched is a residence, "there must be specific information in the affidavit, and reasonable inferences a magistrate may draw, to provide 'a sufficient nexus between the defendant's drug-selling activity and [her] residence to establish probable cause to search the residence.'" To satisfy this "nexus" requirement, and thus the probable cause standard, the affidavit "must provide a substantial basis for concluding that evidence connected to the crime will be found on the specified premises." ... [E]ven "[a] single observation of a suspect leaving [her] home for a drug deal may also support an inference that drugs will be found in the home where it is coupled with other information."

Commonwealth v. Tapia, 463 Mass. 721, 725–26 (2012) (citations omitted).

Here the affidavit established probable cause to believe that Abdie had a gun inside the Apartment. The SnapChat video was taken within 72 hours of the time Ball applied for the search warrant. It clearly depicts Abdie in his bedroom in the Apartment in possession of a firearm. Abdie had no legal authority to possess a firearm. The search warrant affidavit thus established probable cause to believe that Abdie was unlawfully in possession of a firearm, and

that the firearm and other relevant evidence sought by the warrant could be found in the Apartment.

C. Photographs of the Search

The plain view argument as framed by Abdie – that if the police photograph anything they expect to see in a search location, they have conducted a search for which they need a warrant – assumes that such photographs require a warrant. The Supreme Judicial Court has not decided whether the videotaping and photographing of a proper search without court authorization is unconstitutional. See Balicki, 436 Mass. at 13 n. 13 ("We need not decide in this case whether the videotaping and photographing of a proper search would be unconstitutional"). There are no facts here that suggest that photography of the scene during the search was inappropriate or that it examined areas in excess of those within the scope of the warrant; indeed, the defendants introduced none of the photographs at the hearing and presented no specific objection beyond the mere fact that images were taken. There is no basis to suppress the photographs.

4. Miranda issue

Abdie's claim that his statements made at booking should be suppressed as the fruits of the prior illegality mentioned above is meritless.

Abdie's Miranda claim is also meritless. Miranda has no application to volunteered statements made by a defendant in custody which are not the product of interrogation or its functional equivalent. Statements which are "'blurted out,' i.e., made spontaneously, unsolicited and unprovoked by anything done or said by the police . . . are not the product of custodial interrogation and are admissible even if Miranda warnings have not been given." Commonwealth v. Adams, 66 Mass. App. Ct. 1111 (2006); see also Commonwealth v. Byrd, 52

Mass. App. Ct. 642, 649 (2001) ("Miranda safeguards were not intended to prevent a defendant from volunteering incriminating information"). Abdie was advised of his Miranda rights at the Apartment, before booking, and in the normal course would have been re-advised of those rights during booking. Under these facts, the Court finds beyond a reasonable doubt that Abdie voluntarily, knowingly, and intelligently waived his Miranda rights by speaking. Commonwealth v. Edwards, 420 Mass. 666, 669-670 (1995). The voluntariness of a Miranda waiver "turns on the 'totality of the circumstances,' including promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." Commonwealth v. Mandile, 397 Mass. 410, 413 (1986). The test is "essentially the same as that used for determining the voluntariness of statements under the due process clause of the Fourteenth Amendment to the United States Constitution." Edwards, 420 Mass. at 670. No promises or threats were made to Abdie. He was an adult, had experience with the criminal justice system, and was physically unimpaired. He spoke to try to exonerate his brother or to taunt the police, not to curry favor with them. His statements were voluntary beyond any reasonable doubt. Indeed, Abdie's taunting of the police – that they failed to find more guns – shows that Abdie was freely speaking his mind, not speaking as the result of any form of compulsion.

ORDER

For the foregoing reasons, defendants' motion to suppress is **DENIED**.

SO ORDERED.

Justice of the Superior Court

Date: September 24, 2018

UNITED STATES CONSTITUTION

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

MASSACHUSETTS DECLARATION OF RIGHTS

Article 14

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Certificate of Compliance

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The brief is set in 14-point Athelas and contains 7,558 non-excluded words, as determined through use of the "Word Count" feature in Microsoft Word 2010.

/s/ Patrick Levin
Patrick Levin

Certificate of Service

I hereby certify that in the matter of Commonwealth *vs.* Abdirahman Yusuf, Supreme Judicial Court No. SJC-12989, I have today served the Amended Brief of Defendant-Appellant Abdirahman Yusuf on the Commonwealth by directing a copy through the electronic filing service provider to:

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