NO. SJC-12890

IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY **NO. SJC-12890**

COMMONWEALTH OF MASSACHUSETTS,

RESPONDENT-APPELLEE

V.

NELSON MORA, ET AL.,

PETITIONERS-APPELLANTS

ON INTERLOCUTORY APPEAL FROM AN ORDER OF THE ESSEX COUNTY SUPERIOR COURT DENYING A MOTION TO SUPPRESS EVIDENCE

CONSOLIDATED REPLY BRIEF OF THE PETITIONERS-APPELLANTS

Stephen D. Judge
BBO #563390
Hemsey Judge, PC
47 Federal Street
Salem, MA 01970
978-744-2800
sjudge@hemseyjudge.com

Mark G. Miliotis
BBO #346060
Prince Building
63 Atlantic Avenue
Boston, MA 02110
617-720-2274
milo12@aol.com

Elliot M. Weinstein
BBO #520400
83 Atlantic Avenue
Boston, MA 02110
617-367-9334
elliot@eweinsteinlaw.com

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SUMMARY ARGUMENT

The mosaic theory adopted by this court in *Commonwealth v. McCarthy*, SJC-12750 (April 16, 2020), effectively articulates the foundational argument of the appellants constitutional claims. Mosaic Theory establishes that private citizens have a reasonable expectation of privacy in the aggregate of various types of personal information while in public spaces. The court reserved on establishing definitive boundaries related to the quantity or quality of what the government may seize from public spaces without a warrant. Applying this premise to the facts at bar the appellants urge this court to prohibit all video surveillance of the curtilage of private residences.

The distinctions between *McCarthy* and the instant case highlight the considerations of location, scope, duration and enhanced surveillance capability which this court shall find relevant in determining the existence of a search herein. The video surveillance conducted herein took place around personal residences, recorded and preserved everything without discrimination and was employed around the clock for weeks and months. Such warrantless invasive police practices require suppression not only due to the aggregate of what the surveillance reveals, but also because (1) the seizure occurs at the threshold of personal residences upon private property, (2) the covert surveillance is impossible to detect or avoid, and

(3) such state action is not possible or expected to occur by means of traditional physical surveillance.

Finally, this court should not reconsider its rejection of a "good faith" exception to the warrant requirement in the context of this controversy because the record does not support the Commonwealth's invitation.

ARGUMENT

INDIVIDUALS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE AGGREGATE OF DISCRETE ACTS OR THINGS EXPOSED TO PUBLIC VIEW

This court has recently emphasized the important dual purposes of art. 14 and the 4th amendment as the need to "secure the privacies of life against arbitrary power," and to "place obstacles in the way of a too permeating police surveillance." *Commonwealth v. Almonor,* 482 Mass 35*,* 53 (2019) (Lenk, J., concurring); See also *McCarthy*, *supra* at 10 (applying these principles to public highways regarding ALPRs).

The court has now applied those edicts to government surveillance upon the public movements of its citizenry: "When new technologies drastically expand police surveillance of public space, both the United States Supreme Court and this court have recognized a privacy interest in the whole of one's public movements*."* *McCarthy*, *supra* at 17. (internal citations omitted)

This court has determined that the nature and extent of public surveillance matters in determining an intrusion upon our expectations of privacy, and that mosaic theory application is consistent with long standing 4th amendment and art. 14 jurisprudence. "This aggregation principle or mosaic theory is wholly consistent with the statement in *Katz*, 389 U.S. at 351, that '[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,' because the whole of one's movements, even if they are all individually public, are not knowingly exposed in the aggregate." *McCarthy*, *supra* at 20. Given these principles, the Commonwealth's claim that individuals have no reasonable expectation of privacy outside personal residences, upon their curtilages, is without merit. These defendants have a fundamental right and reasonable expectation that the state will not secretly, without limitation, record the their homes and curtilages with the intention to maintain and exploit that data over time.

THE HOME IS WHERE CITIZENS ENJOY THEIR GREATEST FREEDOMS AND WHERE GOVERNMENT TRESPASS UPON PRIVACY IS MOST CLOSELY SCRUTINIZED

This case is not simply about protecting the whole of one's public movements, but rather it is most critically an assessment concerning the protection afforded to the intimacies of our lives and associations at home ***and*** our movements and routines as we venture to and from our personal residences. The

covert video surveillance here invades into the home and curtilage by means of trespasses upon personal privacy. The home was the repository of all that was originally intended to be protected by the founders, containing our persons and papers. Thus, a barrier was provided against government scrutiny of one's intimate behaviors and beliefs. The evolution of modern social norms and technology has led to an expansion of the boundaries of the locale of the content and details of our personal lives. The walls of houses and prohibition from physically crossing the threshold of our property no longer protect against government search and seizure. It is the government's use of technology to secretly invade over that threshold, and to seize, without effort or fear of detection, that which is meant to remain private, which is so offensive to our country's founding principles, and comprises an unlawful trespass.

Definitions of home, privacy, trespass and that which constitutes the prohibition against government intrusion must be clarified and expanded in order to address the acceptable parameters of government video surveillance of citizens. The often criticized as vague and evasive standard of one's "reasonable expectation of privacy" would benefit from established benchmarks as to these four concepts in the face of technology which so easily evades traditional limitations on surveillance and 'arbitrary power'.

The Commonwealth's founders intended to establish a bright line that the government could not cross. The line, not unexpectedly, has become blurred. The government imperative to "protect" its citizens from danger has led to gamesmanship by state agents who mistakenly believe it is necessary and okay to circumvent constitutional protections in order to insure the greater "public good." Without significant restraints, our founders would have never agreed to have the state implement these incredible technological advancements which tilt the playing field in favor of government overreach and against the privacy interests of our citizenry. The integrity of each citizen's privacy, "the right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers and all his possessions" must be preserved with vigor in the face of pervasive efforts of the government to shrink it.

The battle here is not just over an attack upon the people's movements in public, but, more importantly, over the state's assault upon the sanctity of the content of our homes, our bodies, our possessions, our associations and private matters that citizens do not wish to share with the state, and which ought not to be secretly seized by government agents. The Commonwealth suggests that once citizens cross their home's threshold, out into their front yards, considerations of privacy evaporate. The court appears to have shut the door on that concept through the logic and precedent expressed, most recently, in *McCarthy*; but now, upon the

instant facts, is the time to seal it closed. There is no room in this society for warrantless, covert, pervasive video surveillance of homes by the state as it has no corollary in historic understandings of visual surveillance.

The argument that anything that a member of the public might happen to see on and about the curtilages of our homes is not protected from state agents who covertly record, preserve, catalogue, dissect and create an infinite, encyclopedic composite of those details of our lives, is not worthy any consideration, let alone weight. Allowing the government to exploit that data without a warrant is illogical and illegal. Our founders sought protection from the government they created and not from the citizenry at large. They saw government as the greatest threat to the preservation of our natural rights and liberties, including our right to privacy and the enjoyment of those enumerated liberties. No place reveals the quantity and quality of private information more than that which emanates from our homes. A covert perfectly preserved record of those associations and routines of any duration should never be undertaken by state agents in the absence of a search warrant based on probable cause.

ADVANCING TECHNOLOGIES AND GOVERNMENTAL INTRUSIVENESS NEAR CONSTITUTIONALLY SENSITIVE AREAS SHOULD REQUIRE A WARRANT WHERE OTHER MINIMALLY INVASIVE PUBLIC-VIEW SEIZURES MAY NOT

The approach of the *McCarthy* decision and its mosaic theory provide a rational approach to the many public space controversies this court will inevitably

decide. This court has allowed jurisprudence to evolve over time as it has laid the foundation for a rationale balance between minimal invasions of privacy and state scrutiny of movement on public roads. This approach allows the court to distinguish that which may be permitted in the face of broad and varying forms of public movement seizures by the government. Such an approach needs to be adapted in order to address targeted covert video surveillance of personal residences. The sustained duration of covert government surveillance needed for there to exist an unlawful trespass upon one's privacy and movements in public spaces cannot be equated to what is necessarily needed in the context of the compilation of a digital database of all activities at our doorsteps. Such pervasive intrusions into this space must be stopped before they start without a warrant. See *McCarthy*, *supra* at 21.

An individual's home is not a vehicle or a blip on a screen. It is a sacred and cherished location deserving of the greatest protection. The Commonwealth would have its citizens make the Hobson's choice of becoming a prisoner in their own home, windows blackened, or avoiding their homes altogether, rather than accepting that all activities there and about may become a recorded part of a government stockpile of searchable video. That assumes, of course, that one is aware of such a choice, which is really no choice at all. The quality of the information seized, the location of the activities and associations recorded and the

impossibility of individual avoidance of such scrutiny, make the duration of surveillance less important in the present context of residences than in snapshots of movements on public highways. See *McCarthy*, *supra* at 21. Our citizens cannot be made to choose between having a functional home life or avoiding indiscriminate government recording. See *McCarthy*, *supra* at 25, referencing *Almonor*, 482 Mass. at 55 (Lenk, J., concurring) ("When police act on real- time information by arriving at a person's location, they signal to both the individual and his or her associates that the person is being watched. . . . To know that the government can find you, anywhere, at any time is -- in a word -- 'creepy'"). Even creepier, still, is knowing that every time you walk out your front door the government may be waiting, and watching, and recording, all from an invisible perch. The citizens of Massachusetts have the right to be let alone and to feel "secure" in their home and included curtilage knowing that their constitution protects them from the possibility of unreasonable, unauthorized and all permeating covert state surveillance lurking just outside their doors and windows.

Having a residence is not simply an indispensable part of modern life; the activities surrounding our home comprise the body and soul of our human existence. For that reason, and for 240 years, greater, not lesser, protections from the prying eyes of government agents have been afforded to all residences. See *McCarthy*, *supra* at 26 (including cellular phones and driving as indispensable

components to modern life and refusing to place burden on citizens to forgo such use in effort to avoid state surveillance.) Appellants suggest that the citizens of Massachusetts reasonably do not expect the government to record and collect any of their home and curtilage activity in the absence of a warrant.

APPELLANTS HAD BOTH A SUBJECTIVE AND OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY IN THEIR PERSONS, MOVEMENTS AND ACTIVITIES ON AND ABOUT THEIR HOMES AND CURTILAGES AND THE HOMES AND CURTILAGES OF OTHERS

Appellants have established, via supporting affidavits and permissible inferences therefrom, that they enjoyed and manifested a subjective expectation of privacy against around-the-clock surreptitious video surveillance of their activities at and about personal residences. See *McCarthy*, *supra* at 8-9, and at n. 5. *McCarthy* found four factors relevant in comparing ALPRs enhanced surveillance with historic and expected police surveillance techniques. *McCarthy*, *supra* at 27. In each of these four areas, the intrusion herein is far greater than that considered in *McCarthy*:

1. The policy of retaining information for a minimum of one year (There is no record of a regulation regarding the preservation of the data recorded in the present case, leaving it to the government agent's discretion, without limits or mandate);
2. The ability to record the license plate of nearly every passing vehicle

(The cameras recorded everything that occurred at the instant residences including every person, every vehicle and its license plate, the appearance, attire and possessions of all people on and about the private homes; not just a single identifying characteristic on a highway);

3. The continuous, twenty-four-hour nature of the surveillance (The surveillance was also for twenty-four hours a day at these residences, but there was recorded rich video of all persons and activities on the home's curtilage, not just instant occurrences of travel on a public road);
4. The fact that the recorded license plate number is linked to the location of the observation (The recordings herein are also linked to the location of the observation, and that location is a home revealing much more data, in both quantity and quality, than any moment-in-time public surveillance could fathom).

There are significant enhancements of what would reasonably be expected of traditional police surveillance techniques present here, which further offend upon our reasonable expectations regarding state surveillance.

The location of these seizures requires not only the finding of a search in the constitutional sense, but, also, demands a zero-tolerance policy in order to insure privacy protections at these places. The warrant requirement should stand for the

bestowal of any government authority to record our private residences. See *McCarthy*, *supra* at 24 (explaining that even limited technology such as ALPRs, which seize only license plate data, reveal more of an individual's life and associations when placed near constitutionally sensitive locations). For this reason, the appellants urge this court to prohibit all warrantless video electronic surveillance of residences.

As the court has already recognized, prior adoption of, and on-going willingness to employ an emergency exception to the warrant requirement whenever warrantless state action occurs is all that is necessary or wise to hand the government in the context of secret recording of our homes. See *McCarthy*, *supra* at 25 (reiterating the availability of an emergency exception where obtaining a warrant is untenable).

If a warrant is required in all government video surveillance of homes, there will always be a record of why it occurred and what was captured. This court will never again need be concerned with an incomplete record regarding the application of new technologies the government might employ to seize data by means of wireless digital surveillance of our homes.

"GOOD FAITH" HAS NO PLACE IN THE CONTROVERSY BEFORE THIS COURT AS THERE IS NO BASIS FOR ITS CONSIDERATION OR IMPLEMENTATION IN THIS CASE

The record does not support the Commonwealth's argument for adoption, let alone application, of the so-called "good faith" exception to the exclusionary rule. Given that the Commonwealth sought to proceed upon stipulated facts, and suggested none related to officers' states of mind, motivations, knowledge, procedures and actions, among other criteria, there is no basis in the record for this court to consider supposed "good faith".

Without any support in the record, the Commonwealth claims to have relied on federal precedent upholding similar, but more rudimentary recordings in various jurisdictions. There is no basis for such an argument, and the purpose and intent of the exclusionary rule demands its application in the instant matter.

This is not a case where affirmative precedence of this court was subsequently altered or overruled. The Commonwealth must be put on notice that it acts at its own peril when utilizing advancing and enhancing technologies near constitutionally sensitive areas and chooses to do so without seeking judicial authority. Otherwise, police officers will be disincentivized to take the preferred step of securing a warrant in every future case where this court has yet to analyze new technologies or surveillance techniques.

CONCLUSION

A totality of circumstances analysis of the government's covert recorded surveillance of homes offends the founding principles of this Commonwealth. Every rationale factor of analysis under any possible theory of expectation of privacy weighs in favor of requiring a warrant when the government seeks to covertly record a targeted home for investigative purposes. The areas encompassing and surrounding our homes are our most protected and sensitive zones. What occurs on and about our property demands the highest level of protection. Allowing deference to the periodic whims of government was not of interest to our founders. Their intent was to specifically limit the ability of government to expand its intrusions into the private lives of our citizens. This court should emphasize the most fundamental tenet of the social compact by prohibiting all covert recorded surveillance of homes in the absence of a judicially authorized search warrant.

NELSON MORA
By his attorney,
/S/Stephen D. Judge
Stephen D. Judge
BBO #563390
Hemsey Judge, PC
47 Federal Street
Salem, MA 01970
978-744-2800
sjudge@hemseyjudge.com

RANDY SUAREZ
By his attorney,
/S/Mark G. Miliotis
Mark G. Miliotis
BBO #346060
Prince Building
63 Atlantic Avenue
Boston, MA 02110
617-720-2274
milo12@aol.com

LYMBEL GUERRERO
By his attorney,
/S/Elliot M. Weinstein
Elliot M. Weinstein
BBO #520400
83 Atlantic Avenue
Boston, MA 02110
617-367-9334
elliot@eweinsteinlaw.com

CERTIFICATE OF COMPLIANCE

Undersigned counsel does hereby certify that Petitioners-Appellants Brief complies with the current rules of court that pertain to the filing of briefs before the Supreme Judicial Court; specifically, undersigned counsel certifies that compliance with Rule 20 was ascertained by using 14 point Times New Roman, which is a proportionally spaced font in Word X, and that the number of non-excluded words in the brief is 2,798.

CERTIFICATE OF SERVICE

In the matter of *Commonwealth v. Nelson Mora et al*, in the Supreme Judicial Court for the Commonwealth of Massachusetts, Docket No. SJC-12890 undersigned counsel does hereby certify that Defendants-Appellants Consolidated Reply Brief was served, on behalf of Petitioners-Appellants Nelson Mora, Randy Suarez and Lymbel Guerrero, upon the Respondent-Appellee-Commonwealth, Office of Attorney General Maura Healey, 1 Ashburton Place, 20th Floor, Boston, MA 02108, by serving same, via electronic mail, to the Commonwealth's counsel of record, Assistant Attorney General Gina Masotta, gina.masotta@state.mass.us, and Assistant Attorney General Anna Lumelsky, anna.lumelsky@mass.gov, this 27th day of April, 2020.

/S/Stephen D. Judge

Stephen D. Judge
BBO #563390
Hemsey Judge, PC
47 Federal Street
Salem, MA 01970
978-744-2800
sjudge@hemseyjudge.com