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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 BRIEF OF THE PETITIONERS-APPELLANTS

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STATEMENT OF ISSUES

Do the defendants herein, citizens of Massachusetts, possess fundamental privacy interests and reasonable expectations of privacy in the whole of their activities, associations and movements in and around their homes such that government's perpetual twenty-four hour a day covert monitoring, recording, storing and preserving of all captured data is an illegal search and seizure in the absence of a properly issued warrant to conduct such persistent and automated technologically enhanced surveillance?

STATEMENT OF THE CASE

On May 22, 2018, the Defendants and others were arrested after an investigation spanning more than seven months. On August 30, 2018, the Essex County Grand Jury returned indictments charging these Defendants, among others, with violations of the controlled substances laws including trafficking indictments implicating lengthy mandatory minimum sentences for each of these Defendants.

The Defendants herein contested the legality of the warrantless video surveillance by filing motions to suppress. (See Appendix pp. 35-63). These motions sought suppression of pole camera video surveillance and all of the unlawful fruits therefrom. After submission of briefs, the matters were argued in the Essex Superior Court in a non-evidentiary hearing which included stipulations

(See Appendix pp. 102) related to the camera's placement, capabilities, duration of recording, and storage of data, among other relevant factual matters.

The lower court (Feeley, J.) denied the motions in a written decision entered on November 4, 2019. (See Appendix pp. 107) The Defendants filed a timely notice of appeal on November 19, 2019 and a Joint Petition for Interlocutory Appeal. (See Appendix pp. 125) A Single Justice of this court allowed the Defendants' petition and request for direct appellate review. (See App. pp. 144)

STATEMENT OF FACTS

The facts relevant to the constitutional challenge to the warrantless around-the-clock video surveillance in this case are entirely contained in a jointly adopted stipulation which was submitted to the lower court for its consideration. (See Appendix pp. 102).

The Commonwealth and the Defendants stipulated as follows:

1. As part of the investigation that led to the indictments in these cases, the Massachusetts State Police installed what are commonly known as "pole cameras" in public locations in order to conduct surveillance.
2. The pole cameras were installed in fixed locations in the area of the following addresses:
    a. 68 Hillside Avenue, Lynn, MA, which is the residence of defendant Nelson Mora. The Hillside Avenue camera afforded a view of a

portion of the front of the house, as well as the street on which the house is situated and the sidewalk that runs in front of it. The pole camera footage for this location runs from December 6, 2017 at 11:43 a.m. through May 23, 2018 at 3:19 p.m. Mora was regularly seen on the footage from the Hillside Avenue camera. On a few occasions, defendants Inuyama, Adolphe, Guerrero, and Suarez and/or vehicles investigators knew to be operated by them were also seen on the footage from this location.

b. 8-10 Swampscott Avenue, Peabody, MA, which is the residence of defendant Randy Suarez. The Swampscott Avenue camera afforded a view of the front of the residence, as well as a driveway in front of the house (partially obscured by a neighboring Dunkin' Donuts), part of a second driveway on the side of the house, and the street on which the house is situated. The pole camera footage for this location runs from March 23, 2018 at 12 p.m. through May 23, 2018 at 3:19 p.m. Suarez was regularly seen on the footage from the Swampscott Avenue camera. On a few occasions, Guerrero was also seen on the footage from this location.

c. Shepard Street, Lynn, MA. Defendant Frantz Adolphe resides at 9 Shepard Street, though the Shepard Street camera was not focused on

his residence or any other particular residence. The camera afforded a view down the length of Shepard Street, which included a partial view of the top of the driveway to Adolphe's residence. The pole camera footage for this location runs from April 4, 2018 at 8:48 a.m. through May 23, 2018 at 3:20 p.m. Mora and Adolphe were regularly seen on the footage from the Shepard Street camera. On at least one occasion, defendant Grullon-Santos was seen on the footage from this location.

d. 7 Ruthven Terrace, Lynn, MA, which is the residence of defendant Richard Grullon-Santos. The Ruthven Terrace camera afforded a partial view of the front of the house, which was largely obscured by a tree in a neighboring yard. The pole camera footage for this location runs from May 18, 2018 at 8:13 a.m. through May 23, 2018 at 3:20 p.m. On at least one occasion, Grullon-Santos was seen on the footage from the Ruthven Terrace camera.

e. 9 South Elm Street, Lynn, MA, which is the residence of Carlos Perez. Perez is not a charged defendant in this case. The pole camera footage for this location runs from May 9, 2018 at 7:35 a.m. through May 23, 2018 at 3:20 p.m.

3. Each of the cameras captured video but not audio.

4. While the cameras were operating, investigators could remotely view the video from a web-based browser in real time, as well as search and review previously recorded footage.
5. The cameras had zoom and angle movement capabilities, which could be operated remotely by investigators (in real time only). In some instances, the zoom function enabled investigators to read the license plate on a car. None of the pole cameras enabled investigators to see inside any residence. The cameras captured only publicly viewable areas and activity.
6. The cameras did not have any infrared or enhanced night vision capabilities.
7. All cameras recorded without limitation persons coming and going from the above listed locations.
8. While the investigation was ongoing, the data from each pole camera was stored on a State Police server. After the cameras were turned off, the data was removed from the server and transferred onto hard drives for storage.

THE STANDARD OF REVIEW IS DE NOVO REVIEW OF THE LOWER COURT'S FINDINGS AND CONCLUSIONS OF LAW

The Defendants challenge the denial of their Motions to Suppress Evidence and this court should conduct an independent review of both the lower court's findings and conclusions of law. No testimony was taken in the lower court; rather, the parties entered into evidence a written stipulation containing facts related to the

challenged video surveillance which provided the court with those details necessary to rule on the constitutionality of the prolonged video surveillance at issue.[1] See *Commonwealth v. Tremblay*, 480 Mass. 645, 652 (2018) ("In general, in reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" *Id.* at 652, citing *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). In *Tremblay*, this court also reaffirmed the principal that lower court findings drawn from documentary evidence are not entitled to deference and are subject to independent review by appellate courts. *Id.* at 654-655.

SUMMARY ARGUMENT

Defendants submit that the Massachusetts Constitution and Declaration of Rights affords our citizens the right to be "secure" in their home from State sponsored physical intrusion ***AND*** the right to be "secure" in their home, and elsewhere, from State sponsored persistent and comprehensive recorded surveillance. Presently, law enforcement personnel in Massachusetts, with neither cause shown nor judicial oversight employed, are allowed to film and record every

[1] The document itself, Stipulations Related to the Defendants' Motion to Suppress Pole Camera Evidence ("Stipulations") was received and admitted as exhibit 1 at that hearing; and marked as filing #28 in Defendant Nelson Mora's case file.

second of every day, week, and month of a person's life, activities, associations and movements as they relate to their home's curtilage among other places. Any law enforcement officer may do so at his or her singular whim. This wealth of information may then be stored in perpetuity and utilized however the government sees fit. Confronted with the Defendants' challenge to such oppressive surveillance tactics, the Commonwealth asks this court to do nothing. In fact, the Commonwealth claims this court can do nothing because our citizens have no respite from the reach of government surveillance on and about their home's property so long as no physical trespass has occurred. The history and stated purpose of the Massachusetts Constitution, arguably the single most significant protector of individual rights ever put to paper, belies the Commonwealth's defense of its present police practices.

ARGUMENT

I. THE HISTORY OF PRIVACY RIGHTS AND EXPECTATIONS SUPPORTS THE DEFENDANTS' REQUEST

The Supreme Court has long recognized and recently reiterated the guideposts that should dictate which expectations of privacy are entitled to protection and what defines an unreasonable search and seizure. "First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." Second, and relatedly, that a central aim of the Framers was "to place obstacles in

the way of a too permeating police surveillance.'" *Carpenter v. United States*, 138 S.Ct. 2206 (2018).

In order to appreciate the cause for the uncomfortableness felt in one's gut when contemplating the government's perpetual surveillance of private residences, the foundation of our citizen's right to privacy needs to be assessed. The fundamental point is that individuals have a right to be left alone and protected from overly intrusive invasions upon their privacy by the government in the absence of a warrant authorizing such intrusion into their lives.

In their seminal article, *The Right to Privacy*, Samuel Warren and Louis Brandeis observed that it is "necessary from time to time to define anew the exact nature and extent" of the protections an individual has in their person and property. At a time when the technology of photography was proliferating, Warren and Brandeis argued that existing legal rights had broadened over time in response to the "advance of civilization"—such that society's understanding of the "right to life" expanded to include the "right to be let alone," and the right to "property" now encompassed "every form of possession— intangible, as well as tangible." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, at 193-195(1890). *See* BRIEF OF THE CENTER FOR DEMOCRACY & TECHNOLOGY AS AMICUS CURIAE IN SUPPORT OF APPELLEES. *United States v. Moore-Bush*, No. 19-1582 (1st Cir. 2019), at page 14.

There are competing interests at stake when dealing with the issue at bar. The first interest is what the government ought to be permitted to do in order to satisfy its obligation to maintain public order. The competing interest is the citizens affirmative right to privacy and protection against unreasonable governmental intrusions.

It is the content of an individual citizen's being that is entitled to protection from the government's scrutiny and intrusion. Controlling the extent to which government agents may intentionally seek to capture data reflecting personal details of a citizen's life by means of unchecked searches and seizures is the objective of constitutional limitations. The Fourth Amendment protects people, rather than places and its reach does not turn on the presence or absence of a physical intrusion into any given enclosure. *Katz v. United States*, 389 U.S. 347, 351 (1967).

In *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1271 (9th Cir. 2019), an informative decision addressing privacy interests affected by facial recognition technology, the Court refers to *The Right to Privacy,* 4 Harv. L. Rev. 193, at 198, explaining "[t]he common law roots of the right to privacy were first articulated in the 1890s in an influential law review article that reviewed 150 years of privacy-related case law and identified "a general right to privacy" in various common law property and defamation actions.

Privacy rights have long been regarded "as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc. v. Robins* (*Spokeo I),* 578 U.S. ___, 136 S.Ct. 1540, at 1549 (2016). Courts have recognized that a distinct right to privacy existed at common law and treatises identified four privacy torts recognized at common law, one of which was the "unreasonable intrusion upon the seclusion of another." Restatement (Second) of Torts § 652A.

The Supreme Court and other learned treatises have long recognized the common law roots of our individual right to privacy. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 763 & n. 15, 109 S.Ct. 1468 (1989) (recognizing the common law's protection of a privacy right); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 488, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (noting that a right of privacy had been recognized at common law in the majority of American jurisdictions). "Actions to remedy Defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states." Restatement (Second) of Torts § 652B.

In *Patel,* supra at 1272-73, the Court recognized that, "[t]hese common law privacy rights are intertwined with constitutionally protected zones of privacy." See *Gibson v. Fla. Legislative Investigation Comm.,* 372 U.S. 539, 569 n.7, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963) (Douglas, J., concurring) ('A part of the philosophical basis

of [the First Amendment right to privacy] has its roots in the common law.'); *see also Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038 (2001) ('[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable.*' (emphasis in original)). As one commentator summed up, '[d]espite the differences between tort law and constitutional protections of privacy, it is still reasonable to view the interests and values that each protect as connected and related.' Eli A. Meltz, Note, *No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion,* 83 Fordham L. Rev. 3431, 3437 (2015)."

II. THE LOWER COURT ERRED IN FINDING THAT PROLONGED AND TARGETED AROUND-THE-CLOCK VIDEO SURVEILLANCE OF ANY CITIZEN IS NOT A SEARCH

In its ruling on the motion to suppress, the lower court determined that the law of *Carpenter v. Unites States,* 138 S. Ct. 2006 (2018) did not displace the holding of *United States v. Bucci*, 582 F. 3d 108 (1st Cir. 2009) as good law in the First Circuit and under the Fourth Amendment. The court found *Carpenter*'s relevance applied only to CSLI data and its capacity to determine a defendant's precise location. The court further reasoned that the relevant Massachusetts cases cited by the Defendants were limited in application to tracking and cell phone

issues. (See Appendix pp. Decision p. 13-16. The court did not address the Defendant's arguments which centered on the aggregate of the information gained by the government's long-term covert surveillance, or the relevance of the Massachusetts Constitution to such persistent and unrestrained dragnet-type warrantless surveillance.

The holding relied on the law as stated in *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009). In *Bucci*, the First Circuit Court of Appeals first addressed the lawfulness of pole camera surveillance in Massachusetts. The First Circuit did so without ever mentioning *United States v. Knotts*, 460 U.S. 276 (1983) or conducting any analysis of the Supreme Court's open question of whether around-the-clock dragnet-like surveillance violates the Fourth Amendment's right to personal privacy. In finding that the defendant had no expectation of privacy against the government's use of a pole camera trained on his home, the *Bucci* court spent the whole of five sentences to dismiss the issue by concluding that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." *Bucci,* at 116.

The decision in *Bucci* has no place in the matter before this court. Where a court simply restates a part of a legal principle long held to be true but fails to address its actual import in the face of current technological advances or distinguishing facts, the matter has not been truly addressed. Even if one believes

that *Bucci* once stood on generally accepted legal principal, it no longer does and offers little insight into the appropriate analysis this court must undertake under the Fourth Amendment or our Declaration of Rights.

The importance of addressing current technological advances when assessing persistent pole camera surveillance was discussed in *United States v. Cirilo Garcia-Gonzalez*, (D. Mass. No. 14-10296-LTS). There, Judge Sorokin questioned the validity of *Bucci* jurisprudence but upheld it in the end. The Court wrote that the "surveillance captured all types of intimate details of life centered on . . . [the] home." Citing *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986), the Court noted that video observation "may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *Id.*

In *Kyllo v. United States*, 533 U.S. 27 (2001), the court held information seized through thermal imaging violated the Fourth Amendment. The court reasoned that "any other conclusion would leave homeowners at the mercy of advancing technology". *Id.* at 35. Today, in 2020, we may as well be a century away from the technology employed in *Bucci*. And yet even that technology should have triggered a more thoughtful and honest debate about the limits of government surveillance without a warrant, in light of *Knotts*' proclamation in 1983.

The technology employed in this particular case is frightening in comparison to that used in 2003. It is the automated nature of this dragnet surveillance, its lack of expense, its ease of use, its universal employability, its unlimited storage, its search capabilities and its infinite means of use in today's artificial intelligence dominated world which distinguish the technology here from prior cases this court has considered and that which the *Bucci* court considered. The software and technology presently available to and being used by law enforcement can be unleashed on this massive compilation of data; this is the part of the government's warrantless intrusion into our lives that should frighten us the most. The ability to digitize and manipulate the seized information and images suggests that facial recognition, biometric identification and the capturing of things no person could ever anticipate a casual passerby seeing, let alone remembering or identifying, creates infinite future trespasses to our own person, image and information possible by the government.

III. DRAGNET-TYPE PERSISTENT RECORDED SURVEILLANCE OF HOMES IS A SEARCH

The Supreme Court has spoken to two independently operating standards in determining whether or not a search took place in the first instance. They are a trespass theory and an expectation of privacy theory. Over the past several decades there has been much debate as to which theory should be applied in various

circumstances. After four decades of debate, the question of whether persistent warrantless surveillance violates a citizen's right to privacy remains.

In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court raised and then left open the question of whether "twenty-four-hour surveillance of any citizen of this country" by means of "dragnet-type law enforcement practices" violates the Fourth Amendment's guarantee of personal privacy. *Id. at 283-284.* In *United States v. Jones,* 565 U.S. 400 (2012), the court employed the trespass theory to determine whether a warrantless GPS tracking of a vehicle was unconstitutional. By using the trespass theory to find that the warrantless search violated the Fourth Amendment, the Supreme Court majority did not address whether in the absence of a trespass there would still have been a violation. The Court specifically reserved on this question and allowed for situations involving merely the transmission of electronic signals, without an accompanying trespass, that could qualify as an unconstitutional invasion of privacy.

Thus, an expectation of privacy analysis should be considered a safeguard for those situations where the trespass theory does not find an illegal physical intrusion by the government, but where a constitutional violation exists all the same.

IV. THE *KATZ* EXPECTATION OF PRIVACY TEST MANDATES SUPPRESSION OF ALL EVIDENCE SEIZED

Federal law has long dictated that the Fourth Amendment protects people not places. *Katz v. United States*, 389 U.S. 347, 351 (1967). "[W]hat [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* *Katz* also held that "[w]hat a person knowingly exposes to the public… is not a subject of Fourth Amendment protection." *Id.* In light of the relevant concerns of privacy, advancing technology and government surveillance in public areas, the *Katz* court established a two-part test. In the absence of a trespass analysis determination, the test has been applied to expectation of privacy analysis for over 50 years. First, a defendant must demonstrate that he has an actual subjective expectation of privacy. And second, society must be prepared to recognize that defendant's expectation as "objectively reasonable." *Id.* See also *Bond v. United States*, 529 U.S. 334, 338 (2000).

The key concept for the protection of *Katz* seems to be the concept of "knowingly". The present case calls into question whether the expectation of privacy analysis limits a citizen's exercise of his right to privacy in and about the curtilage of his home or anywhere else in the "public domain". To "knowingly" expose aspects of one's life for public capture and use first requires a determination as to what a reasonable person expects to have captured when they venture in and out of their home.

To understand the application of *Katz* here, one must analyze the specific facts and context of that controversy. In *Katz*, the defendant ventured out of his home and utilized a public phone booth to engage in illegal bookmaking activities. Government agents placed a microphone, which was attached to a recording device, outside of the phone booth and captured the defendant's conversations on several occasions. The government utilized technology to capture information that was available to be heard by anyone located in the public space next to that phone booth. Presumably, the defendant could have whispered in order to prevent the sound of his voice from being overheard. The Court did not require such extraordinary measure in order to confer upon the defendant's activity an expectation of privacy. What the covert recording device captured could have been captured by anyone appurtenant to that public space, but *Katz* held that the Government's eavesdropping activities violated the privacy expectations upon which the defendant justifiably relied while using the public telephone. Thus, the Court made a determination that there was a "search and seizure" within the meaning of the Fourth Amendment. *Id.* at 350 -353. The defendant's "knowingly" walking to a phone booth, "knowingly" using the phone and "knowingly" speaking aloud in a public place, did not extinguish the constitutional protections from warrantless government eavesdropping that he possessed. *Id.* The Court in *Katz* held "once it is recognized that the Fourth Amendment protects people-and not

simply ‘areas’-against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.*

Katz highlighted the importance of the defendant’s subjective expectation of privacy that was presumed by the court specifically because people do not have an expectation that they will be covertly surveilled or eavesdropped upon in public without any objective warning. *Id.* at 354-359.

When *Katz*’ facts are analogized to the facts at bar, it is clear that these Defendants enjoyed constitutional protection that was not recognized by the lower court. In both, government agents placed a device of technology on property owned by a public utility and located in a public place. They may or may not have committed a trespass to do so. The technology in both cases then seized either words or images that were knowingly placed in the public domain. The fact patterns are virtually identical in this regard. However, the unreasonableness of government action here was far more egregious than in *Katz* given its scope, breadth, duration and indiscriminate employment.

In *Katz,* government agents attempted to avoid capturing anything but the defendant’s own words. They did this by only activating the recorder when they knew the defendant was coming to use the phone. *Id.* at 354-359. In the case at bar, the covert technology captured months of the Defendants’ activities around their

homes, as well as months of activities of every single person and thing that happened to get caught in its web. And this was all done in a totally indiscriminate manner for up to five months. The camera captured everything and everyone within its scope. It could also remotely zoom in and analyze more closely any person, feature or object that law enforcement desired to scrutinize. The law protects people, beings, images, words and actions no matter that they're recorded in public. When the government targets a person and employs pole camera surveillance technology, there is no distinction between the objects, words, images or information which is seized and maintained by the government. Accordingly, upon a finding that the Defendants had a reasonable expectation of privacy in their activities and associations in and about their home, *Katz* mandates that the warrantless seizure of the intangibles of their lives be suppressed.

V. *UNITED STATES V. JONES* HERALDED SEISMIC CHANGES IN PRIVACY ANALYSIS, PERMISSIBLE LAW ENFORCEMENT TECHNIQUES AND THE INTERPLAY BETWEEN TRESPASS THEORY AND EXPECTATION OF PRIVACY THEORY UNDER FEDERAL LAW

The lower court in *United States v. Jones*, held "the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again

the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine." *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010), affd sub nom. *United States v. Jones*, 132 S. Ct. 945 (2012).

In affirming the D.C. Circuit, the Supreme Court chose a narrow path, holding that a trespass to property to obtain information established a trespassory search. By placing the GPS device on the Defendant's car, the "Government physically occupied private property for the purpose of obtaining information." *Jones*, at 950. It was not that *Katz*'s reasonable expectation of privacy test was supplanted; it was that it coexisted with a [physical] trespass test. If the latter dictated the outcome, there was no need to invoke a "reasonable expectation" of privacy analysis. However, even where no obvious physical trespassory intrusion is found, the analysis may still transfer to one based upon an expectation of privacy.

VI. *UNITED STATES V.* JONES IS IMPACTING STATE AND FEDERAL PRECEDENT OUTSIDE THE REALM OF GPS TRACKING IN THE FACE OF ADVANCING TECHNOLOGIES

In *Jones*, Supreme Court Justice Scalia, writing for the five-justice majority, made three salient points for purposes of analyzing prolonged video surveillance. First, the officers in *Jones* committed a trespass by installing the GPS tracker on the automobile in violation of the Fourth Amendment. *Jones*, 132 S. Ct. at 949,

952. Second, the Opinion affirmed that "the *Katz* reasonable- expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952 (emphasis in original). Third, the Court noted that "[i]t may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy[.]" *Id.* at 954.

In the concurrence, Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, rejected the property rationale of the majority, noting that the Court's reasoning ''largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking)." [emphasis in original].

According to Justice Alito, *Id.* at 963:

> Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. [cite omitted] But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

The emphasis then was on the use of the seized information and not on the manner of seizure. It was the use of that information to engage in "long term" tracking that so offended Justice Alito and those Justices joining his concurrence.

A second concurring opinion in *Jones*, *Id.* at 956, written by Justice Sotomayor, while accepting the majority's narrow property-intrusion theory, joined Justice Alito's concurring opinion by quoting the above passage approvingly. She then further stated:

> [T]he Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring--by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track--may "alter the relationship between citizen and government in a way that is inimical to democratic society." *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (CA7 2011) (Flaum, J., concurring).

The language of the concurring opinions in *Jones* is broad, as if anticipating cases like the present one. Justice Alito noted that "physical intrusion is now unnecessary to many forms of surveillance." *Id.* at 955. With the computer age, and its many innovations and intrusions, many non-trespassory technologies are now available (e.g., spyware, GPS, smartphones, video surveillance, wireless chip connectivity, stingray and other wireless signal stealing devices), each capable of offering a significant degree of intrusion into privacy and often without a hint of physical trespass. Justice Alito further noted that "[i]n the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical." *Jones* at 963. Few police forces could devote significant surveillance resources to any but the most significant cases. And a person who observed

physical surveillance could take steps to assure his privacy against an intruding government. Since the duration of a surveillance was limited by manpower considerations and required physical presence, there was generally no issue about the longevity of the surveillance.

VII. THE SURVEILLANCE HEREIN WAS SO INTRUSIVE THAT IT VIOLATED AN OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY AND AMOUNTED TO A TRESPASS UPON THE DEFENDANTS' PERSON, LIVES AND LIBERTIES

Video surveillance permits a comprehensive record of a person's associations, cars he got into or arrived in, what he carried or wore, his habits and intimate details including his personal associations. The Supreme Court noted in *Riley v. California*, 573 U.S. 374 (2014), "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions ...." Because the surveillance is visual, it permits law enforcement to select opportune times to act. In the end, GPS and video surveillance are both technologies that permit collections of data over time which can disclose all manners of intimate details.

Data collection by video surveillance, however, offers rich visual images, made richer still when one considers combining and advancing technologies such as license plate readers, facial recognition software and lenses that see miniscule details with high definition clarity from over 1,000 feet away. Indeed, an understanding of presently available technologies make evident that the video

surveillance, not the GPS, is the more powerful, productive, invasive and dangerous tool.

"[T]he legitimacy of a citizen's expectation of privacy in a particular place may be affected by the nature of the intrusion that occurs." *United States v. Nerber*, 222 F.3d 597, 601 (9th Cir. 2000). In *Jones*, the Supreme Court answered the question regarding one form of "dragnet" surveillance, GPS tracking devices, saying that such tracking, if employed for an extended period, violated the Fourth Amendment. Justice Alito said: "We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark." *Jones*, at 964.

Comparing the intrusive character of warrantless GPS with a warrantless, constantly recording, video camera with zoom, angling and remote control, the camera is clearly the more pernicious intrusion. A GPS device permits tracking of a single vehicle but yields only data tracing its path. A camera does more; trained on a person's home for prolonged periods of time it permits a massive aggregate of information to be seized. That aggregate necessarily reveals an endless litany of personal habits and characteristics. That information is kept in a database for processing, sorting and searching as law enforcement sees fit.

Prolonged video monitoring seizes "associations, objects or activities otherwise imperceptible to police or fellow citizens." *California v. Ciraolo*, 476

U.S. 207, 215, n.3 (1986). "Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), aff'd sub nom. *United States v. Jones*, 132 S.Ct. 945 (2012).

VIII. THE GOVERNMENT INTRUSION IN THIS CASE IS A SEARCH UNDER EITHER TRESPASS OR EXPECTATION OF PRIVACY ANALYSIS

In the wake of *Jones* and following its logic, the prolonged surveillance of a person's public movements is actually a "search" under *Katz* because a reasonable person does not expect that the totality of his or her movements will be covertly seized, recorded, stored, catalogued and later examined for revealing details for any reason or ***no reason at all*** and just because he left his front door.

In 2018, the Supreme Court reasserted the importance of *Katz* and it's holding with respect to the conflict between public and private spaces and individual expectations of privacy. See *Carpenter*. Writing for the court, Justice Alito stated "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." In holding that the governments capturing of historical CSLI information without a warrant contravened the 4th Amendment, the court stated "[w]hen an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a

search and requires a warrant supported by probable cause.'" *Carpenter*, at 2213 quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

In *Carpenter*, the defendants did nothing to affirmatively manifest a subjective expectation of privacy in their CSLI data. However, their expectation of privacy was deemed to be objectively reasonable by the Supreme Court. The analogy to the video surveillance here is not just compelling but it is logically inescapable. Following that logic, Judge Young believed that *Carpenter* had freed First Circuit trial court judges from the clutches of *Bucci's* simplistic analysis.

In *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019), Judge Young, confronted with circumstances strikingly similar to those before this court, found that *Carpenter* justified a new look at the pole camera issue. See *United States v. Moore-Bush*, at 143-144. In doing so, the court found that the defendant's and their guests had both a subjective and objectively reasonable expectation of privacy in their movements and activities about the front of their home during some eight months of video surveillance. *Id.*

IX. THE GOVERNMENT'S USE OF THE SEIZED INFORMATION IS OFFENSIVE TO INDIVIDUAL RIGHTS UNDER THE FOURTH AMENDMENT AND THE BROADER GUARANTEES AND PROTECTIONS OF THE MASSACHUSETTS CONSTITUTION

The lower court decision in this case was simply an upholding of *Bucci* while acknowledging that Massachusetts jurisprudence has trended toward requiring a warrant in "tracking" type surveillance cases. The lower court did not

address Article 14 as it applies to prolonged video surveillance, nor other constitutional implications of oppressive surveillance by the state, which necessarily impinge on our First Amendment rights as well. Indeed, no mention was made of either Justice Scalia's suggestion that wireless surveillance without any physical trespass may be unconstitutional from *Jones* or of Justice Alito's expectation of privacy analysis in *Carpenter*.

The Commonwealth argued below that Judge Young's decision in *Moore-Bush* had no precedent value for that court's consideration. While the statement is literally true, it completely ignores the value and necessity of considering thoughtful decisions which speak to evolving understandings of historical precedent. Judge Young's decision takes account of the varying applications of "search" analysis and their application to the rapidly expanding intrusions of government surveillance which result in all manner of personal seizures.

What is also lacking in the lower court's holding is any substantial reference to the Massachusetts Declaration of Rights, particularly Article 14 jurisprudence, which has often provided greater protections to our citizens than the Fourth Amendment, and which has often been a focus of this Honorable Courts' significant work in the area of privacy and advancing technology.

Consider *Commonwealth v. Fredericq*, 482 Mass. 70, 76 (2019) where the police obtained subscriber information and toll records pursuant to a court order

issued under 18 U.S.C. § 2703(d). This court held that under Article 14 of the Massachusetts Declaration of Rights, the police may not use CSLI for more than six hours to track the location of a cellular telephone unless authorized by a search warrant based on probable cause. See *Commonwealth v. Estabrook*, 472 Mass. 852, 858 (2015); *Commonwealth v. Augustine*, 467 Mass. 230, 254-255 (2014). See also, *Carpenter,* at 2220. (government acquisition of CSLI records constitutes "a search within the meaning of the Fourth Amendment [to the United States Constitution]").

Commonwealth v. Rousseau, 465 Mass. 372 (2013), declared that "under art. 14, a person may reasonably expect not to be subjected to extended [global positioning system (GPS)] electronic surveillance by the government, targeted at his movements, without judicial oversight and a showing of probable cause." The Court held that a passenger with no possessory interest in a vehicle has standing to challenge the extended GPS surveillance of the vehicle as an invasion of his or her own reasonable expectation of privacy. *Id. at* 382.

This court's legal analysis some seven years ago in *Rousseau*, and more than a decade ago in *Connolly*, was consistent with the majority of Supreme Justices' opinions as it relates to privacy considerations as expressed in the *Jones* concurrences. See *Jones*, *supra at* 415-416 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public

movements ... [and] evades the ordinary checks that constrain abusive law enforcement practices."); *Commonwealth v. Connolly*, 454 Mass. 808, 833 (2009) (Gants, J., concurring) ("the appropriate constitutional concern is not the protection of property but rather the protection of the reasonable expectation of privacy").

With respect to the Defendants' reasonable expectation of privacy, the same considerations exist as in the CSLI tracking of a cellular telephone; and implicates the same constitutional concerns as the GPS surveillance of the vehicle in *Rousseau*. See *Augustine*, supra at 254. In *Augustine,* the Court noted that the type of prospective CSLI tracking that largely took place there -- as opposed to historical CSLI tracking -- is even more closely akin to direct GPS surveillance. *Id.* at 254 n.36. The CSLI search was "targeted at [the Defendant's] movements," much as the GPS search was targeted at the passenger Defendant in *Rousseau*, and as in the present case where the Defendant's movements and activities at their residences, and those of all who visited them, were constantly monitored and recorded over long periods of time.

The impact of the government action herein is the same, and trespass theories are equally applicable where the government seizes the personal information and biometrics of its citizens. Had the GPS and CSLI cases been achieved without a definitive trespass, such as Justice Alito speculated in *Jones*, should the result be any different or would the analysis simply travel the path of expectation of privacy to get

to the same result. Indeed, in case after case, the rise in aggressive and proactive policing combined with the rapid technological advances of the twenty first century combined to intrude upon the reasonable expectations of privacy of individual citizens.

It is clear that even if the surveillance at issue is not considered a search, per se, that the defendants herein still enjoyed an expectation of privacy in the seized information requiring the obtaining of a warrant. The invasiveness of the surveillance and its length in time both justify the requirement of a warrant. The requirement of a warrant is in line with both federal and state court decisions and is a must in light of the technologic advances in the equipment used to seize the information.

X. THE COURT IS ALLOWED AND COMPELLED TO CONSIDER ADVANCING TECHNOLOGIES AND THEIR IMPACT ON THE ARTICLE 14 PROTECTIONS GUARANTEED TO THE CITIZENS OF MASSACHUSETTS

The technology involved in the present surveillance clearly falls into the class of technological advancements for which methods of evaluation must be adopted for the purpose of Article 14 scrutiny. Conventional techniques of surveillance could not, under any imaginable scenario, have ever captured and seized the 6 terabytes of data which the state police seized this case. Because of technology, however, that six terabytes that is the Defendants' lives was able to be recorded with zero effort or

expense and maintained for subsequent review and analysis, and to do so with all of the world marketplace's software at their disposal.

In *Commonwealth v. Johnson*, 481 Mass. 710 (2019) such use of historical data was addressed through the lens of advancing technology

> "General Laws c. 276, § 90, was enacted in 1880 and was last amended in 1938...The state of technology at the time meant that the enacting Legislature had no opportunity to evaluate the privacy interests that may now be implicated by the recording and storing of long-term historical GPS location data. See *Commonwealth v. Augustine*, 467 Mass. 230, 245 (2014), S.C., 472 Mass. 448 (2015) ("the digital age has altered dramatically the societal landscape"). *Jones*, *supra* at 415 (Sotomayor, J., concurring) ("the same technological advances that have made possible [law enforcement's] nontrespassory surveillance techniques will ... shap[e] the evolution of societal privacy expectations"). As stated supra, we must reconsider older statutes in light of new technologies to ensure that privacy rights are not left at "the mercy of advancing technology." *Kyllo v. United States*, 533 U.S. 27, 35 (2001). See *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting); See also *Augustine*, *supra* at 250-251.
>
> *Johnson*, at 746, n. 9.

This Court also offered compelling analysis in *Commonwealth v. Almonor*, 482 Mass. 35, 46-47 (2019), concluding that by causing the defendant's cell phone to reveal its real-time location, the Commonwealth intruded on the defendant's reasonable expectation of privacy in the real-time location of his cell phone. The Commonwealth therefore conducted a search in the constitutional sense under article. 14. In reaching that holding in *Almonor*, this Court referred to the Supreme Court's observation in *Carpenter* that such an extraordinarily powerful surveillance tool

finds no analog in the traditional surveillance methods of law enforcement and therefore grants police unfettered access "to a category of information otherwise unknowable." *Carpenter, supra.*

The practical and obvious distinctions between traditional surveillance and that accomplished by technological means are getting exponentially wider each year. Our jurisprudence in the area of privacy and police practices must account for the greater capabilities of current technology and the wisdom of permitting the government to unleash that technology on any citizen, at any time and for any duration. The relevance and recognition that "prior to the advent of cell phones, law enforcement officials were generally required, by necessity, to patrol streets, stake out homes, interview individuals, or knock on doors to locate persons of interest. *Jones*, *supra* at 429 (Alito, J., concurring) (recognizing that, '[i]n the pre-computer age,' law enforcement surveillance tools were limited and thus 'the greatest protections of privacy were neither constitutional nor statutory, but practical''); *Id. at* 415-416 (Sotomayor, J., concurring) ('because GPS monitoring is cheap ... and ... proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility' [quotation and citation omitted])" is comprehensive and compelling when applied to this case.

The power of the unauthorized pole camera surveillance that occurred in this case is far too permeating and too susceptible to arbitrary exercise by law

enforcement. This is precisely the type of governmental conduct against which the framers sought to guard and the very reason why article 14 was adopted and requires a search warrant in this case. See e.g., *Commonwealth v. Blood*, 400 Mass. 61, 71(1987).

No one expects, nor is it reasonable, to have every entrance and exit to one's private residence secretly surveilled and video recorded for historical data review by law enforcement officers. It is executive exercise of prerogative without a hint of oversight either by the legislature or the judiciary, and it is to the detriment of individual rights. The analogy of the present surveillance to traditional security camera footage is simply inapposite. The historic security camera does not target a specific citizen for purposes of criminal investigation in the first place, nor has it been employed at the unchecked discretion of individual officers. Rather, it is ordinarily put in place to protect against intrusion, the exact opposite of the stated purpose of intentionally spying on, capturing and preserving information about the lives and associations of individual citizens.

Many recent decisions by the Supreme Judicial Court have slashed such police prerogative by expanding expected privacy interests. Justice Lenk: Citizens have a "right to be left alone." Citing *Blood*, at 69. Chief Justice Gant: "Individuals reasonably expect that they will not be contemporaneously monitored except through physical surveillance." *Connolly*, at 835. Justice Gaziano: "In sum, when

the government seeks to conduct a search that is more than minimally invasive, art. 14 requires an individualized determination of reasonableness." *Commonwealth v. Feliz*, 481 Mass. 689, 700 (2019).

Justice Sotomayor observed in *Jones* that the digital age made it necessary to revisit "the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" because "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Jones*, at 417 (Sotomayor, J., concurring). She contended the Fourth Amendment should not "treat secrecy as a prerequisite for privacy." *Id.* at 418.

In *Carpenter*, dissenting Justice Gorsuch complained that the *Katz* test leads to inconsistent and nonsensical results. *Id.* at 2263 (Gorsuch, J., dissenting). Justice Gorsuch derided results like *Florida v. Riley,* 488 U.S. 445 (1989), which says a "police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy. Try that one out on your neighbors." *Carpenter*, 138 S. Ct. at 2266. Justice Gorsuch also questioned *California v. Greenwood*, 486 U.S. 35 (1988), which holds that a "person has no reasonable expectation of privacy in the garbage he puts out for collection," and he expressed doubt "that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager." *Carpenter*, 138 S. Ct.

at 2266. One need not imagine what he would say regarding the pole camera surveillance here.

CONCLUSION

Based on the authorities cited and the reasons aforesaid, the Defendants requests that this Court vacate the denial of the Defendant's Motion to Suppress (Feeley, J.) and enter an order allowing said motion, or, in the alternative, the Defendants ask for such other relief as they may be entitled.

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Dated: March 4, 2020

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 8,037.

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 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 4th day of March, 2020.

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ADDENDUM

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Massachusetts Declaration of Rights

Article XIV

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.

United States Constitution

Amendment IV

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 General Laws Chapter 276

Section 90: Powers of probation officers; reports; records; inspection

A probation officer shall not be an active member of the regular police force, but so far as necessary in the performance of his official duties shall, except as otherwise provided, have all the powers of a police officer, and if appointed by the superior court may, by its direction, act in any part of the commonwealth. He shall report to the court, and his records may at all times be inspected by police officials of the towns of the commonwealth; provided, that his records in cases arising under sections fifty-two to fifty-nine, inclusive, of chapter one hundred and nineteen shall not be open to inspection without the consent of a justice of his court.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2018-00540
2018-00542
2018-00543
2018-00544
2018-00592
2018-00593
2018-00594

COMMONWEALTH

vs.

NELSON MORA, ET AL.,

MEMORANDUM AND DECISION ON DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE DERIVED FROM POLE CAMERAS

PROCEDURAL AND FACTUAL BACKGROUND

Defendant Nelson Mora ("Mora") is alleged in this case to be an organizer/leader of a large-scale illegal drug distribution operation based in Essex County. It is alleged that Mora was engaged in the illegal distribution of oxycodone, fentanyl, and cocaine. Defendants Gregory Inuyama ("Inuyama"), Frantz Adolphe ("Adolphe"), Randy Suarez, and Aggeliki Iliopoulos ("Iliopoulos") are alleged to have been associated with Mora and involved to varying degrees in his drug distribution operation. Four other alleged participants have already pled guilty to

various drug offenses. [2018-00545, 00546, 00547, and 00548]. Defendant Erick Delrosario ("Delrosario") is alleged to have been an oxycodone supplier for Mora. Lymbel Guerrero ("Guerrero") and Richard Grullon-Santos ("Grullon-Santos") are alleged to have been fentanyl suppliers for Mora.

This case arose out of a long-term investigation by the Office of the Attorney General of the Commonwealth of Massachusetts. The investigation spanned approximately seven months. State police investigators were assisted by investigators from DEA, Lynn Drug Task Force, and Beverly Police Department. In November 2017, the investigation was initiated with the assistance of a confidential informant ("CI") who identified Mora as a large-scale drug distributor. At the time the CI did not know Mora's true name or residential address, but was willing to introduce an undercover officer ("UCO") for purposes of arranging controlled buys from Mora. Over time, the UCO made ten controlled buys of oxycodone and fentanyl from Mora.

On March 19, 2018, the court (Feeley, J.) issued the first of a series of wiretap warrants for a cell phone identified as used by Mora.[1] The intercepted calls assisted investigators in identifying associates/customers of Mora and their cell phone numbers. Continued warrants to intercept communications on the Mora phone, as

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[1]All warrants in this case were authorized and issued by the undersigned associate justice. This court (Feeley, J.) has not and will not adjudicate challenges to the validity of the various warrants in this case.

well as new intercept warrants for phones associated with Delrosario and Guerrero, were soon issued by the court, with continued authorization through the middle of May 2018.[2] Telephone ("ping") and GPS warrants were also issued by the court during the active part of the investigation. On May 21, 2018, in conjunction with the arrests of defendants, the court issued search warrants for eight or nine different locations. Those locations included the residences of Mora, Adolphe, Inuyama, Grullon-Santos, Suarez, Guerrero, and Iliopoulos. Thirteen individuals were arrested. Execution of the various residential search warrants yielded almost 2,400 pills, more than a kilogram of heroin/fentanyl, seventy-five (75) grams of cocaine, and approximately $415,000 in U.S. currency.

Before (and after) the issuance of the initial wiretap warrant, investigators installed "pole cameras" on various telephone/electrical poles in public locations near but not on the property of a number of defendants. The purpose was to conduct surveillance of residences, or in one instance a street that the investigation had disclosed was associated with one of more of the defendants and their unlawful activities. The pole cameras were installed without notice to any defendant, without trespassing on any defendants' property, and without prior judicial authorization by

[2]Defendants' motions to suppress wiretap evidence were denied by the court (Lang, J.) on August 9, 2019.

means of a search warrant. The following stipulations were filed with the court:

2. The pole cameras were installed in fixed locations in the area of the following addresses:

   a. 68 Hillside Avenue, Lynn, MA, which is the residence of defendant Nelson Mora. The Hillside Avenue camera afforded a view of a portion of the front of the house, as well as the street on which the house is situated and the sidewalk that run in front of it. The pole camera footage for this location runs from December 6, 2017 at 11:43 a.m. through May 23, 2018, at 3:19 p.m. Mora was regularly seen on the footage from the Hillside Avenue camera. On a few occasions, defendants Inuyama, Adolphe, Guerrero, and Suarez and /or vehicles investigators knew to be operated by them were also seen on the footage from this location.

   b. 8-10 Swampscott Avenue, Peabody, Ma, which is the residence of defendant Randy Suarez. The Swampscott Avenue camera afforded a view of the front of the residence, as well as a driveway in front of the house (partially obscured by a neighboring Dunkin' Donuts), part of a second driveway on the side of the house, and the street on which the house is situated. The pole camera footage for this location runs from March 23, 2018 at 12 p.m. thorough May 23, 2018 at 3:19. Suarez was

regularly seen on the footage from the Swampscott Avenue camera. On a few occasions, Guerrero was also seen on the footage from this location.

c. Shepard Street, Lynn, MA. Defendant Frantz Adolphe resides at 9 Shepard Street, though the Shepard Street camera was not focused on his residence or any other particular residence.[3] The camera afforded a view down the length of Shepard Street, which included a partial view of the top of the driveway to Adolphe's residence. The pole camera footage for this location runs from April 4, 2018 at 8:48 a.m. through May 23, 2018 at 3:20 p.m.. Mora and Adolphe were regularly seen on the footage from the Shepard Street camera. On at least one occasion, defendant Grullon-Santos was seen on the footage from this location.

d. 7 Ruthven Terrace, Lynn, MA, which is the residence of defendant Richard Grullon-Santos. The Ruthven Terrace camera afforded a partial view of the front of the house, which was largely obscured by a tree in a neighboring yard. The pole camera footage for this location runs from May 18, 2018 at 8:13 a.m. through May 23, 2018 at 3:20 p.m. On at

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[3]Information from the CI at the beginning of the investigation included a report that Mora (identity then unknown) would use different meet locations in Lynn to conduct his business, but used Shepard Street in Lynn as one of his primary meet locations.

least one occasion, Grullon-Santos was seen on the footage from the Ruthven Terrace camera.

e. 9 South Elm Street, Lynn, MA, which is the residence of Carlos Perez. Perez is not a charged defendant in this case.. The pole camera footage for this location funs from may 9, 2018 at 7:35 a.m. through May 23, 2018 at 3:20 p.m.

3. Each of the cameras captured video but not audio.

4. While the cameras were operating, investigators could remotely view the video from a web-based browser in real time, as well as search and review previously recorded footage.

5. The cameras had zoom and angle movement capabilities, which could be operated remotely by investigators (in real time only). In some instances, the zoom function enabled investigators to read the license plate on a car. None of the pole cameras enabled investigators to see inside any residence. The cameras captured only publicly viewable areas and activity.

6. The cameras did not have any infrared or enhanced night vision capabilities.

7. All cameras recorded without limitation persons coming and going from the above-listed locations.

8. While the investigation was ongoing, the data from each pole camera was

stored on a State Police server. After the cameras were turned off, the data was removed from the server and transferred onto hard drives for storage.

DISCUSSION

1. The Other Defendants

In total, five pole cameras were used, but only three cameras covered the fronts of residences occupied by named defendants. Those three defendants are Mora, Suarez, and Grullon-Santos. Mora and Suarez (and Guerrero) filed motions to suppress.[4] The remaining defendants were permitted by the court to join in those motions. However, the remaining defendants (including Guerrero) are in a different position than those defendants whose residences were subject to continuous pole camera coverage periods ranging from six days to five and one-half months. The camera outside Mora's residence was in place for five and one-half months. The camera outside Suarez's residence was in place for two months. The camera outside Grullon-Santos' residence was in place for six days. The camera on Shepard Street, which focused on the street and only covered the very top of Adolphe's driveway, was in place for one month and three weeks.

The defendants other than Mora, Suarez, and Grullon-Santos (the "other

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[4]The motions seek to exclude pole camera evidence at trial. They also seek to excise any pole camera references, or evidence derived therefrom, from search warrant affidavits and to thereafter challenge the warrants as lacking probable cause.

defendants"), concede that they stand on a different footing than Mora, Suarez, and Grullon-Santos, as their residences were never subject to continuous pole camera surveillance. The invasion of their privacy, and their expectation of privacy for those occasions when they were depicted on pole camera footage, was in this court's view, de minimus.[5] Even if an occasional depiction on one of the residential pole cameras at one of the covered residences, or in the middle of Shepard Street, is sufficient to establish standing to contest the constitutionality of the pole cameras, an occasional depiction on pole camera footage at another's residence or street is a far cry from continuous video surveillance coverage of one's residence. The arguments advanced by Mora, Suarez, and Grullon-Santos focus primarily on the continuous and lengthy video surveillance of their residences and the information about the residents' lives that may be reflected on the pole camera footage. The arguments advanced by Mora, Suarez, and Grullon-Santos also gain strength, as opposed to the other defendants, because the pole cameras focused on their homes, and homes are a protection at the heart of the fourth amendment and art.14.[6] The other defendants do not have the

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[5]In fact, two defendants joining in the suppression motions, Delrosario and Iliopoulos, are not depicted on any pole camera footage. Constitutional rights are personal, and Delrosario's and Iliopoulos' motions to suppress pole camera evidence are denied for lack of standing.

[6]The fourth amendment provides in part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Art. 14 of the Declaration of Rights provides in part, "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his

same invasion of privacy and expectation of privacy arguments as are advanced by Mora, Suarez, and Grullon-Santos. An occasional depiction in footage from pole cameras focused on residences of others (or a public street) does not provide a basis to raise the search issued raised by Mora, Suarez, and Grullon-Santos, who can at least argue that their subjective and objective expectations of privacy were infringed by the continuous, long-term pole camera surveillance of the front's of their residences. The motions to suppress filed or joined in by the other defendants will be denied without further discussion.

2. *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019)

On June 4, 2019, the Honorable William G. Young of the United States District Court for the District of Massachusetts issued his amended decision in *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019) ("*Moore-Bush*"). It was *Moore-Bush* that prompted the defendants' challenges to the use of fixed, long-term surveillance pole cameras in this case.[7] Prior to *Moore-Bush*, federal case law had pretty much uniformly rejected challenges to pole camera surveillance of residences

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possessions."

[7]The motions to suppress pole camera footage were all filed after *Moore-Bush*, and all referenced the recent decision from the United States District Court for the District of Massachusetts. Prior to *Moore-Bush*, defendants had challenged the wiretap warrants issued in this case, but had not challenged the use of surveillance pole cameras. Thus, it is helpful to start this court's analysis with *Moore-Bush*, a non-binding decision with which this court disagrees.

for lack of a objectively reasonable expectation of privacy. [See multiple case cites in Commonwealth's opposition memorandum, D. 25]. Rejecting First Circuit precedent in light of subsequent Supreme Court precedent undermining it, the *Moore-Bush* court considered the pole camera issue before it as a matter of first impression. *Id.* at 144.

The facts in *Moore-Bush* are remarkably similar to those before this court in that a long-term fixed surveillance pole camera was focused on a defendants' driveway and part of the front of her house for eight months. The camera captured video, but not audio. The camera could zoom and angle to read license plates but could not peer inside windows. The camera recorded and produced a digitized searchable database. Over the government's objection and arguments, *Moore-Bush* found the long-term pole camera surveillance of the defendant's house and property to be a warrantless search, implicating the Fourth Amendment of the United States Constitution. *Id.* at 143. The exclusionary rule was applied because no exceptions to the warrant requirement were present, or argued to be present.

Moore-Bush recognized that the First Circuit previously approved the use of a pole camera in *United States* v. *Bucci*, 582 F. 3d 108, 116-117 (1st Cir. 2009), which reasoned that the legal principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public" disposed of the matter. *Id.* at

144, quoting *Bucci*, 582 F.3d at 116-117. The *Moore-Bush* court felt free to decide the pole camera issue differently based on a change in federal law it derived from *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2006 (2018).[8] *Moore-Bush* read *Carpenter* "to cabin" – if not repudiate – that principle (from *Bucci*) with the following: "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'"[9] *Id.* at 144, quoting *Carpenter*, 138 S. Ct. at 2217, quoting *Katz* v. *United States*, 389 U.S. 347, 351-351 (1967). Although *Moore-Bush* acknowledged that *Carpenter* does not discuss pole cameras, it found that *Carpenter's* logic contradicted the First Circuit's holding in *Bucci* regarding a lack of an objectively reasonable expectation of privacy. *Moore-Bush* found both a subjective expectation of privacy in their and their guests' comings and goings from their house and an objectively reasonable expectation of privacy in their and their guests' activities around the front of the

[8]Defendants in *Moore-Bush* argued that the *Bucci* holding was limited to the camera used at that time, which had fewer capabilities than the more modern pole camera at issue in their case. *Moore-Bush* rejected their argument, and instead distinguished the *Bucci* holding by finding that *Carpenter* changed the law and required a different result.

[9]This court has no problem with the general statement in *Carpenter*, but it means little if anything outside the context of CSLI. Just as what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected, it also **may not** be constitutionally protected. *Carpenter* found CSLI to be constitutionally protected. It did not find pole camera surveillance focused on the front of a residence to be constitutionally protected.

house for a continuous eight-month period.

3. Analysis

As an initial matter, there is no dispute as to the constitutional protection sought by defendants. It falls under the expectation of privacy prong of federal fourth amendment constitutional jurisprudence. See *Katz*, 389 U.S. at 351. "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.'" *Carpenter*, 138 S. Ct. at 2213, quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks and alterations omitted). See *Commonwealth* v. *Augustine*, 467 Mass. 230, 241-242 (2014), citing *Commonwealth v. Montanez*, 410 Mass. 290, 301 (1991) (same reasonable expectation of privacy standard under art. 14). However, "[t]he Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady* v. *North Carolina*, 135 S. Ct. 1368 (2015), citing e.g., *Samson* v. *California*, 547 U.S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes was

reasonable).

Although defendants rely on *Carpenter* and *Moore-Bush*, they also rely on a series of Supreme Judicial Court cases that deal with fourth amendment and art. 14 jurisprudence and constrained law enforcement's use of developing and evolving areas of surveillance technology. See e.g. *Commonwealth v. Connolly*, 454 Mass. 808 (2009) (GPS tracking device placed on automobile); *Commonwealth* v. *Rousseau*, 465 Mass. 372 (2013) (GPS tracking devise placed on automobile, passenger standing); *Commonwealth* v. *Augustine*, 467 Mass. 230 (2014) (CSLI); *Commonwealth* v. *Feliz*, 481 Mass. 689 (2019) (personal GPS devise as an automatic condition of probation in sex offender cases); *Commonwealth* v. *Johnson*, 481 Mass. 710 (2019) (personal GPS devise as a condition of probation in a non-sex offender case); *Commonwealth* v. *Almonor*, 482 Mass. 35 (2019) (cell phone providing police with real-time location of phone (i.e. "pinging"), and in essence, the real time location of its user); and *Commonwealth* v. *Fredericq*, 482 Mass. 70 (2019) (police real time tracking of a cellular telephone through which police obtained CSLI).

Carpenter itself involved law enforcement, without a warrant, obtaining historical CSLI records over a period of 127 days, specifically obtaining an average of 101 data points a day, that allegedly showed that defendant's phone was near four robbery locations at the time the robberies occurred. *Carpenter*, 138 S. Ct. at 2212-

2213. Defendants argue that based on *Carpenter*, *Moore-Bush*, and the above cited Supreme Judicial Court cases, among other cases, a trend has been established to extend constitutional protections against law enforcement surveillance techniques that have evolved through advancements in technology. The court does not disagree that recent jurisprudence shows such a trend. However, with the exception of *Moore-Bush*, the trend is limited to surveillance techniques that track a person's movements or location and is limited surveillance by or through cell phones (i.e. CSLI) and/or GPS devises. See *Carpenter*, 138 S. Ct. at 2216, 2219 (CSLI tracking partakes of many of the qualities of GPS monitoring – it is detailed, encyclopedic, and effortlessly compiled – accuracy of CSLI is rapidly approaching GPS-level precision); *United States* v. *Jones*, 565 U. S. 400, 430 (2012) (opinion of Alito, J.) (GPS monitoring of a vehicle tracks every movement a person makes in that vehicle); *Carpenter*, 138 S. Ct. at 2217 (CSLI over 127 days provides an all-encompassing record of the holder's whereabouts).

Other than *Moore-Bush*, which deviated from prior well-established federal law regarding pole cameras, no other "trend-establishing" cases cited by defendants involved use of pole cameras. The trend is not so much a function of any new technology, as it is a trend toward protecting against the use of new technology that tracks or is capable of tracking persons' movements and locations on a continuous

basis in and through public and non-public areas. There is a uniqueness that cell phones (i.e. CSLI) and GPS devises have brought to the forefront of law enforcement surveillance efforts that is lacking in pole camera surveillance. See *e.g., Carpenter*, 138 S. Ct. at 2217 (noting unique nature of CSLI records) .

Carpenter begins by noting that there are 396 million cell phone service accounts in the United States, a nation of 326 million people. *Carpenter*, 138 S. Ct. at 2211. In *Carpenter*, the case involved "the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls." *Id.* at 2215. The Court acknowledged: "This sort of digital data — personal location information maintained by a third party — does not fit neatly under existing precedents."[10] *Id. Carpenter* required the Court "to confront a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals." *Id.* at 2216. Cell phones -- nearly a "feature of human anatomy" – tracks nearly exactly the movements of its owner. *Id.* at 2218, quoting *Riley*, 134 S. Ct. at 2484. "[T]his **newfound tracking capacity** runs against

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[10]The uniqueness of cell phones in light of technological advancements was earlier recognized in a fourth amendment "search incident" case, *Riley* v. *California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2484 (2014). A "cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 2491. As the *Carpenter* Court later explained: "while the general rule allowing warrantless searches incident to arrest 'strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to' the vast store of sensitive information on a cell phone." *Carpenter*, 138 S. Ct. at 2214.

everyone." *Id.* at 2218 (emphasis added).

This court disagrees with defendants and *Moore-Bush*. *Carpenter* and other CSLI and/or GPS cases have not established a trend outside their subject matters of CSLI or GPS monitoring. It is only those two (although in the future there may be more) technological surveillance advancements that accurately and precisely track persons' movements and locations in areas accessible to and inaccessible to the public. This court concludes that *Carpenter, supra*, did not change the well-established case law rejecting challenges to pole camera surveillance based on the legal principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." *Bucci*, 582 F.3d at 116-117. *Carpenter* specifically did not call into question "conventional surveillance techniques and tools, such as security cameras." *Carpenter*, 138 S. Ct. at 2220.[11]

Fixed, even long-term pole camera surveillance covers a discrete area. Zoom ability does not expand the video coverage area. It is unclear if angling abilities

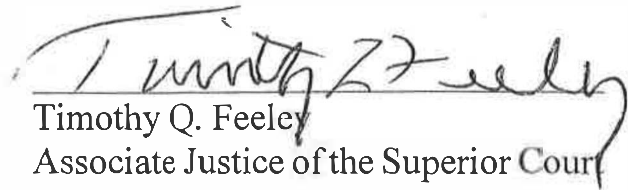
[11] *Moore-Bush* focuses on the Supreme Court's use of the term "security camera[]" and concludes that the Court was referencing private security cameras. This court focuses on the words "conventional surveillance techniques" and concludes that the Court was referencing law enforcement surveillance tools, such as pole cameras. Private security cameras (residential or commercial) and non-law enforcement government (e.g., cities, schools, public buildings, parks, etc.) installed video cameras are not conventional law enforcement surveillance techniques. Pole cameras are a long-standing conventional surveillance technique.

expand the video coverage area, but if it does, it does so in a de minimus manner.[12] The pole camera does not move from its fixed location. It does not track every movement and every location a person makes during the course of any given day. Pole cameras were installed in public locations and record only areas and activity that were exposed to the public. Footage depict times when an occupant of a covered residence leaves and returns to the residence. It depicts guests who might occasionally stop by the residence, or leave or return to the residence of the subject. It may identify a limited number of associates/friends, but associations not depicted at the front of the residence are unknown to law enforcement. The information obtained from pole cameras as to a subject's associations, lawful or unlawful, is far less complete than associational information obtained from call detail records of a subject's cell phone that can be obtained without a warrant. Pole camera surveillance does not follow its subjects into private residences, doctor's offices, hospitals, political headquarters, houses of worship, known drug houses, locations of unlawful drug activity or residences of known drug dealers, methadone clinics, brothels, locations of sexual liaisons, firearms businesses, and other potentially revealing locales.

[12]Even *Moore-Bush* rejected the argument that new technological advancements to pole camera justified disregarding First Circuit law as announced in *Bucci, supra.*

ORDER

Defendants' motions to suppress, filed or joined in, are **DENIED** for reasons discussed above, as well as for the reasons advanced in the Commonwealth's opposition memorandum.



Timothy Q. Feeley
Associate Justice of the Superior Court

November 4, 2019